

CONSTITUTIONAL LIMITATIONS
ON
LAND USE CONTROLS, ENVIRONMENTAL
REGULATIONS AND GOVERNMENTAL
EXACTIONS

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PREFACE

In 1868, Michigan professor and jurist Thomas M. Cooley published the first edition of his classic treatise on Constitutional Limitations. Therein Judge Cooley described the powers of sovereignty: the eminent domain; the power of taxation; and the police power. Then with “judicial decisions, legal treatises, and historical events, as a convenient guide” he undertook the task of considering the constitutional limitations that restrict the exercise of these sovereign powers. Cooley wrote in “full sympathy with all those restraints . . . upon the exercise of the powers of government,” thus leading the way in safeguarding vested rights and private property.¹

Early in the twentieth century the mood shifted. In 1921 jurist Benjamin N. Cardozo pioneered a “sociological jurisprudence.” He argued that “[t]he final cause of law is the welfare of society” and that existing legal principles and judicial precedents should be “extended or restricted” so as to fix the path of the law in the direction of “justice and general utility.” “Property . . . though immune under the Constitution from destruction, [was] not immune from regulation essential for the common good.”²

Cardozo’s argument carried the day as Progressive jurists fluidly and dynamically interpreted the Constitution so as to legitimize land planning, zoning, slum clearance, and urban renewal. But some of today’s jurisprudents have second thoughts. Regulations, rather than promoting the common good, may be “designed to . . . forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”³ And recently the U.S. Supreme Court has reconsidered various constitutional provisions to call into question the legitimacy of land-use controls, environmental regulations, economic restrictions, and public exactions. Thomas Cooley’s Constitutional Limitations is once again in jurisprudential fashion.

Now seems the time to readdress attention to this clash between sovereignty and property. This compilation does so by presenting a number of cases from over the two hundred year history of the American Republic wherein the courts have considered the legitimacy of government intervention in private affairs. It takes a detailed look at the constitutional history behind many of the legal controversies of today: the legitimacy of government-sponsored wealth redistributions; the “navigability” boundary on federal power; the “public use” limitation on eminent domain; the tension between government authority and religious freedom; the “leveraging” of the police power; the fine line between confiscation and taxation; and more.

¹ Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*, at iii (Boston, Little, Brown, & Co. 5th ed. 1883).

² Benjamin N. Cardozo, *The Nature of the Judicial Process* 66-87 (1921).

³ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The casebook, which is electronically published in PDF format, is a part of the E-scholarship Repository of the University of Maryland School of Law. It consists of non-copyrighted material and is intended for classroom use. Professors and students are free to use it in whole or part. As the Table of Contents indicates, 170 odd cases have been grouped into 36 “sessions.” Most sessions consist of four or five tightly-edited cases and the related statutes, if any. The readings are intended to be historically, economically, politically, and legally evocative; they are designed to provide an assignment appropriate for a 55 minute class discussion. The compilation is approximately 1100 pages in length. It is up-dated annually.

Note on Editing Style

These are teaching materials. The cases herein have been drastically cut in length and fundamentally altered in structure. In many instances salient points are lost. Footnotes are omitted and those that remain are renumbered; citations to judicial opinions are also often deleted; concurring and dissenting opinions are sometimes cut. Omissions are not noted with ellipsis marks. Asterisks are only employed when necessary to signal to the reader the reason for an otherwise unexplained non-sequitur in the text.

An effort has been made not to distort or manipulate the language of the courts but inevitably context is lost, and meanings change. The reader is reminded that she must look to the original for a complete appreciation of the text.

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PART I. INTRODUCTION

"A fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." MR. JUSTICE STEWART in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972).

Session 1. Sovereignty, Liberty & Property

MUNN v. ILLINOIS 94 U.S. 113 (1876)

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The question to be determined in this case is whether the general assembly of Illinois can, under the limitations upon the legislative power of the States imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the State having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

It is claimed that such a law is repugnant –

To that part of amendment 14 which ordains that no State shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.

The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in *Magna Charta*, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the States.

When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non loedas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, "are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things."

Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property.

It is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some

circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation.

Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control. When private property is devoted to a public use, it is subject to public regulation.

The warehouses of these plaintiffs and the business which is carried on there [are] a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We come now to consider the effect upon this statute of the power of Congress to regulate commerce. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their inter-state relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a State, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to inter-state commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done.

We conclude, therefore, that the statute in question is not repugnant to the Constitution of the United States, and that there is no error in the judgment. In passing upon this case we have not been unmindful of the vast importance of the questions involved. This and cases of a kindred character were argued before us more than a year ago by most eminent counsel, and in a manner

worthy of their well-earned reputations. We have kept the cases long under advisement, in order that their decision might be the result of our mature deliberations.

Judgment affirmed.

MR. JUSTICE FIELD and MR. JUSTICE STRONG dissented.

**UNITED STATES v. CAROLINE PRODUCTS CO.,
304 U.S. 144 (1938)**

MR. JUSTICE STONE delivered the opinion of the Court.

The question for decision is whether the "Filled Milk Act" of Congress of March 4, 1923 (c. 262, 42 Stat. 1486, 21 U. S. C. §§61-63), which prohibits the shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat, so as to resemble milk or cream, transcends the power of Congress to regulate interstate commerce or infringes the Fifth Amendment.

Congress is free to exclude from interstate commerce articles whose use in the states for which they are destined it may reasonably conceive to be injurious to the public health, morals or welfare.... And it is no objection to the exertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states. The prohibition of the shipment of filled milk in interstate commerce is a permissible regulation of commerce, subject only to the restrictions of the Fifth Amendment.

The prohibition of shipment of appellee's product in interstate commerce does not infringe the Fifth Amendment. Twenty years ago this Court, in *Hebe Co. v. Shaw*, 248 U.S. 297, held that a state law which forbids the manufacture and sale of a product assumed to be wholesome and nutritive, made of condensed skimmed milk, compounded with coconut oil, is not forbidden by the Fourteenth Amendment. The power of the legislature to secure a minimum of particular nutritive elements in a widely used article of food and to protect the public from fraudulent substitutions, was not doubted; and the Court thought that there was ample scope for the legislative judgment that prohibition of the offending article was an appropriate means of preventing injury to the public.

We see no persuasive reason for departing from that ruling here, where the Fifth Amendment is concerned; and since none is suggested, we might rest decision wholly on the presumption of constitutionality. But affirmative evidence also sustains the statute. In twenty years evidence has steadily accumulated of the danger to the public health from the general consumption of foods which have been stripped of elements essential to the maintenance of health...

Appellee raises no valid objection to the present statute by arguing that its prohibition has not been extended to oleomargarine or other butter substitutes in which vegetable fats or oils are substituted for butter fat. The Fifth Amendment has no equal protection clause, and even that of the Fourteenth, applicable only to the states, does not compel their legislatures to prohibit all like evils, or none. A legislature may hit at an abuse which it has found, even though it has failed to strike at another.

Legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions [and] is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.⁴

Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it.

The prohibition of shipment in interstate commerce of appellee's product, as described in the indictment, is a constitutional exercise of the power to regulate interstate commerce. As the statute is not unconstitutional on its face the demurrer should have been overruled and the judgment will be

Reversed.

⁴ There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation....

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

LYNCH v. HOUSEHOLD FINANCE CORP.
405 U.S. 538 (1972)

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1968, the appellant, Mrs. Dorothy Lynch, a resident of New Haven, Connecticut, directed her employer to deposit \$10 of her \$69 weekly wage in a credit union savings account. In 1969, appellee Household Finance Corp. sued Mrs. Lynch for \$525 in a state court, alleging nonpayment of a promissory note. Before she was served with process, the appellee corporation garnished her savings account under the provisions of Connecticut law that authorize summary pre-judicial garnishment at the behest of attorneys for alleged creditors.

The appellant then brought this class action in a federal district court against Connecticut sheriffs who levy on bank accounts and against creditors who invoke the garnishment statute. Mrs. Lynch alleged that she had no prior notice of the garnishment and no opportunity to be heard. She claimed that the state statutes were invalid under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and sought declaratory and injunctive relief pursuant to 28 U. S. C. §1343 (3).⁵

The District Court did not reach the merits of the case. It dismissed the complaint without an evidentiary hearing on the grounds that it lacked jurisdiction under §1343 (3). We hold, for the reasons that follow, that §1343 (3) [does not] warrant dismissal of the appellant's complaint. Accordingly, we remand the case to the District Court for consideration of the remaining issues in this litigation.

In dismissing the appellant's complaint, the District Court held that §1343 (3) applies only if "personal" rights, as opposed to "property" rights, are allegedly impaired. This Court has never adopted the distinction between personal liberties and proprietary rights as a guide to the contours of §1343 (3) jurisdiction. Today we expressly reject that distinction.

Neither the words of §1343 (3) nor the legislative history of that provision distinguishes between personal and property rights. In fact, the Congress that enacted the predecessor of §1343 (3) seems clearly to have intended to provide a federal judicial forum for the redress of wrongful deprivations of property by persons acting under color of state law. Acquisition, enjoyment, and alienation of property were among those rights. *Jones v. Mayer Co.*, 392 U.S.

⁵ The statute states in relevant part:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

....
"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . . ."

409, 432. "It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee." *Shelley v. Kraemer*, 334 U.S. 1, 10. See also, *Buchanan v. Warley*, 245 U.S. 60, 74-79; H. Flack, *The Adoption of the Fourteenth Amendment* 75-78, 81, 90-97 (1908); J. ten Broek, *The Antislavery Origins of the Fourteenth Amendment* (1951).

A ... compelling reason for rejecting a "personal liberties" limitation upon §1343 (3) is the virtual impossibility of applying it. The federal courts have been particularly bedeviled by "mixed" cases in which both personal and property rights are implicated, and the line between them has been difficult to draw with any consistency or principled objectivity. The case before us presents a good example of the conceptual difficulties created by the test.

Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. J. Locke, *Of Civil Government* 82-85 (1924); J. Adams, *A Defence of the Constitutions of Government of the United States of America*, in F. Coker, *Democracy, Liberty, and Property* 121-132 (1942); 1 W. Blackstone, *Commentaries* *138-140. Congress recognized these rights in 1871 when it enacted the predecessor of §1343 (3). We do no more than reaffirm the judgment of Congress today.

We conclude, therefore, that the District Court had jurisdiction to entertain the appellant's suit for an injunction. Accordingly, the judgment before us is reversed, and the case remanded for further proceedings consistent with this opinion. It is so ordered.

PRUNEYARD SHOPPING CENTER v. ROBINS
447 U.S. 74 (1980)

Mr. Justice Rehnquist delivered the opinion of the Court.

We postponed jurisdiction of this appeal from the Supreme Court of California to decide the important federal constitutional questions it presented. Those are whether state constitutional provisions, which permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited, violate the shopping center owner's property rights under the Fifth and Fourteenth Amendments or his free speech rights under the First and Fourteenth Amendments.

I

Appellant Prune Yard is a privately owned shopping center in the city of Campbell, Cal. It covers approximately 21 acres--5 devoted to parking and 16 occupied by walkways, plazas, sidewalks, and buildings that contain more than 65 specialty shops, 10 restaurants, and a movie theater. The Prune Yard is open to the public for the purpose of encouraging the patronizing of its commercial establishments. It has a policy not to permit any visitor or tenant to engage in any publicly expressive activity, including the circulation of petitions, that is not directly related to its commercial purposes. This policy has been strictly enforced in a nondiscriminatory fashion. The Prune Yard is owned by appellant Fred Sahadi.

Appellees are high school students who sought to solicit support for their opposition to a United Nations resolution against "Zionism." On a Saturday afternoon they set up a card table in a corner of Prune Yard's central courtyard. They distributed pamphlets and asked passersby to sign petitions, which were to be sent to the President and Members of Congress. Their activity was peaceful and orderly and so far as the record indicates was not objected to by Prune Yard's patrons.

Soon after appellees had begun soliciting signatures, a security guard informed them that they would have to leave because their activity violated Prune Yard regulations. The guard suggested that they move to the public sidewalk at the Prune Yard's perimeter. Appellees immediately left the premises and later filed this lawsuit in the California Superior Court of Santa Clara County. They sought to enjoin appellants from denying them access to the Prune Yard for the purpose of circulating their petitions.

The Superior Court held that appellees were not entitled under either the Federal or California Constitution to exercise their asserted rights on the shopping center property. The California Court of Appeal affirmed. The California Supreme Court reversed.

III

Appellants first contend that *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), prevents the State from requiring a private shopping center owner to provide access to persons exercising their state constitutional rights of free speech and petition when adequate alternative avenues of communication are available. *Lloyd* dealt with the question whether under the Federal Constitution a privately owned shopping center may prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations. *Id.*, at 552. Respondents in *Lloyd* argued that because the shopping center was open to the public, the First Amendment prevents the private owner from enforcing the handbilling restriction on shopping center premises. *Id.*, at 564. We stated that property does not "lose its private character merely because the public is generally invited to use it for designated purposes," and that "[the] essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center." 407 U.S., at 569.

Our reasoning in *Lloyd*, however, does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution. It is, of course, well established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision. See, e.g., *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). *Lloyd* held that when a shopping center owner opens his private property to the public for the purpose of shopping, the First Amendment to the United States Constitution does not thereby create individual rights in expression beyond those already existing under applicable law.

IV

Appellants next contend that a right to exclude others underlies the Fifth Amendment guarantee against the taking of property without just compensation and the Fourteenth Amendment guarantee against the deprivation of property without due process of law.

It is true that one of the essential sticks in the bundle of property rights is the right to exclude others. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979). And here there has literally been a "taking" of that right to the extent that the California Supreme Court has interpreted the State Constitution to entitle its citizens to exercise free expression and petition

rights on shopping center property.⁶ But it is well established that "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. 40, 48 (1960). Rather, the determination whether a state law unlawfully infringes a landowner's property in violation of the Taking Clause requires an examination of whether the restriction on private property "[forces] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.*, at 49. This examination entails inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. *Kaiser Aetna v. United States*, supra, at 175. When "regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Here the requirement that appellants permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants' property rights under the Taking Clause. There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center. The Prune Yard is a large commercial complex that covers several city blocks, contains numerous separate business establishments, and is open to the public at large. The decision of the California Supreme Court makes it clear that the Prune Yard may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions. Appellees were orderly, and they limited their activity to the common areas of the shopping center. In these circumstances, the fact that they may have "physically invaded" appellants' property cannot be viewed as determinative.

V

Appellants finally contend that a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others.

We conclude that neither appellants' federally recognized property rights nor their First Amendment rights have been infringed by the California Supreme Court's decision recognizing a right of appellees to exercise state-protected rights of expression and petition on appellants' property. The judgment of the Supreme Court of California is therefore Affirmed.

⁶ 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). It 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] [denotes] the group of rights inhering in the citizen's relation to the physical thing, as 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.

PART II. DOMINIUM/PROPERTY

"Dominion, from the Roman concept *Dominium*, was concerned with property and ownership, as against *imperium*, which related to political sovereignty." MR. JUSTICE FRANKFURTER, dissenting in *U.S. v. California*, 332 U.S. 19 (1947)

Session 2. Public Domain

MARTIN v. LESSEE WADDELL 41 U.S. 367 (1842)

Mr. Chief Justice TANEY delivered the opinion of the Court.

This case is brought here by writ of error from the Circuit Court of the United States, for the district of New Jersey. It was fully argued at the last term. But it was not then decided, because the important principles involved in it, made it proper that the case should be heard and determined by a full Court; and as some of the justices were not present at the former hearing, a re-argument was ordered. In pursuance of this order, it has been again elaborately discussed by counsel: and having been carefully considered by the Court, I am instructed to deliver their opinion.

The questions before us arise upon an action of ejectment, instituted by the plaintiff in the Court to recover one hundred acres of land, covered with water situated in the township of Perth Amboy, in the state of New Jersey. At the trial in the Circuit Court, the jury found a special verdict, setting forth, among other things, that the land claimed lies beneath the navigable waters of the Raritan river and bay, where the tide ebbs and flows. And it appears that the principal matter in dispute, is the right to the oyster fishery in the public rivers and bays of East New Jersey.

The plaintiff makes title under the charters granted by Charles the Second to his brother the Duke of York, in 1664 for the purpose of enabling him to plant a colony on this continent. The boundar[y] in the charter embrace[s] the territory which now forms the state of New Jersey. The [plaintiff] claims the land covered with water, mentioned in the declaration, by virtue of a survey made in 1834, under the authority of the proprietors, and fully recorded in the proper office. And, if they were authorized to make this grant, he is entitled to the premises as owner of the soil, and has an exclusive right to the fishery in question. The [defendant] also claims an exclusive right to take oysters in the same place; and derives his title under a law of the state of New Jersey, passed in 1824.

The point in dispute between the parties, therefore, depends upon the construction and legal effect of the letters patent to the Duke of York.

The letters patent to the duke included a very large territory, extending along the Atlantic coast from the river St. Croix to the Delaware bay, and containing within it many navigable rivers, bays, and arms of the sea. The right of the king to make this grant, with all of its prerogatives and powers of government, cannot at this day be questioned. But in order to enable us to determine the nature and extent of the interest which it conveyed to the duke, it is proper to inquire into the character of the right claimed by the British crown in the country discovered by its subjects, on this continent; and the principles upon which it was parcelled out and granted.

The English possessions in America were not claimed by right of conquest but by right of discovery. For according to the principles of international law, as then understood by the civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered. Whatever forbearance may have been sometimes practised towards the unfortunate aborigines, either from humanity or policy, yet the territory they occupied was disposed of by the governments of Europe at their pleasure, as if it had been found without inhabitants. The grant to the Duke of York, therefore, was not of lands won by the sword; nor were the government or laws he was authorized to establish intended for a conquered people.

The country mentioned in the letters patent, was held by the king in his public and regal character as the representative of the nation, and in trust for them. The discoveries made by persons acting under the authority of the government were for the benefit of the nation; and the crown, according to the principles of the British constitution, was the proper organ to dispose of the public domains; and upon these principles rest the various charters and grants of territory made on this continent.

According to the theory of the British constitution all vacant lands are vested in the crown as representing the nation, and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative. It has been already shown that this principle was as fully recognised in America as in the island of Great Britain."

This being the principle upon which the charter in question was founded, by what rules ought it to be construed?

We do not propose to meddle with the point which was very much discussed at the bar, as to the power of the king since Magna Charta to grant to a subject a portion of the soil covered by the navigable waters of the kingdom, so as to give him an immediate and exclusive right of fishery either for shell fish or floating fish within the limits of his grant. ...[W]e ... forbear to express an opinion on this subject, because it has ceased to be a matter of much interest in the United States. For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils

under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government. A grant made by their authority must therefore manifestly be tried and determined by different principles from those which apply to grants of the British crown, when the title is held by a single individual in trust for the whole nation.

The dominion and property in navigable waters, and in the lands under them, being held by the king as a public trust, the grant to an individual of an exclusive fishery in any portion of it, is so much taken from the common fund intrusted to his care for the common benefit. In such cases, whatever does not pass by the grant, still remains in the crown for the benefit and advantage of the whole community. In the case before us, the rivers, bays, and arms of the sea, and all prerogative rights within the limits of the charter, undoubtedly passed to the Duke of York.

The questions upon this charter are very different ones. They are: Whether the dominion and propriety in the navigable waters, and in the soils under them, passed as a part of the prerogative rights annexed to the political powers conferred on the duke? Whether in his hands they were intended to be a trust for the common use of the new community about to be established; or private property to be parcelled out and sold to individuals, for his own benefit. And in deciding a question like this we must not look merely to the strict technical meaning of the words of the letters patent. The laws and institutions of England, the history of the times, the object of the charter, the contemporaneous construction given to it, and the usages under it, for the century and more which has since elapsed, are all entitled to consideration and weight. It is not a deed conveying private property to be interpreted by the rules applicable to cases of that description. It was an instrument upon which was to be founded the institutions of a great political community; and in that light it should be regarded and construed.

Taking this rule for our guide, we can entertain no doubt as to the true construction of these letters patent. The object in view appears upon the face of them. They were made for the purpose of enabling the Duke of York to establish a colony upon the newly discovered continent, to be governed, as nearly as circumstances would permit, according to the laws and usages of England; and in which the duke, his heirs and assigns, were to stand in the place of the king, and administer the government according to the principles of the British constitution. And the people who were to plant this colony, and to form the political body over which he was to rule, were subjects of Great Britain, accustomed to be governed according to its usages and laws.

And in the judgment of the Court, the land under the navigable waters passed to the grantee as one of the royalties incident to the powers of government; and were to be held by him in the same manner, and for the same purposes that the navigable waters of England, and the soils under them, are held by the crown. This opinion is confirmed by referring to similar grants for other tracts of country upon this continent, made about the same period of time. Various

other charters for large territories on the Atlantic coast, were granted by different monarchs of the Stuart dynasty to different persons, for the purposes of settlement and colonization, in which the powers of government were united with the grant of territory. Some of these charters very nearly resembled in every respect the one now in controversy; and none of them, it is believed, differed materially from it in the terms in which the bays, rivers, and arms of the sea, and the soils under them, were conveyed to the grantees. Yet, in no one of these colonies has the soil under its navigable waters, and the rights of fishery for shell-fish or floating fish, been severed by the letters patent from the powers of government. In all of them, from the time of the settlement to the present day, the previous habits and usages of the colonists have been respected, and they have been accustomed to enjoy in common, the benefits and advantages of the navigable waters for the same purposes, and to the same extent, that they have been used and enjoyed for centuries in England. Indeed, it could not well have been otherwise; for the men who first formed the English settlements, could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers if the land under the water at their very doors was liable to immediate appropriation by another as private property; and the settler upon the fast land thereby excluded from its enjoyment, and unable to take a shell-fish from its bottom, or fasten there a stake, or even bathe in its waters without becoming a trespasser upon the rights of another. The usage in New Jersey has, in this respect, from its original settlement conformed to the practice of the other chartered colonies. And it would require very plain language in these letters patent to persuade us that the public and common right of fishery in navigable waters, which has been so long and so carefully guarded in England, and which was preserved in every other colony founded on the Atlantic borders, was intended, in this one instance, to be taken away. But we see nothing in the charter to require this conclusion.

And when the people of New Jersey took possession of the reins of government, and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the crown or the parliament, became immediately and rightfully vested in the state. We are of opinion that the proprietors are not entitled to the rights in question; and the judgment of the Circuit Court must, therefore, be reversed.

Mr. Justice Thompson, and Mr. Justice Baldwin, dissented.

Mr. Justice THOMPSON.

The premises in question in this case are a mud-flat covered by the waters of the bay of Amboy, in the state of New Jersey. And the general question in the case is whether this mud-flat became vested in the proprietors of New Jersey, as private property. The opinion of a majority of the Court is against this right, in which opinion, however, I cannot concur, and shall briefly assign the reasons upon which my opinion rests.

That the title to land under a navigable stream of water must be held subject to certain public rights, cannot be denied. But the question still remains, what are such public rights? Navigation, passing and repassing, are certainly among those public rights. And should it be admitted that the right to fish for floating fish was included in this public right, it would not decide the present question. The premises in dispute are a mud-flat; and the use to which it has been and is claimed to be applied is the growing and planting of oysters. It is the use of land, and not of water, that is in question.

The rules and principles laid down by Lord Hale, as we find them in Hargrave's Law Tracts, are admitted as containing the correct common law doctrine as to the rights and power of the king over the arms of the sea and navigable streams of water. These rules, as laid down by Lord Hale, have always been considered as settling the law upon the subjects to which they apply, and have been understood by all elementary writers as governing rules, and have been recognised by Courts of justice as controlling doctrines. They establish that by the common law the king is the owner of all navigable rivers, bays, and shores. That he owns them in full dominion and propriety, and has full power and authority to convey the same; that he may grant a several fishery in a navigable stream, and the common law has annexed only two limitations upon this power. That these waters shall remain highways for passage and navigation, and that whilst they remain ungranted, there is a common right of fishery in them; but, subject to these limitations, the king has as full power to convey as an individual has to convey the land of which he is the owner.

If, then, according to the principles of the common law, the king had the power to grant the soil under the waters of a navigable stream, where the tide ebbs and flows; and if such grant of soil carries with it the right of a several fishery, to the exclusion of a public use, the remaining inquiries are whether the grant of Charles the Second to the Duke of York, in the year 1664, did convey the premises in question. And, if as I think the authorities clearly show, a grant of the soil carries with it the right to every private use to which it can be applied, including the cultivation of oysters, there can be no ground upon which this can be claimed as a common right. A several fishery and a common fishery are utterly incompatible with each other. The former is founded upon and annexed to the right of soil. And when that right of soil is acquired by an individual, the several fishery begins, and the common fishery ends.

And I must again repeat, if the king held such lands as trustee for the common benefit of all his subjects, and inalienable as private property, I am unable to discover on what ground the state of New Jersey can hold the land discharged of such trust, and can assume to dispose of it to the private and exclusive use of individuals. If it was a trust estate in the king for the benefit of his subjects, and upon the Revolution, the government of New Jersey became the trustee in the place of the king, and the trust devolved upon such government, and the land became as inalienable in the government of New Jersey as in the hands of the king, and the state must be

bound to hold all such lands subject to the trust, which, as contended, embraces a common right of fishery in the waters, and the dredging for oysters in the land covered by the waters; and if this be so, there certainly can be no power in the state, without a breach of trust, to deprive the citizens of New Jersey of such common right, and convert these oyster grounds to the private and exclusive use of individuals.

Upon the whole, I am of opinion that the judgment of the Circuit Court ought to be affirmed.

POLLARD v. HAGAN
44 U.S. 212 (1845)

Mr. Justice McKINLEY delivered the opinion of the court.

This case comes before this court upon a writ of error to the Supreme Court of Alabama.

An action of ejectment was brought by the plaintiffs against the defendants, in the Circuit Court of Mobile county, in said state; and upon the trial, to support their action, "the plaintiffs read in evidence a patent from the United States for the premises in question, and an act of Congress passed the 6th day of July, 1836, confirming to them the premises in the patent mentioned, together with an act of Congress passed the 20th of May, 1824. The premises in question were admitted by the defendants to be comprehended within the patent; and there was likewise an admission by both parties that the land lay between Church street and North Boundary street, in the city of Mobile; and there the plaintiffs rested their case."

"The defendants, to maintain the issue on their part, introduced a witness to prove that the premises in question, between the years 1819 and 1823, were covered by water of the Mobile river at common high tide;" to which evidence the plaintiffs by their counsel objected; but the court overruled the objection, and permitted the evidence to go to the jury. "It was also in proof, on the part of the defendant, that at the date of the Spanish grant to Panton, Leslie & Co., under which they claim, the waters of the Mobile bay, at high tide, flowed over what is now Water street, and over about one-third of the lot west of Water street, conveyed by the Spanish grant to Panton, Leslie & Co.; and that the waters continued to overflow Water street, and the premises sued for, during all the time up to 1822 or 1823; to all which admissions of evidence, on part of the defendants, the plaintiffs excepted." "The court charged the jury, that if they believed the premises sued for were below usual high water-mark, at the time Alabama was admitted into the union, then the act of Congress, and the patent in pursuance thereof, could give the plaintiffs no title, whether the waters had receded by the labour of man only, or by alluvion; to which the plaintiffs excepted. Whereupon a verdict and judgment were rendered in favour of the defendants, and which judgment was afterwards affirmed by the Supreme Court of the state."

This is the first time we have been called upon to draw the line that separates the sovereignty and jurisdiction of the government of the union, and the state governments, over the subject in controversy.

Alabama was ceded by the state of Georgia to the United States, by deed bearing date the 24th day of April, 1802, which is substantially, in all its principles and stipulations, like the deed of cession executed by Virginia to the United States, on the 1st day of March, 1784, by which she ceded to the United States the territory north-west of the river Ohio. And in the deed of cession by Georgia it is expressly stipulated, "That the territory thus ceded shall form a state and

be admitted as such into the union as soon as it shall contain sixty thousand free inhabitants, or at an earlier period if Congress shall think it expedient, on the same conditions and restrictions, with the same privileges, and in the same manner, as is provided in the ordinance of Congress of the 13th day of July, 1787, for the government of the north-western territory of the United States, which ordinance shall in all its parts extend to the territory contained in the present act of cession, that article only excepted which forbids slavery." The manner in which the new states were to be admitted into the union, according to the ordinance of 1787, as expressed therein, is as follows: "And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted by its delegates into the Congress of the United States, on an equal footing with the original states in all respects whatever."

Thus it appears that the stipulations, trusts, and conditions, are substantially the same in both of these deeds of cession; and the acts of Congress, and of the state legislatures in relation thereto, are founded in the same reasons of policy and interest, with this exception, however -- the cession made by Virginia was before the adoption of the Constitution of the United States, and that of Georgia afterwards. Taking the legislative acts of the United States, and the states of Virginia and Georgia, and their deeds of cession to the United States, and giving to each, separately, and to all jointly, a fair interpretation, we must come to the conclusion that it was the intention of the parties to invest the United States with the eminent domain of the country ceded, both national and municipal, for the purposes of temporary government, and to hold it in trust for the performance of the stipulations and conditions expressed in the deeds of cession and the legislative acts connected with them. To a correct understanding of the rights, powers, and duties of the parties to these contracts, it is necessary to enter into a more minute examination of the rights of eminent domain, and the right to the public lands. When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new states, and to invest them with it, to the same extent, in all respects, that it was held by the states ceding the territories.

When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands. The right of Alabama and every other new state to exercise all the powers of government, which belong to and may be exercised by the original states of the union, must be admitted, and remain unquestioned, except so far as they are, temporarily, deprived of control over the public lands.

We will now inquire into the nature and extent of the right of the United States to these lands, and whether that right can in any manner affect or control the decision of the case before us. This right originated or voluntary surrenders, made by several of the old states, of their waste

and unappropriated lands, to the United States, under a resolution of the old Congress, of the 6th of September, 1780, recommending such surrender and cession, to aid in paying the public debt, incurred by the war of the Revolution. The object of all the parties to these contracts of cession, was to convert the land into money for the payment of the debt, and to erect new states over the territory thus ceded; and as soon as these purposes could be accomplished, the power of the United States over these lands, as property, was to cease.

Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, in all respects whatever. We, therefore, think the United States hold the public lands within the new states by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new states, for that particular purpose.

And this brings us to the examination of the question, whether Alabama is entitled to the shores of the navigable waters, and the soils under them, within her limits. The principal argument relied on against this right, is, that the United States acquired the land in controversy from the King of Spain. It was insisted that the United States had, under the treaty, succeeded to all the rights and powers of the King of Spain; and as by the laws and usages of Spain, the king had the right to grant to a subject the soil under navigable waters, that, therefore, the United States had the right to grant the land in controversy, and thereby the plaintiffs acquired a complete title. Had Spain considered herself as ceding territory, she could not have neglected to stipulate for the property of the inhabitants, a stipulation which every sentiment of justice and of national honour would have demanded, and which the United States would not have refused. But, instead of requiring an article to this effect; she expressly stipulated to withdraw the settlements then within what the treaty admits to be the territory of the United States, and for permission to the settlers to take their property with them. "We think this an unequivocal acknowledgment that the occupation of the territory by Spain was wrongful, and we think the opinion thus clearly indicated was supported by the state of facts. It follows, that Spanish grants made after the treaty of peace can have no intrinsic validity." *Henderson v. Poindexter*, 12 Wheat. 535.

On the 3d of March, 1817, Congress passed an act declaring, "That all that part of the Mississippi territory which lies within the following boundaries, to wit: Beginning at the point where the line of the thirty-first degree of north latitude intersects the Perdido river; thence east to the western boundary line of the state of Georgia; thence along said line to the southern boundary line of the state of Tennessee; thence west, along said boundary line, to the Tennessee river; thence up the same to the mouth of Bear creek; thence by a direct line to the north-west corner of Washington county; thence due south to the Gulf of Mexico; thence eastwardly,

including all the islands within six leagues of the shore to the Perdido river; thence up the same to the beginning; shall, for the purposes of temporary government, constitute a separate territory, and be called Alabama.” .

Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the union on an equal footing with the original states, the constitution, laws, and compact, to the contrary notwithstanding. But her rights of sovereignty and jurisdiction are not governed by the common law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions. In the case of *Martin and others v. Waddell*, 16 Peters, 410, the present chief justice, in delivering the opinion of the court, said: "When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution." Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States.

This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers. But in the hands of the states this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States, "and the laws which shall be made in pursuance thereof."

By the preceding course of reasoning we have arrived at these general conclusions: First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. Thirdly, The right of the United States to the public lands, and the power of congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case. The judgment of the Supreme Court of the state of Alabama is, therefore, affirmed.

SHIVELY v. BOWLBY
152 U.S. 1 (1894)

Mr. Justice Gray, after stating the case, delivered the opinion of the court.

This case concerns the title in certain lands below high water mark in the Columbia River in the State of Oregon; the defendant claiming under the United States, and the plaintiffs claiming under the State of Oregon; and is in substance this: James M. Shively, being the owner, by title obtained by him from the United States under the act of Congress of September 27, 1850, c. 76, while Oregon was a Territory, of a tract of land in Astoria, bounded north by the Columbia River, made a plat of it, laying it out into blocks and streets, and including the adjoining lands below high water mark . . . The plaintiffs afterwards obtained from the State of Oregon deeds of conveyance of the tide lands in front of these blocks, and built and maintained a wharf upon part of them. The defendant, by counter-claim, asserted a title, under a subsequent conveyance from Shively.

The counter-claim depended upon the effect of the grant from the United States to Shively of land bounded by the Columbia River, and of the conveyance from Shively to the defendant, as against the deeds from the State to the plaintiffs. The Supreme Court of Oregon, affirming the judgment of a lower court of the State, held the counter-claim to be invalid.

The judgment against its validity proceeded upon the ground that the grant from the United States upon which it was founded passed no title or right, as against the subsequent deeds from the State, in lands below high water mark. This is a direct adjudication against the validity of a right or privilege claimed under a law of the United States, and presents a Federal question within the appellate jurisdiction of this court.

The briefs submitted to the court in the case at bar have been so able and elaborate, and have disclosed such a diversity of view as to the scope and effect of the previous decisions of this court upon the subject of public and private rights in lands below high water mark of navigable waters, that this appears to the court to be a fit occasion for a full review of those decisions and a consideration of other authorities upon the subject.

I

By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of

fishing by all the King's subjects. Therefore the title, *jus privatum*, in such lands, as of waste and unoccupied lands, belongs to the King as the sovereign; and the dominion thereof, *jus publicum*, is vested in him as the representative of the nation and for the public benefit.

The great authority in the law of England upon this subject is Lord Chief Justice Hale, whose authorship of the treatise *De Jure Maris*, sometimes questioned, has been put beyond doubt by recent researches. In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the King, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage and that this title, *jus privatum*, whether in the King or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing.

It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention.

By recent judgments of the House of Lords, after conflicting decisions in the courts below, it has been established in England, that the owner of land fronting on a navigable river in which the tide ebbs and flows has a right of access from his land to the river . . . The right thus recognized, however, is not a title in the soil below high water mark, nor a right to build thereon, but a right of access only, analogous to that of an abutter upon a highway. *Buccleuch v. Metropolitan Board of Works*, L.R. 5 H.L. 418; *Lyon v. Fishmongers Co.*, 1 App. Cas. 662.

II

The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several Colonies and States, or by the Constitution and laws of the United States.

The English possessions in America were claimed by right of discovery. Having been discovered by subjects of the King of England, and taken possession of in his name, by his authority or with his assent, they were held by the King as the representative of and in trust for the nation; and all vacant lands, and the exclusive power to grant them, were vested in him. The various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide waters. And upon the American Revolution, all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the national government by the Constitution of the United States. *Johnson v. McIntosh*, 8 Wheat. 543, 595; *Martin v. Waddell*, 16 Pet. 367, 408-410, 414; *Commonwealth v. Roxbury*, 9 Gray, 451, 478-481; *Stevens v. Paterson & Newark Railroad*, 5 Vroom, (34 N.J. Law,) 532; *People v. New York & Staten Island Ferry*, 68 N.Y. 71.

The leading case in this court, as to the title and dominion of tide waters and of the lands under them, is *Martin v. Waddell*, (1842) 16 Pet. 367, which arose in New Jersey. This court, in the opinion delivered by Chief Justice Taney, summed up in his own words: “the dominion and propriety in the navigable waters, and in the soils under them, passed, as a part of the prerogative rights annexed to the political powers conferred on the Duke;” and “in his hands they were intended to be a trust for the common use of the new community about to be established”—“a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shell fish as floating fish”—and not as “private property, to be parcelled out and sold . . .”

III

The governments of the several Colonies, with a view to induce persons to erect wharves for the benefit of navigation and commerce, early allowed the owners of lands bounding on tide waters greater rights and privileges in the shore below high water mark, than they had in England. But the nature and degree of such rights and privileges differed in the different Colonies, and in some were created by statute, while in others they rested upon usage only.

The laws of the original States shows that there is no universal and uniform law upon the subject; but that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.

IV

The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands below the high water mark, within their respective jurisdictions.

The act of 1783 and the deed of 1784, by which the State of Virginia, before the adoption of the Constitution, ceded “unto the United States in Congress assembled, for the benefit of the said States, all right, title and claim, as well of soil as jurisdiction,” to the Northwest Territory, and the similar cession by the State of Georgia to the United States in 1802 of territory including great parts of Alabama and of Mississippi, each provided that the territory so ceded should be formed into States, to be admitted, on attaining a certain population, into the Union, (in the words of the Virginia cession) “having the same rights of sovereignty, freedom and independence as the other States,” or (in the words of the Ordinance of Congress of July 13, 1787, for the government of the Northwest Territory, adopted in the Georgia cession) “on an equal footing with the original States in all respects whatever;” and that “all the lands within” the

territory so ceded to the United States, and not reserved or appropriated for other purposes, should be considered as a common fund for the use and benefit of the United States. In *Pollard v. Hagan* (1844) this court, upon full consideration, adjudged that upon the admission of the State of Alabama into the Union, the title in the lands below high water mark of navigable waters passed to the State, and could not afterwards be granted away by the Congress of the United States.

VII

The later judgments of this court clearly establish that the title and rights of riparian or littoral proprietors in the soil below high water mark of navigable waters are governed by the local laws of the several States, subject, of course, to the rights granted to the United States by the Constitution.

VIII

Notwithstanding the dicta contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high water mark of navigable waters in a Territory of the United States, it is evident that this is not strictly true. By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the Territories, so long as they remain in a territorial condition.

We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.

IX

But Congress has never undertaken by general laws to dispose of such lands. And the reasons are not far to seek. In the words of Chief Justice Taney, “the country” discovered and settled by Englishmen “was held by the King in his public and regal character as the representative of the nation, and in trust for them;” and the title and the dominion of the tide waters and of the soil under them, in each colony, passed by the royal charter to the grantees as “a trust for the common use of the new community about to be established;” and, upon the American Revolution, vested absolutely in the people of each State “for their own common use, subject only to the rights since surrendered by the Constitution to the general government.” *Martin v. Waddell*, 16 Pet. 367, 409-411.

The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, . . . shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community.

X

The title of the United States to Oregon was founded upon original discovery and actual settlement by citizens of the United States, authorized or approved by the government of the United States; as well as upon the cession of the Louisiana Territory by France in the treaty of 1803, and the renunciation of the claims of Spain in the treaty of 1819.

The United States, on assuming undisputed dominion over the Territory, owned all the lands therein; and Congress had the right to confine its bounties to settlers within just such limits as it chose. The first act of Congress which granted to settlers titles in such lands was the Oregon Donation Act of September 27, 1850, c. 76. That act required the lands in Oregon to be surveyed as in the Northwest Territory; and it made grants or donations of land, measured by sections, half sections and quarter sections, to actual settlers and occupants. It contains nothing indicating any intention on the part of Congress to depart from its settled policy of not granting to individuals lands under tide waters or navigable rivers. 9 Stat. 496; Rev. Stat. §§2395, 2396, 2409.

It is evident, therefore, that a donation claim under this act, bounded by the Columbia River, where the tide ebbs and flows, did not, of its own force, have the effect of passing any title in lands below high water mark. Nor is any such effect attributed to it by the law of the State of Oregon.

By the law of the State of Oregon, as declared and established by the decisions of its Supreme Court, the owner of upland bounding on navigable water has no title in the adjoining lands below high water mark, and no right to build wharves thereon, except as expressly permitted by statutes of the State; but the State has the title in those lands, and, unless they have been so built upon with its permission, the right to sell and convey them to any one, free of any right in the proprietor of the upland, and in the case at bar, the lands in controversy are below

high water mark of the Columbia River where the tide ebbs and flows; and the defendant claims them by a deed from John M. Shively, who, while Oregon was a Territory, obtained from the United States a donation claim, bounded by the Columbia River, at the place in question.

The plaintiffs claim title to the lands in controversy by deeds executed in behalf of the State of Oregon, pursuant to a statute of the State of 1872, as amended by a statute of 1874, which recited that the annual encroachments of the sea upon the land, washing away the shores and shoaling harbors, could be prevented only at great expense by occupying and placing improvements upon the tide and overflowed lands belonging to the State, and that it was desirable to offer facilities and encouragement to the owners of the soil abutting on such harbors to make such improvements; and therefore enacted that the owner of any land abutting or fronting upon, or bounded by the shore of any tide waters, should have the right to purchase the lands belonging to the State in front thereof; and that, if he should not do so within three years from the date of the act, they should be open to purchase by any other person who was a citizen and resident of Oregon, after giving notice and opportunity to the owner of the adjoining upland to purchase; and made provisions for securing to persons who had actually made improvements upon tide lands a priority of right so to purchase them.

Neither the defendant nor his grantor appears to have ever built a wharf or made any other improvement upon the lands in controversy, or to have applied to the State to purchase them. But the plaintiff after their purchase from the State, built and maintained a wharf upon the part of these lands nearest the channel, which extended several hundred feet into the Columbia River, and at which ocean and river craft were wont to receive and discharge freight.

By the law of the State of Oregon, therefore, as enacted by its legislature and declared by its highest court, the title in the lands in controversy is in the [plaintiffs]; and, upon the principles recognized and affirmed by a uniform series of recent decisions of this court, above referred to, the law of Oregon governs the case.

The conclusions from the considerations and authorities above stated may be summed up as follows: Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and the control of them are vested in the sovereign for the benefit of the whole people.

At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the Colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States.

Upon the acquisition of a Territory by the United States, whether by cession from one of the States, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the Territory.

The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution.

The United States, while they hold the country as a Territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the Territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the States, respectively, when organized and admitted into the Union.

Grants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future State when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each State, subject only to the rights vested by the Constitution in the United States.

The donation land claim, bounded by the Columbia River, upon which the [defendant] relies, includes no title or right in the land below high water mark; and the statutes of Oregon, under which the [plaintiffs] hold, are a constitutional and legal exercise by the State of Oregon of its dominion over the lands under navigable waters.

Judgment affirmed.

BORAX CONSOLIDATED, LTD v. LOS ANGELES
296 U.S. 10 (1935)

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The City of Los Angeles brought this suit to quiet title to land claimed to be tideland of Mormon Island situated in the inner bay of San Pedro now known as Los Angeles Harbor. The City asserted title under a legislative grant by the State. Petitioners claimed under a preemption patent issued by the United States on December 30, 1881, to one William Banning. The District Court entered a decree, upon findings, dismissing the complaint upon the merits and adjudging that petitioner, Borax Consolidated, Limited, was the owner in fee simple and entitled to the possession of the property. 5 F.Supp. 281. The Circuit Court of Appeals reversed the decree. 74 F.2d 901. Because of the importance of the questions presented, and of an asserted conflict with decisions of this Court, we granted certiorari, June 3, 1935.

In May, 1880, one W. H. Norway, a Deputy Surveyor, acting under a contract with the Surveyor General of the United States for California, made a survey of Mormon Island. The surveyor's field notes and the corresponding plat of the island were approved by the Surveyor General and were returned to the Commissioner of the General Land Office. The latter, having found the survey to be correct, authorized the filing of the plat. The land which the patent to Banning purported to convey was described by reference to that plat as follows: "Lot numbered one, of section eight, in township five south, of range thirteen west of San Bernardino Meridian, in California, containing eighteen acres, and eighty eight hundredths of an acre, according to the Official Plat of the Survey of the said Lands, returned to the General Land Office by the Surveyor General."

The District Court found that the boundaries of "lot one," as thus conveyed, were those shown by the plat and field notes of the survey; that all the lands described in the complaint were embraced within that lot; and that no portion of the lot was or had been tideland or situated below the line of mean high tide of the Pacific Ocean or of Los Angeles Harbor. The District Court held that the complaint was a collateral, and hence unwarranted, attack upon the survey, the plat and the patent; that the action of the General Land Office involved determinations of questions of fact which were within its jurisdiction and were specially committed to it by law for decision; and that its determinations, including that of the correctness of the survey, were final and were binding upon the State of California and the City of Los Angeles, as well as upon the United States.

The Circuit Court of Appeals disagreed with this view as to the conclusiveness of the survey and the patent. The court held that the Federal Government had neither the power nor the intention to convey tideland to Banning, and that his rights were limited to the upland. The court also regarded the lines shown on the plat as being meander lines and the boundary line of the

land conveyed as the shore line of Mormon Island. The court declined to pass upon petitioners' claim of estoppel in pais and by judgment, upon the ground that the question was not presented to or considered by the trial court, and was also of the opinion that the various questions raised as to the failure of the City to allege and prove the boundary line of the island were important only from the standpoint of the new trial which the court directed. 74 F.2d p. 904. For the guidance of the trial court the Court of Appeals laid down the following rule: The "mean high tide line" was to be taken as the boundary between the land conveyed and the tideland belonging to the State of California, and in the interest of certainty the court directed that "an average for 18.6 years should be determined as near as possible by observation or calculation."

Petitioners contest these rulings of the Court of Appeals. With respect to the ascertainment of the shore line, they insist that the court erred in taking the "mean high tide line" and in rejecting "neap tides" as the criterion for ordinary high water mark.

1. The controversy is limited by settled principles governing the title to tidelands. The soils under tidewaters within the original States were reserved to them respectively, and the States since admitted to the Union have the same sovereignty and jurisdiction in relation to such lands within their borders as the original States possessed. *Martin v. Waddell*, 16 Pet. 367, 410; *Pollard v. Hagan*, 3 How. 212, 229, 230; *Goodtitle v. Kibbe*, 9 How. 471, 478; *Weber v. Harbor Commissioners*, 18 Wall. 57, 65, 66; *Shively v. Bowlby*, 152 U.S. 1, 15, 26. This doctrine applies to tidelands in California. *Weber v. Harbor Commissioners*, *supra*; *Shively v. Bowlby*, *supra*, pp. 29, 30; *United States v. Mission Rock Co.*, 189 U.S. 391, 404, 405. Upon the acquisition of the territory from Mexico, the United States acquired the title to tidelands equally with the title to upland, but held the former only in trust for the future States that might be erected out of that territory. *Knight v. United States Land Assn.*, 142 U.S. 161, 183.

It follows that if the land in question was tideland, the title passed to California at the time of her admission to the Union in 1850. That the Federal Government had no power to convey tidelands, which had thus vested in a State, was early determined. *Pollard v. Hagan*, *supra*.

2. So far as pertinent here, the jurisdiction of the Land Department extended only to "the public lands of the United States." The patent to Banning was issued under the preemption laws, which expressly related to lands "belonging to the United States." R. S. 2257, 2259. Obviously these laws had no application to lands which belonged to the States. Specifically, the term "public lands" did not include tidelands. *Mann v. Tacoma Land Co.*, 153 U.S. 273, 284. "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Newhall v. Sanger*, 92 U.S. 761, 763; *Barker v. Harvey*, 181 U.S. 481, 490; *Union Pacific R. Co. v. Harris*, 215 U.S. 386, 388.

Here, the question goes to the existence of the subject upon which the Land Department was competent to act. Was it upland, which the United States could patent, or tideland, which it could not? Such a controversy as to title is appropriately one for judicial decision upon evidence, and we find no ground for the conclusion that it has been committed to the determination of administrative officers.

3. As the District Court fell into a fundamental error in treating the survey and patent as conclusive, it was not incumbent upon the Court of Appeals to review the evidence and decide whether it showed, or failed to show, that the land in question was tideland. The court remanded the cause for a new trial in which the issues as to the boundary between upland and tideland, and as to the defenses urged by petitioners, are to be determined. In that disposition of the case we find no error.

4. There remains for our consideration, however, the ruling of the Court of Appeals in instructing the District Court to ascertain as the boundary "the mean high tide line" and in thus rejecting the line of "neap tides."

Petitioners claim under a federal patent which, according to the plat, purported to convey land bordering on the Pacific Ocean. There is no question that the United States was free to convey the upland, and the patent affords no ground for holding that it did not convey all the title that the United States had in the premises. The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law.

The tideland extends to the high water mark. *Hardin v. Jordan*, supra; *Shively v. Bowlby*, supra; *McGilvra v. Ross*, 215 U.S. 70, 79. This does not mean, as petitioners contend, a physical mark made upon the ground by the waters; it means the line of high water as determined by the course of the tides. By the civil law, the shore extends as far as the highest waves reach in winter. Inst. lib. 2, tit. 1, §3; Dig. lib. 50, tit. 16, §112. But by the common law, the shore "is confined to the flux and reflux of the sea at ordinary tides." *Blundell v. Catterall*, 5 B. & A. 268, 292. It is the land "between ordinary high and low-water mark, the land over which the daily tides ebb and flow. When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails." *United States v. Pacheco*, 2 Wall. 587, 590.

In view of the definition of the mean high tide, as given by the United States Coast and Geodetic Survey, that "Mean high water at any place is the average height of all the high waters at that place over a considerable period of time," and the further observation that "from theoretical considerations of an astronomical character" there should be a "a periodic variation in

the rise of water above sea level having a period of 18.6 years," the Court of Appeals directed that in order to ascertain the mean high tide line with requisite certainty in fixing the boundary of valuable tidelands, such as those here in question appear to be, "an average of 18.6 years should be determined as near as possible." We find no error in that instruction. The decree of the Court of Appeals is Affirmed.

Session 3. National Dominion

UNITED STATES v. CALIFORNIA 332 U.S. 19 (1947)

Mr. Justice Black delivered the opinion of the Court.

The United States by its Attorney General and Solicitor General brought this suit against the State of California invoking our original jurisdiction under Article III, §2, of the Constitution which provides that “In all Cases . . . in which a State shall be Party, the Supreme Court shall have original Jurisdiction.” The complaint alleges that the United States “is the owner in fee simple of, or possessed of paramount rights in and powers over, the lands, minerals and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low water mark on the coast of California and outside of the inland waters of the State, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California.” It is further alleged that California, acting pursuant to state statutes, but without authority from the United States, has negotiated and executed numerous leases with persons and corporations purporting to authorize them to enter upon the described ocean area to take petroleum, gas, and other mineral deposits, and that the lessees have done so, paying to California large sums of money in rents and royalties for the petroleum products taken. The prayer is for a decree declaring the rights of the United States in the area as against California and enjoining California and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States.

California has filed an answer to the complaint. It admits that persons holding leases from California, or those claiming under it, have been extracting petroleum products from the land under the three-mile ocean belt immediately adjacent to California. The basis of California’s asserted ownership is that a belt extending three English miles from low water mark lies within the original boundaries of the state, Cal. Const. Art. XII (1849); that the original thirteen states acquired from the Crown of England title to all lands within their boundaries under navigable waters, including a three-mile belt in adjacent seas; and that since California was admitted as a state on an “equal footing” with the original states, California at that time became vested with title to all such lands.

First. It is contended that the pleadings present no case or controversy under Article III, §2, of the Constitution. The contention rests in the first place on an argument that there is no case or controversy in a legal sense, but only a difference of opinion between federal and state officials. It is true that there is a difference of opinion between federal and state officers. But there is far more than that. The point of difference is as to who owns, or has paramount rights in and power over several thousand square miles of land under the ocean off the coast of California. The difference involves the conflicting claims of federal and state officials as to which government, state or federal, has a superior right to take or authorize the taking of the vast

quantities of oil and gas underneath that land, much of which has already been, and more of which is about to be, taken by or under authority of the state. Such concrete conflicts as these constitute a controversy in the classic legal sense, and are the very kind of differences which can only be settled by agreement, arbitration, force, or judicial action.

Second. It is contended that we should dismiss this action on the ground that the Attorney General has not been granted power either to file or to maintain it. It is not denied that Congress has given a very broad authority to the Attorney General to institute and conduct litigation in order to establish and safeguard government rights and properties. The argument is that Congress has for a long period of years acted in such a way as to manifest a clear policy to the effect that the states, not the Federal Government, have legal title to the land under the three-mile belt. Although Congress has not expressly declared such a policy, we are asked to imply it from certain conduct of Congress and other governmental agencies charged with responsibilities concerning the national domain. And, in effect, we are urged to infer that Congress has by implication amended its long-existing statutes which grant the Attorney General broad powers to institute and maintain court proceedings in order to safeguard national interests.

[T]he matters to which we have [referred . . . do not] afford support for a holding that Congress has either explicitly or by implication stripped the Attorney General of his statutorily granted power to invoke our jurisdiction in this federal-state controversy. This brings us to the merits of the case.

Third. The crucial question on the merits is not merely who owns the bare legal title to the lands under the marginal sea. The United States here asserts rights in two capacities transcending those of a mere property owner. In one capacity it asserts the right and responsibility to exercise whatever power and dominion are necessary to protect this country against dangers to the security and tranquility of its people incident to the fact that the United States is located immediately adjacent to the ocean. The Government also appears in its capacity as a member of the family of nations. In that capacity it is responsible for conducting United States relations with other nations. It asserts that proper exercise of these constitutional responsibilities requires that it have power, unencumbered by state commitments, always to determine what agreements will be made concerning the control and use of the marginal sea and the land under it. In the light of the foregoing, our question is whether the state or the Federal Government has the paramount right and power to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered, may be exploited.

California claims that it owns the resources of the soil under the three-mile marginal belt as an incident to those elements of sovereignty which it exercises in that water area. The state points out that and that California was admitted “on an equal footing with the original States in all respects whatever.” With these premises admitted, California contends that its ownership

follows from the rule originally announced in *Pollard's Lessee v. Hagan*, 3 How. 212; see also *Martin v. Waddell*, 16 Pet. 367, 410.

The Government does not deny that under the Pollard rule, as explained in later cases, California has a qualified ownership of lands under inland navigable waters such as rivers, harbors, and even tidelands down to the low water mark. It does question the validity of the rationale in the Pollard case that ownership of such water areas, any more than ownership of uplands, is a necessary incident of the state sovereignty contemplated by the "equal footing" clause. Cf. *United States v. Oregon*, 295 U.S. 1, 14. For this reason, among others, it argues that the Pollard rule should not be extended so as to apply to lands under the ocean. It stresses that the thirteen original colonies did not own the marginal belt; that the Federal Government did not seriously assert its increasingly greater rights in this area until after the formation of the Union; that it has not bestowed any of these rights upon the states, but has retained them as appurtenances of national sovereignty. And the Government insists that no previous case in this Court has involved or decided conflicting claims of a state and the Federal Government to the three-mile belt in a way which requires our extension of the Pollard inland water rule to the ocean area.

From all the wealth of material supplied, however, we cannot say that the thirteen original colonies separately acquired ownership to the three-mile belt or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it.

At the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders. Those who settled this country were interested in lands upon which to live, and waters upon which to fish and sail. There is no substantial support in history for the idea that they wanted or claimed a right to block off the ocean's bottom for private ownership and use in the extraction of its wealth.

It did happen that shortly after we became a nation our statesmen became interested in establishing national dominion over a definite marginal zone to protect our neutrality. Largely as a result of their efforts, the idea of a definite three-mile belt in which an adjacent nation can, if it chooses, exercise broad, if not complete dominion, has apparently at last been generally accepted throughout the world.

There are innumerable executive declarations to the world of our national claims to the three-mile belt, and more recently to the whole continental shelf. The latest and broadest claim is President Truman's recent proclamation that the United States "regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control . . ." Exec. Proc. 2667, Sept. 28, 1945, 10 F. R. 12303.

Not only has acquisition, as it were, of the three-mile belt been accomplished by the National Government, but protection and control of it has been and is a function of national external sovereignty. The belief that local interests are so predominant as constitutionally to require state dominion over lands under its land-locked navigable waters finds some argument for its support. But such can hardly be said in favor of state control over any part of the ocean or the ocean's bottom. This country, throughout its existence has stood for freedom of the seas, a principle whose breach has precipitated wars among nations.

The ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve that peace. And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual state, so, if wars come, they must be fought by the nation. The state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks. Conceding that the state has been authorized to exercise local police power functions in the part of the marginal belt within its declared boundaries, these do not detract from the Federal Government's paramount rights in and power over this area. Consequently, we are not persuaded to transplant the Pollard rule of ownership as an incident of state sovereignty in relation to inland waters out into the soil beneath the ocean, so much more a matter of national concern. If this rationale of the Pollard case is a valid basis for a conclusion that paramount rights run to the states in inland waters to the shoreward of the low water mark, the same rationale leads to the conclusion that national interests, responsibilities, and therefore national rights are paramount in waters lying to the seaward in the three-mile belt.

The question of who owned the bed of the sea only became of great potential importance at the beginning of this century when oil was discovered there. As a consequence of this discovery, California passed an Act in 1921 authorizing the granting of permits to California residents to prospect for oil and gas on blocks of land off its coast under the ocean. Cal. Stats. 1921, c. 303. This state statute, and others which followed it, together with the leasing practices under them, have precipitated this extremely important controversy, and pointedly raised this state-federal conflict for the first time. Now that the question is here, we decide for the reasons we have stated that California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil.

We hold that the United States is entitled to the relief prayed for. The parties, or either of them, may, before September 15, 1947, submit the form of decree to carry this opinion into effect, failing which the Court will prepare and enter an appropriate decree at the next term of Court.

It is so ordered.

Mr. Justice Frankfurter, dissenting.

By this original bill the United States prayed for a decree enjoining all persons, including those asserting a claim derived from the State of California, from trespassing upon the disputed area. An injunction against trespassers normally presupposes property rights. The Court, however, grants the prayer but does not do so by finding that the United States has proprietary interests in the area. To be sure, it denies such proprietary rights in California. But even if we assume an absence of ownership or possessory interest on the part of California, that does not establish a proprietary interest in the United States. It is significant that the Court does not adopt the Government's elaborate argument, based on dubious and tenuous writings of publicists, see Schwarzenberger, *Inductive Approach to International Law*, 60 *Harv. L. Rev.* 539, 559, that this part of the open sea belongs, in a proprietary sense, to the United States. See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 351. Instead, the Court finds trespass against the United States on the basis of what it calls the "national dominion" by the United States over this area.

To speak of "dominion" carries precisely those overtones in the law which relate to property and not to political authority. Dominion, from the Roman concept *dominium*, was concerned with property and ownership, as against *imperium*, which related to political sovereignty. One may choose to say, for example, that the United States has "national dominion" over navigable streams. But the power to regulate commerce over these streams, and its continued exercise, do not change the *imperium* of the United States into *dominium* over the land below the waters. Of course the United States has "paramount rights" in the sea belt of California- the rights that are implied by the power to regulate interstate and foreign commerce, the power of condemnation, the treaty-making power, the war power. We have not now before us the validity of the exercise of any of these paramount rights. Rights of ownership are here asserted- and rights of ownership are something else. Ownership implies acquisition in the various ways in which land is acquired- by conquest, by discovery and claim, by cession, by prescription, by purchase, by condemnation. When and how did the United States acquire this land?

The fact that these oil deposits in the open sea may be vital to the national security, and important elements in the conduct of our foreign affairs, is no more relevant than is the existence of uranium deposits, wherever they may be, in determining questions of trespass to the land of which they form a part. This is not a situation where an exercise of national power is actively and presently interfered with. In such a case, the inherent power of a federal court of equity may be invoked to prevent or remove the obstruction. In *re Debs*, 158 U.S. 564; *Sanitary District v. United States*, 266 U.S. 405. Neither the bill, nor the opinion sustaining it, suggests that there is interference by California or the alleged trespassers with any authority which the Government presently seeks to exercise. It is beside the point to say that "if wars come, they must be fought by the nation." Nor is it relevant that "The very oil about which the state and nation here contend might well become the subject of international dispute and settlement." It is common knowledge

that uranium has become “the subject of international dispute” with a view to settlement. Compare *Missouri v. Holland*, 252 U.S. 416.

To declare that the Government has “national dominion” is merely a way of saying that vis-à-vis all other nations the Government is the sovereign. If that is what the Court’s decree means, it needs no pronouncement by this Court to confer or declare such sovereignty. If it means more than that, it implies that the Government has some proprietary interest. That has not been remotely established except by sliding from absence of ownership by California to ownership by the United States.

Let us assume, for the present, that ownership by California cannot be proven. On a fair analysis of all the evidence bearing on ownership, then, this area is, I believe, to be deemed unclaimed land, and the determination to claim it on the part of the United States is a political decision not for this Court. The Constitution places vast authority for the conduct of foreign relations in the independent hands of the President. See *United States v. Curtiss-Wright Corp.*, 299 U.S. 304. It is noteworthy that the Court does not treat the President’s proclamation in regard to the disputed area as an assertion of ownership. See Exec. Proc. 2667 (Sept. 28, 1945) 10 F. R. 12303. If California is found to have no title, and this area is regarded as unclaimed land, I have no doubt that the President and the Congress between them could make it part of the national domain and thereby bring it under Article IV, Section 3, of the Constitution. The disposition of the area, the rights to be created in it, the rights heretofore claimed in it through usage that might be respected though it fall short of prescription, all raise appropriate questions of policy, questions of accommodation, for the determination of which Congress and not this Court is the appropriate agency.

Today this Court has decided that a new application even in the old field of torts should not be made by adjudication, where Congress has refrained from acting. *United States v. Standard Oil Co.*, 332 U.S. 301. Considerations of judicial self-restraint would seem to me far more compelling where there are obviously at stake claims that involve so many far-reaching, complicated, historic interests, the proper adjustments of which are not readily resolved by the materials and methods to which this Court is confined.

This is a summary statement of views which it would serve no purpose to elaborate. I think that the bill should be dismissed without prejudice.

SUBMERGED LANDS ACT OF 1953
43 U.S.C. §§1301-1315

§1301. Definitions

When used in this Act [43 USCS §§1301-1315]—

The term "lands beneath navigable waters" means—

all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and water thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 4 hereof [43 USCS §1312] but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico, except that any boundary between a State and the United States under this Act [43 USCS §§1301-1315] which has been or is hereafter fixed by coordinates under a final decree of the United States Supreme Court shall remain immobilized at the coordinates provided under such decree and shall not be ambulatory;

The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

The terms "grantees" and "lessees" include (without limiting the generality thereof) all political subdivisions, municipalities, public and private corporations, and other persons holding grants or leases from a State, or from its predecessor sovereign if legally validated, to lands beneath navigable waters if such grants or leases were issued in accordance with the constitution, statutes, and decisions of the courts of the State in which such lands are situated, or of its

predecessor sovereign: Provided, however, That nothing herein shall be construed as conferring upon said grantees or lessees any greater rights or interests other than are described herein and in their respective grants from the State, or its predecessor sovereign;

The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

The term "lands beneath navigable waters" does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person;

The term "State" means any State of the Union;

The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation.

§1302. Resources Seaward of the Continental Shelf

Nothing in this Act [43 USCS §§1301-1315] shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 2 hereof [43 USCS §1301], all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is hereby confirmed.

§1303. Amendment, modification, or repeal of other laws

Nothing in this Act [43 USCS §§1301-1315] shall be deemed to amend, modify, or repeal the Acts of July 26, 1866 (14 Stat. 251), July 9, 1870 (16 Stat. 217), March 3, 1877 (19 Stat. 377), June 17, 1902 (32 Stat. 388), and December 22, 1944 (58 Stat. 887), and Acts amendatory thereof or supplementary thereto.

§1311. Rights of the States

Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use. It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned

to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

Release and relinquishment of title and claims of United States; payment to States of moneys paid under leases. (1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States hereby releases and relinquishes all claims of the United States, of any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters; and (3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural resources all moneys paid thereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on the effective date of this Act [enacted May 22, 1953], except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided by stipulation or agreement between the United States and any of said States;

Omitted

Authority and rights of the United States respecting navigation, flood control and production of power. Nothing in this Act [43 USCS §§1301-1315] shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power....

omitted.

§1312. Seaward boundaries of States

The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond

three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

§1313. Exceptions from confirmation and establishment of States' title, power and rights

There is excepted from the operation of section 3 of this Act [43 USCS §1311]—

all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and any rights the United States has in lands presently and actually occupied by the United States under claim of right;

such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians; and

all structures and improvements constructed by the United States in the exercise of its navigational servitude.

§1314. Rights and powers retained by the United States; purchase of natural resources; condemnation of lands

The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 3 of this Act [43 USCS §1311].

In time of war or when necessary for national defense, and the Congress or the President shall so prescribe, the United States shall have the right of first refusal to purchase at the prevailing market price, all or any portion of the said natural resources, or to acquire and use any portion of said lands by proceeding in accordance with due process of law and paying just compensation therefor.

§1315. Rights acquired under laws of the United States unaffected

Nothing contained in this Act [43 USCS §§1301-1315] shall affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to this Act [43 USCS §§1301-1315] and such rights, if any, shall be governed by the law in effect at the time they may have been acquired: Provided, however, That nothing contained in this Act [43 USCS §§1301-1315] is intended or shall be construed as a finding, interpretation, or construction by the Congress that the law under which such rights may be claimed in fact or in law applies to the lands subject to this Act [43 USCS §§1301-1315], or authorizes or compels the granting of such rights in such lands, and that the determination of the applicability or effect of such law shall be unaffected by anything contained in this Act [43 USCS §§1301-1315].

UNITED STATES v. FLORIDA
363 U.S. 121 (1960)

[The present controversy involves the interests of Florida, Texas, Louisiana, Mississippi, and Alabama in the submerged lands off their shores.]

MR. JUSTICE FRANKFURTER, concurring

Considering the variety of views evoked by these cases, I deem it appropriate to add a few words. The one thing which I take to be incontestable is that Congress did not, by the Submerged Lands Act of 1953, make an outright grant to any of the Gulf States in excess of three miles. Congress only granted to each of these States the opportunity to establish at law that it possessed a boundary in excess of three miles, either by virtue of possession of such a boundary at the time of its admission to the Union or by virtue of congressional "approval" of such a boundary prior to the enactment of the Submerged Lands Act. A Gulf State that can successfully establish such a judicially ascertainable fact is entitled to a grant of the submerged lands beyond three miles to a distance of the lesser of three leagues or of the boundary so established. Congress, in the Submerged Lands Act itself, did not determine the existence of a boundary for any State beyond three miles, either explicitly or by implied approval of a claim presented to it in the course of the legislative process. Nor of course did Congress vest this Court with determination of a claim based on "equity" in the layman's loose sense of the term, for it could not. Congress may indulge in largess based on considerations of policy; Congress cannot ask this Court to exercise benevolence on its behalf. There is no foundation in the Act of 1953 or its legislative history for the view that particularized, express approval of a State's boundary claim by a prior Congress is required to make a defined boundary the measure of the grant. To the contrary, in the case of Florida, authoritative legislative history makes it perfectly clear that the very question deliberately preserved by the Act of 1953 was whether congressional approval of the new Florida Constitution in the Reconstruction legislation of 1867-1868, by which Florida was restored to full participation in the Union, amounted to an approval of the three-league boundary which that constitution explicitly set forth.

UNITED STATES v. MAINE
420 U.S. 515 (1975)

Mr. Justice White delivered the opinion of the Court.

Seeking to invoke the jurisdiction of this Court under Art. III, §2, of the Constitution . . . the United States in April 1969 asked leave to file a complaint against the 13 States bordering on the Atlantic Ocean—Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, and Florida.¹ We granted leave to file on June 16, 1969. The complaint asserted a separate cause of action against each of the States which alleged that:

“[T]he United States is now entitled to the exclusion of the defendant State, to exercise sovereign rights over the seabed and subsoil underlying the Atlantic Ocean, lying more than three geographical miles seaward from the ordinary low-water mark and from the outer limit of inland waters on the coast, extending seaward to the outer edge of the continental shelf, for the purpose of exploring the area and exploiting its natural resources.”

It was therefore prayed that a decree be entered declaring the rights of the United States and that such further relief be awarded as might prove proper.

The defendants answered, each generally denying proprietary rights of the United States in the seabed in the area beyond the three-mile marginal sea. Each of them, except Florida, claimed for itself, as successor in title to certain grantees of the Crown of England (and in the case of New York, to the Crown of Holland), the exclusive right of dominion and control over the seabed underlying the Atlantic Ocean seaward from its coastline to the limits of the jurisdiction of the United States, asserting as well that any attempt by the United States to interfere with these rights would in itself violate the Constitution of the United States.

We entered an order appointing the Honorable Albert B. Maris as Special Master and referred the case to him with authority to request further pleadings, to summon witnesses, and to take such evidence and submit such reports as he might deem appropriate. Before the Special Master, the United States contended that based on *United States v. California*, 332 U.S. 19 (1947), *United States v. Louisiana*, 339 U.S. 699 (1950), and *United States v. Texas*, 339 U.S. 707 (1950), it was entitled to judgment in accordance with its motion. The defendant States asserted that their cases were distinguishable from the prior cases and that in any event, California, Louisiana, and Texas were erroneously decided and should be overruled.

¹ The State of Connecticut was not made a defendant, apparently because that State borders on Long Island Sound, which is considered inland water rather than open sea.

At the conclusion of the proceeding before him, the Special Master submitted a Report (hereinafter Report) which the United States supports in all respects, but to which the States have submitted extensive and detailed exceptions. The controversy is now before us on the Report, the exceptions to it, and the briefs and oral arguments of the parties.

In his Report, the Special Master concluded that the California, Louisiana, and Texas cases, which he deemed binding on him, governed this case and required that judgment be entered for the United States.

Assuming, however, that those cases were open to re-examination, the Special Master went on independently to examine the legal and factual contentions of the States and concluded that they were without merit and that the Court's prior cases should be reaffirmed.

We fully agree with the Special Master that California, Louisiana, and Texas rule the issues before us. We also decline to overrule those cases as the defendant States request us to do.

The Special Master was correct in concluding that these cases, unless they are to be overruled, completely dispose of the States' claims of ownership here. These decisions considered and expressly rejected the assertion that the original States were entitled to the seabed under the three-mile marginal sea. They also held that under our constitutional arrangement paramount rights to the lands underlying the marginal sea are an incident to national sovereignty and that their control and disposition in the first instance are the business of the Federal Government rather than the States.

The States seriously contend that the prior cases, as well as the Special Master, were in error in denying that the original Colonies had substantial rights in the seabed prior to independence, and afterwards, by grant from or succession to the sovereignty of the Crown. Given the dual basis of the California decision, however, and of those that followed it, the States' claims of ownership prior to the adoption of the Constitution are not dispositive. Whatever interest the States might have had immediately prior to statehood, the Special Master was correct in reading the Court's cases to hold that as a matter of "purely legal principle . . . the Constitution . . . allotted to the federal government jurisdiction over foreign commerce, foreign affairs and national defense" and that "it necessarily follows, as a matter of constitutional law, that as attributes of these external sovereign powers the federal government has paramount rights in the marginal sea." Report, 23.

Assuming the possibility, however, that the Court might re-examine the constitutional premise of California and similar cases, the Special Master proceeded, with admirable diligence and lucidity, to address the historical evidence presented by the States aimed primarily at establishing that the Colonies had legitimate claims to the marginal sea prior to independence and statehood and that the new States never surrendered these rights to the Federal Government. The Special Master's ultimate conclusion was that the Court's view of our history expressed in

the California case was essentially correct and that if prior cases were open to re-examination, they should be reaffirmed in all respects.

We need not retrace the Special Master's analysis of historical evidence, for we are firmly convinced that we should not undertake to re-examine the constitutional underpinnings of the California case and of those cases which followed and explicated the rule that paramount rights to the offshore seabed inhere in the Federal Government as an incident of national sovereignty. That premise, as we have indicated, has been repeated time and again in the cases. It is also our view, contrary to the contentions of the States, that the premise was embraced rather than repudiated by Congress in the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. §1301. In that legislation, it is true, Congress transferred to the States the rights to the seabed underlying the marginal sea; however, this transfer was in no wise inconsistent with paramount national power but was merely an exercise of that authority. As the Special Master said, the Court in its prior cases "did not indicate that the federal government by Act of Congress might not, as it did by the subsequently enacted Submerged Lands Act, grant to the riparian states rights to the resources of the federal area, subject to the reservation by the federal government of its rights and powers of regulation and control for purposes of commerce, navigation, national defense, and international affairs." Report, 16. The question before the Court in the California case was "whether the state or the Federal Government has the paramount right and power to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered, may be exploited." 332 U.S., at 29. The decision there was that the National Government had the power at issue, the Court declining to speculate that "Congress, which has constitutional control over Government property, will execute its powers in such a way as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission." *Id.*, at 40.

The Submerged Lands Act did indeed grant to the States dominion over the offshore seabed within the limits defined in the Act and released the States from any liability to account for any prior income received from state leases that had been granted with respect to the marginal sea. But in further exercise of paramount national authority, the Act expressly declared that nothing in the Act "shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of [the marginal sea], all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is confirmed." 43 U.S.C. §1302.

This declaration by Congress is squarely at odds with the assertions of the States in the present case. So, too, is the provision of the Act by which the grant to the States is expressly limited to the seabed within three miles (or three marine leagues in some cases) of the coastline, whether or not the States' historic boundaries might extend farther into the ocean. §1301 (b).

Congress emphatically implemented its view that the United States has paramount rights to the seabed beyond the three-mile limit when a few months later it enacted the Outer Continental Shelf Lands Act of 1953, 67 Stat. 462, 43 U.S.C. §1331 et seq. Section 3 of the Act

“declared [it] to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter.” 43 U.S.C. §1332 (a).

I

The Act then proceeds to set out detailed provisions for the exercise of exclusive jurisdiction in the area and for the leasing and development of the resources of the seabed.

Of course, the defendant States were not parties to *United States v. California* or to the relevant decisions, and they are not precluded by *res judicata* from litigating the issues decided by those cases. But the doctrine of *stare decisis* is still a powerful force in our jurisprudence; and although on occasion the Court has declared—and acted accordingly—that constitutional decisions are open to re-examination, we are convinced that the doctrine has peculiar force and relevance in the present context. It is apparent that in the almost 30 years since *California*, a great deal of public and private business has been transacted in accordance with those decisions and in accordance with major legislation enacted by Congress, a principal purpose of which was to resolve the “interminable litigation” arising over the controversy of the ownership of the lands underlying the marginal sea. See H.R. Rep. No. 215, 83d Cong., 1st Sess., 2 (1953). Both the Submerged Lands Act and the Outer Continental Shelf Lands Act which soon followed proceeded from the premises established by prior Court decisions and provided for the orderly development of offshore resources. Since 1953, when this legislation was enacted, 33 lease sales have been held, in which 1,940 leases, embracing over eight million acres, have been issued. The Outer Continental Shelf, since 1953, has yielded over three billion barrels of oil, 19 trillion m.c.f. of natural gas, 13 million long tons of sulfur, and over four million long tons of salt. In 1973 alone, 1,081,000 barrels of oil and 8.9 billion cubic feet of natural gas were extracted daily from the Outer Continental Shelf. We add only that the Atlantic States, by virtue of the *California*, *Louisiana*, and *Texas* cases, as well as by reason of the Submerged Lands Act, have been on notice of the substantial body of authoritative law, both constitutional and statutory, which is squarely at odds with their claims to the seabed beyond the three-mile marginal sea. Neither the States nor their putative lessees have been in the slightest misled. Judgment shall be entered for the United States.

Session 4. The Public Trust

ILLINOIS CENTRAL R. CO. v. ILLINOIS 146 U.S. 387 (1892)

Justice Field delivered the opinion of the court.

This suit was commenced on the 1st of March, 1883, in a Circuit Court of Illinois, by an information or bill in equity, filed by the Attorney General of the State, in the name of its people against the Illinois Central Railroad Company, a corporation created under its laws, and against the city of Chicago.

The object of the suit is to obtain a judicial determination of the title of certain lands on the east or lake front of the city of Chicago, situated between the Chicago River and Sixteenth Street, which have been reclaimed from the waters of the lake, and are occupied by the tracks, depots, warehouses, piers and other structures used by the railroad company in its business; and also of the title claimed by the company to the submerged lands, constituting the bed of the lake, lying east of its tracks, within the corporate limits of the city, for the distance of a mile, and between the south line of the south pier near Chicago River extended eastwardly, and a line extended, in the same direction, from the south line of lot 21 near the company's round-house and machine shops. The determination of the title of the company will involve a consideration of its right to construct, for its own business, as well as for public convenience, wharves, piers and docks in the harbor.

We agree with the court below that, to a clear understanding of the numerous questions presented in this case, it was necessary to trace the history of the title to the several parcels of land claimed by the company. And the court, in its elaborate opinion, (33 Fed. Rep. 730) for that purpose referred to the legislation of the United States and of the State, and to ordinances of the city and proceedings thereunder, and stated, with great minuteness of detail, every material provision of law and every step taken. We have with great care gone over the history detailed and are satisfied with its entire accuracy. It would, therefore, serve no useful purpose to repeat what is, in our opinion, clearly and fully narrated. In what we may say of the rights of the railroad company, of the State, and of the city, remaining after the legislation and proceedings taken, we shall assume the correctness of that history.

The State of Illinois was admitted into the Union in 1818 on an equal footing with the original States in all respects. It is sufficient for our purpose to observe that they include within their eastern line all that portion of Lake Michigan lying east of the main land of the State and the middle of the lake.

It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion

thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. *Pollard's Lessee v. Hagan*, 3 How. 212.

The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce with different States and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In England the ebb and flow of the tide constitute the legal test of the navigability of waters. But in this country the case is different. Some of our rivers are navigable for great distances above the flow of the tide; indeed, for hundreds of miles, by the largest vessels used in commerce.

We hold, therefore that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations. Upon that theory we shall examine how far such dominion, sovereignty and proprietary right have been encroached upon by the railroad company, and how far that company had, at the time, the assent of the State to such encroachment, and also the validity of the claim which the company asserts of a right to make further encroachments thereon by virtue of a grant from the State in April, 1869.

The city of Chicago is situated upon the south western shore of Lake Michigan. For a long time after the organization of the city its harbor was the Chicago River, a small, narrow stream opening into the lake near the center of the east and west line of section 10, and in it the shipping arriving from other ports of the lake and navigable waters was moored or anchored, and along it were docks and wharves. The growth of the city in subsequent years in population, business and commerce required a larger and more convenient harbor, and the United States, in view of such expansion and growth, commenced the construction of a system of breakwaters and other harbor protections in the waters of the lake in front of the fractional sections mentioned. In the prosecution of this work there was constructed a line of breakwaters or cribs of wood and stone covering the front of the city between the Chicago River and Twelfth street, with openings in the piers or lines of cribs for the entrance and departure of vessels, thus enclosing a large part of the lake for the uses of shipping and commerce, and creating an outer harbor for Chicago.

The case proceeds upon the theory and allegation that the defendant, the Illinois Central Railroad Company, has, without lawful authority, encroached, and continues to encroach, upon the domain of the State, and its original ownership and control of the waters of the harbor and of the lands thereunder, upon a claim of rights acquired under a grant from the State and ordinance of the city to enter the city and appropriate land and water two hundred feet wide in order to

construct a track for a railway, and to erect thereon warehouses, piers and other structures in front of the city, and upon a claim of riparian rights acquired by virtue of ownership of lands originally bordering on the lake in front of the city. It also proceeds against the claim asserted by the railroad company of a grant by the State, in 1869, of its right and title to the submerged lands, constituting the bed of Lake Michigan lying east of the tracks and breakwater of the company, for the distance of one mile; and of a right thereby to construct at its pleasure, in the harbor, wharves, piers and other works for its use.

The State prays a decree establishing and confirming its title to the bed of Lake Michigan and exclusive right to develop and improve the harbor of Chicago by the construction of docks, wharves, piers and other improvements, against the claim of the railroad company, that it has an absolute title to such submerged lands by the act of 1869, and the right, subject only to the paramount authority of the United States in the regulation of commerce, to fill all the bed of the lake within the limits above stated, for the purpose of its business; and the right, by the construction and maintenance of wharves, docks and piers, to improve the shore of the lake for the promotion generally of commerce and navigation. And the State, insisting that the company has, without right, erected and proposes to continue to erect wharves and piers upon its domain, asks that such alleged unlawful structures may be ordered to be removed, and the company be enjoined from erecting further structures of any kind.

We proceed to consider the claim of the railroad company to the ownership of submerged lands in the harbor, and the right to construct such wharves, piers, docks and other works therein as it may deem proper for its interest and business. The claim is founded upon the third section of the act of the legislature of the State passed on the 16th of April, 1869, the material part of which is as follows:

“SEC. 3. The right of the Illinois Central Railroad Company under the grant from the State in its charter, which said grant constitutes a part of the consideration for which the said company pays to the State at least seven per cent of its gross earnings, and under and by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident to such grant, appropriation, occupancy, use and control, in and to the lands submerged or otherwise lying east of the said line running parallel with and four hundred feet east of the west line of Michigan Avenue, in fractional sections ten and fifteen, township and range as aforesaid, is hereby confirmed; and all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company, for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot twenty-one, south of and near to the round-house and machine shops of said company, in the south division of the said city of Chicago, are hereby granted in fee to the said Illinois Central Railroad Company, its successors and assigns: provided, however, that the fee to

said lands shall be held by said company in perpetuity, and that the said company shall not have power to grant, sell or convey the fee to the same; and that all gross receipts from use, profits, leases or otherwise of said lands, or the improvements thereon, or that may hereafter be made thereon, shall form a part of the gross proceeds, receipts and income of the said Illinois Central Railroad Company, upon which said company shall forever pay into the State treasury, semi-annually, the per centum provided for in its charter, in accordance with the requirements of said charter: and provided also, that nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation; nor shall this act be construed to exempt the Illinois Central Railroad Company, its lessees or assigns, from any act of the general assembly which may be hereafter passed regulating the rates of wharfage and dockage to be charged in said harbor.”

The act, of which this section is a part, was accepted by a resolution of the board of directors of the company at its office in the city of New York, July 6, 1870; but the acceptance was not communicated to the State until the 18th of November, 1870. A copy of the resolution was on that day forwarded to the Secretary of State, and filed and recorded by him in the records of his office. On the 15th of April, 1873, the legislature of Illinois repealed the act. The questions presented relate to the validity of the section cited of the act and the effect of the repeal upon its operation.

As to the grant of the submerged lands, the act declares that all the right and title of the State in and to the submerged lands, constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the company for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastwardly from the south line of lot twenty one, south of and near to the round-house and machine shops of the company “are granted in fee to the railroad company, its successors and assigns.” The grant is accompanied with a proviso that the fee of the lands shall be held by the company in perpetuity, and that it shall not have the power to grant, sell or convey the fee thereof. It also declares that nothing therein shall authorize obstructions to the harbor or impair the public right of navigation, or be construed to exempt the company from any act regulating the rates of wharfage and dockage to be charged in the harbor.

This clause is treated by the counsel of the company as an absolute conveyance to it of title to the submerged lands, giving it as full and complete power to use and dispose of the same, except in the technical transfer of the fee, in any manner it may choose, as if they were uplands, in no respect covered or affected by navigable waters, and not as a license to use the lands subject to revocation by the State. Treating it as such a conveyance, its validity must be determined by the consideration whether the legislature was competent to make a grant of the kind.

The act, if valid and operative to the extent claimed, placed under the control of the railroad company nearly the whole of the submerged lands of the harbor, subject only to the limitations that it should not authorize obstructions to the harbor or impair the public right of navigation, or exclude the legislature from regulating the rates of wharfage or dockage to be charged. A corporation created for one purpose, the construction and operation of a railroad between designated points, is, by the act, converted into a corporation to manage and practically control the harbor of Chicago, not simply for its own purpose as a railroad corporation, but for its own profit generally.

The circumstances attending the passage of the act through the legislature were on the hearing the subject of much criticism. As originally introduced, the purpose of the act was to enable the city of Chicago to enlarge its harbor and to grant to it the title and interest of the State to certain lands adjacent to the shore of Lake Michigan on the eastern front of the city, and place the harbor under its control, giving it all the necessary powers for its wise management. But during the passage of the act its purport was changed. Instead of providing for the cession of the submerged lands to the city, it provided for a cession of them to the railroad company. The question, therefore, to be considered is whether the legislature was competent to thus deprive the State of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the State.

That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. . . . The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. . . . The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be

delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.

The harbor of Chicago is of immense value to the people of the State of Illinois in the facilities it affords to its vast and constantly increasing commerce; and the idea that its legislature can deprive the State of control over its bed and waters and place the same in the hands of a private corporation created for a different purpose, one limited to transportation of passengers and freight between distant points and the city, is a proposition that cannot be defended.

Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time. Undoubtedly there may be expenses incurred in improvements made under such a grant which the State ought to pay; but, be that as it may, the power to resume the trust whenever the State judges best is, we think, incontrovertible.

It follows from the views expressed, and it is so declared and adjudged, that the State of Illinois is the owner in fee of the submerged lands constituting the bed of Lake Michigan, which the third section of the act of April 16, 1869, purported to grant to the Illinois Central Railroad Company, and that the act of April 15, 1873, repealing the same is valid and effective for the purpose of restoring to the State the same control, dominion and ownership of said lands that it had prior to the passage of the act of April 16, 1869.

NATIONAL AUDUBON SOCIETY v. SUPERIOR COURT OF ALPINE COUNTY
33 Cal. 3d 419, 658 P.2d 709 (1983)

Opinion by Broussard, Justice.

Mono Lake, the second largest lake in California, sits at the base of the Sierra Nevada escarpment near the eastern entrance to Yosemite National Park. The lake is saline; it contains no fish but supports a large population of brine shrimp which feed vast numbers of nesting and migratory birds. Islands in the lake protect a large breeding colony of California gulls, and the lake itself serves as a haven on the migration route for thousands of Northern Phalarope, Wilson's Phalarope, and Eared Grebe. Towers and spires of tufa on the north and south shores are matters of geological interest and a tourist attraction.

Although Mono Lake receives some water from rain and snow on the lake surface, historically most of its supply came from snowmelt in the Sierra Nevada. Five freshwater streams (Mill, Lee Vining, Walker, Parker and Rush Creeks) arise near the crest of the range and carry the annual runoff to the west shore of the lake. In 1940, however, the Division of Water Resources, the predecessor to the present California Water Resources Board, granted the Department of Water and Power of the City of Los Angeles (hereafter DWP) a permit to appropriate virtually the entire flow of four of the five streams flowing into the lake. DWP promptly constructed facilities to divert about half the flow of these streams into DWP's Owens Valley aqueduct. In 1970 DWP completed a second diversion tunnel, and since that time has taken virtually the entire flow of these streams.

As a result of these diversions, the level of the lake has dropped; the surface area has diminished by one-third; one of the two principal islands in the lake has become a peninsula, exposing the gull rookery there to coyotes and other predators and causing the gulls to abandon the former island. The ultimate effect of continued diversions is a matter of intense dispute, but there seems little doubt that both the scenic beauty and the ecological values of Mono Lake are imperiled.

Plaintiffs filed suit in superior court to enjoin the DWP diversions on the theory that the shores, bed and waters of Mono Lake are protected by a public trust. Plaintiffs' suit was transferred to the federal district court, which requested that the state courts determine the relationship between the public trust doctrine and the water rights system, and decide whether plaintiffs must exhaust administrative remedies before the Water Board prior to filing suit. The superior court then entered summary judgments against plaintiffs . . . ruling that the public trust doctrine offered no independent basis for challenging the DWP diversions. . . . Plaintiffs petitioned us directly for writ of mandate to review that decision; in view of the importance of the issues presented, we issued an alternative writ.

This case brings together for the first time two systems of legal thought: the appropriative water rights system which since the days of the gold rush has dominated California

water law, and the public trust doctrine which, after evolving as a shield for the protection of tidelands, now extends its protective scope to navigable lakes. Ever since we first recognized that the public trust protects environmental and recreational values (*Marks v. Whitney* (1971) 6 Cal.3d 251 [98 Cal. Rptr. 790, 491 P.2d 374]), the two systems of legal thought have been on a collision course. (Johnson, *Public Trust Protection for Stream Flows and Lake Levels* (1980) 14 U.C. Davis L. Rev. 233.) They meet in a unique and dramatic setting which highlights the clash of values. Mono Lake is a scenic and ecological treasure of national significance, imperiled by continued diversions of water; yet, the need of Los Angeles for water is apparent, its reliance on rights granted by the board evident, the cost of curtailing diversions substantial.

Attempting to integrate the teachings and values of both the public trust and the appropriative water rights system, we have arrived at certain conclusions which we briefly summarize here. In our opinion, the core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters. This authority applies to the waters tributary to Mono Lake and bars DWP or any other party from claiming a vested right to divert waters once it becomes clear that such diversions harm the interests protected by the public trust. The corollary rule which evolved in tideland and lakeshore cases barring conveyance of rights free of the trust except to serve trust purposes cannot, however, apply without modification to flowing waters. The prosperity and habitability of much of this state requires the diversion of great quantities of water from its streams for purposes unconnected to any navigation, commerce, fishing, recreation, or ecological use relating to the source stream. The state must have the power to grant nonvested usufructuary rights to appropriate water even if diversions harm public trust uses. Approval of such diversion without considering public trust values, however, may result in needless destruction of those values. Accordingly, we believe that before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.

The water rights enjoyed by DWP were granted, the diversion was commenced, and has continued to the present without any consideration of the impact upon the public trust. An objective study and reconsideration of the water rights in the Mono Basin is long overdue. The water law of California- which we conceive to be an integration including both the public trust doctrine and the board-administered appropriative rights system- permits such a reconsideration; the values underlying that integration require it.⁷

⁷ For the history of the public trust doctrine, see generally Sax, *The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention* (1970) 68 Mich. L. Rev. 471.

The Public Trust Doctrine in California.

“By the law of nature these things are common to mankind- the air, running water, the sea and consequently the shores of the sea.” (Institutes of Justinian 2.1.1.) From this origin in Roman law, the English common law evolved the concept of the public trust, under which the sovereign owns “all of its navigable waterways and the lands lying beneath them ‘as trustee of a public trust for the benefit of the people.’” (Colberg, Inc. v. State of California ex rel. Dept. Pub. Wks. (1967) 67 Cal.2d 408, 416 [62 Cal. Rptr. 401, 432 P.2d 3].) The State of California acquired title as trustee to such lands and waterways upon its admission to the union (City of Berkeley v. Superior Court (1980) 26 Cal.3d 515, 521 [162 Cal. Rptr. 327, 606 P.2d 362] and cases there cited); from the earliest days (see Eldridge v. Cowell (1854) 4 Cal. 80, 87) its judicial decisions have recognized and enforced the trust obligation.

Three aspects of the public trust doctrine require consideration in this opinion: the purpose of the trust; the scope of the trust, particularly as it applies to the nonnavigable tributaries of a navigable lake; and the powers and duties of the state as trustee of the public trust. We discuss these questions in the order listed.

(a) The purpose of the public trust.

The objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways. As we observed in *Marks v. Whitney*, supra, 6 Cal.3d 251,

“[public] trust easements [were] traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes.” (P. 259.)

We went on, however, to hold that the traditional triad of uses- navigation, commerce and fishing –did not limit the public interest in the trust res. In language of special importance to the present setting, we stated that “[the] public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. [Citation.] There is a growing public recognition that one of the most important public uses of the tidelands– a use encompassed within the tidelands trust -is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.” (pp. 259-260.)

Mono Lake is a navigable waterway. It supports a small local industry which harvests brine shrimp for sale as fish food, which endeavor probably qualifies the lake as a “fishery” under the traditional public trust cases. The principal values plaintiffs seek to protect, however, are recreational and ecological—the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds. Under *Marks v. Whitney*, supra, 6 Cal.3d 251, it is clear that protection of these values is among the purposes of the public trust.

(b) The scope of the public trust.

Early English decisions generally assumed the public trust was limited to tidal waters and the lands exposed and covered by the daily tides (see *Stevens*, op. cit. supra, 14 U.C. Davis L. Rev. 195, 201 and authorities there cited); many American decisions, including the leading California cases, also concern tidelands. (See, e.g., *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515 [162 Cal. Rptr. 327, 606 P.2d 362]; *Marks v. Whitney*, supra, 6 Cal.3d 251; *People v. California Fish Co.* (1913) 166 Cal. 576 [138 P. 79].) It is, however, well settled in the United States generally and in California that the public trust is not limited by the reach of the tides, but encompasses all navigable lakes and streams.

Mono Lake is, as we have said, a navigable waterway. The beds, shores and waters of the lake are without question protected by the public trust. The streams diverted by DWP, however, are not themselves navigable. Accordingly, we must address in this case a question not discussed in any recent public trust case—whether the public trust limits conduct affecting non-navigable tributaries to navigable waterways.

We conclude that the public trust doctrine, as recognized and developed in California decisions, protects navigable waters from harm caused by diversion of non-navigable tributaries.⁸

(c) Duties and powers of the state as trustee.

In the following review of the authority and obligations of the state as administrator of the public trust, the dominant theme is the state’s sovereign power and duty to exercise continued supervision over the trust. One consequence, of importance to this and many other cases, is that parties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust.

As we noted recently in *City of Berkeley v. Superior Court*, supra, 26 Cal.3d 515, the decision of the United States Supreme Court in *Illinois Central Railroad Company v. Illinois*, supra, 146 U.S. 387, “remains the primary authority even today, almost nine decades after it was

⁸ In view of the conclusion stated in the text, we need not consider the question whether the public trust extends for some purposes—such as protection of fishing, environmental values, and recreation interests—to non-navigable streams. For discussion of this subject, see *Walston, The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy* (1982) 22 Santa Clara L. Rev. 63, 85.

decided.” (p. 521.) The California Supreme Court endorsed the Illinois Central principles in *People v. California Fish Co.*, supra, 166 Cal. 576 [138 P. 79]. California Fish concerned title to about 80,000 acres of tidelands conveyed by state commissioners pursuant to statutory authorization. The court first set out principles to govern the interpretation of statutes conveying that property: “[Statutes] purporting to authorize an abandonment of . . . public use will be carefully scanned to ascertain whether or not such was the legislative intention, and that intent must be clearly expressed or necessarily implied. It will not be implied if any other inference is reasonably possible. And if any interpretation of the statute is reasonably possible which would not involve a destruction of the public use or an intention to terminate it in violation of the trust, the courts will give the statute such interpretation.” (Id., at p. 597.) Applying these principles, the court held that because the statute in question and the grants pursuant thereto were not made for trust purposes, the grantees did not acquire absolute title; instead, the grantees “own the soil, subject to the easement of the public for the public uses of navigation and commerce, and to the right of the state, as administrator and controller of these public uses and the public trust therefore, to enter upon and possess the same for the preservation and advancement of the public uses and to make such changes and improvements as may be deemed advisable for those purposes.” (Id., at pp. 598-599.)

Finally, rejecting the claim of the tideland purchasers for compensation, the court stated they did not lose title, but retained it subject to the public trust. (See pp. 599-601.) While the state may not “retake the absolute title without compensation” (p. 599), it may without such payment erect improvements to further navigation and take other actions to promote the public trust.

Boone v. Kingsbury (1928) 206 Cal. 148 [273 P. 797], presents another aspect of this matter. The Legislature authorized the Surveyor-General to lease trust lands for oil drilling. Applying the principles of Illinois Central, the court upheld that statute on the ground that the derricks would not substantially interfere with the trust. Any licenses granted by the statute, moreover, remained subject to the trust: “The state may at any time remove [the] structures. . . even though they have been erected with its license or consent, if it subsequently determines them to be purprestures or finds that they substantially interfere with navigation or commerce.” (pp. 192-193.)

Finally, in our recent decision in *City of Berkeley v. Superior Court*, supra, 26 Cal.3d 515, we considered whether deeds executed by the Board of Tidelands Commissioners pursuant to an 1870 act conferred title free of the trust. Applying the principles of earlier decisions, we held that the grantees’ title was subject to the trust, both because the Legislature had not made clear its intention to authorize a conveyance free of the trust and because the 1870 act and the conveyances under it were not intended to further trust purposes.

Once again we rejected the claim that establishment of the public trust constituted a taking of property for which compensation was required: “We do not divest anyone of title to

property; the consequence of our decision will be only that some landowners whose predecessors in interest acquired property under the 1870 act will, like the grantees in *California Fish*, hold it subject to the public trust.” (p. 532.)⁹

In summary, the foregoing cases amply demonstrate the continuing power of the state as administrator of the public trust, a power which extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust (see *City of Berkeley v. Superior Court*, supra, 26 Cal.3d 515). Except for those rare instances in which a grantee may acquire a right to use former trust property free of trust restrictions, the grantee holds subject to the trust, and while he may assert a vested right to the servient estate (the right of use subject to the trust) and to any improvements he erects, he can claim no vested right to bar recognition of the trust or state action to carry out its purposes.

Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.

3. The California Water Rights System.

“It is laid down by our law writers, that the right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use.” (*Eddy v. Simpson* (1853) 3 Cal. 249, 252.) Hence, the cases do not speak of the ownership of water, but only of the right to its use.

[T]he Water Board has steadily evolved from the narrow role of deciding priorities between competing appropriators to the charge of comprehensive planning and allocation of waters. This change necessarily affects the board’s responsibility with respect to the public trust. The board of limited powers of 1913 had neither the power nor duty to consider interests protected by the public trust; the present board, in undertaking planning and allocation of water resources, is required by statute to take those interests into account.

⁹ We noted, however, that “any improvements made on such lands could not be appropriated by the state without compensation.” (Pp. 533-534, citing *Illinois Central Railroad Co. v. Illinois*, supra, 146 U.S. 387, 455 [36 L. Ed. 1018, 1043].) In *State of California v. Superior Court (Fogerty)*, supra, 29 Cal.3d 240, 249, we stated that owners of shoreline property in Lake Tahoe would be entitled to compensation if enforcement of the public trust required them to remove improvements. By implication, however, the determination that the property was subject to the trust, despite its implication as to future uses and improvements, was not considered a taking requiring compensation.

4. The relationship between the Public Trust Doctrine and the California Water Rights System.

As we have seen, the public trust doctrine and the appropriative water rights system administered by the Water Board developed independently of each other. Each developed comprehensive rules and principles which, if applied to the full extent of their scope, would occupy the field of allocation of stream waters to the exclusion of any competing system of legal thought. Plaintiffs, for example, argue that the public trust is antecedent to and thus limits all appropriative water rights, an argument which implies that most appropriative water rights in California were acquired and are presently being used unlawfully. Defendant DWP, on the other hand, argues that the public trust doctrine as to stream waters has been “subsumed” into the appropriative water rights system and, absorbed by that body of law, quietly disappeared; according to DWP, the recipient of a board license enjoys a vested right in perpetuity to take water without concern for the consequences to the trust.

We are unable to accept either position. In our opinion, both the public trust doctrine and the water rights system embody important precepts which make the law more responsive to the diverse needs and interests involved in the planning and allocation of water resources. To embrace one system of thought and reject the other would lead to an unbalanced structure, one which would either decry as a breach of trust appropriations essential to the economic development of this state, or deny any duty to protect or even consider the values promoted by the public trust. Therefore, seeking an accommodation which will make use of the pertinent principles of both the public trust doctrine and the appropriative water rights system, and drawing upon the history of the public trust and the water rights system, the body of judicial precedent, and the views of expert commentators, we reach the following conclusions:

The state as sovereign retains continuing supervisory control over its navigable waters and the lands beneath those waters. This principle, fundamental to the concept of the public trust, applies to rights in flowing waters as well as to rights in tidelands and lakeshores; it prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust.

As a matter of current and historical necessity, the Legislature, acting directly or through an authorized agency such as the Water Board, has the power to grant usufructuary licenses that will permit an appropriator to take water from flowing streams and use that water in a distant part of the state, even though this taking does not promote, and may unavoidably harm, the trust uses at the source stream. The population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values. California’s Constitution (see art. X, §2), its statutes (see Water Code, §§100, 104), decisions (see, e.g., *Waterford I. Dist. v. Turlock I. Dist.* (1920) 50 Cal. App. 213, 220 [194 P. 757]), and commentators (e.g., Hutchins, *The Cal. Law of Water Rights*, op. cit. supra, p. 11) all emphasize the need to make efficient use of California’s limited water resources: all recognize, at least

implicitly, that efficient use requires diverting water from in-stream uses. Now that the economy and population centers of this state have developed in reliance upon appropriated water, it would be disingenuous to hold that such appropriations are and have always been improper to the extent that they harm public trust uses, and can be justified only upon theories of reliance or estoppel.

The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. Just as the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests. (See Johnson, *op. cit. supra*, 14 U.C. Davis L. Rev. 233, 256-257; Robie, *Some Reflections on Environmental Considerations in Water Rights Administration* (1972) 2 Ecology L.Q. 695, 710-711; Comment, *op. cit. supra*, 33 Hastings L.J. 653, 654.) As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust (see *United Plainsmen v. N.D. State Water Cons. Commission* (N.D. 1976) 247 N.W.2d 457, 462-463), and to preserve, so far as consistent with the public interest, the uses protected by the trust. It is clear that some responsible body ought to reconsider the allocation of the waters of the Mono Basin. No vested rights bar such reconsideration. We recognize the substantial concerns voiced by Los Angeles--the city's need for water, its reliance upon the 1940 board decision, the cost both in terms of money and environmental impact of obtaining water elsewhere. Such concerns must enter into any allocation decision. We hold only that they do not preclude a reconsideration and reallocation which also takes into account the impact of water diversion on the Mono Lake environment.

6. Conclusion.

This has been a long and involved answer to the question posed by the federal district court. In summarizing our opinion, we will essay a shorter version of our response.

The federal court inquired first of the interrelationship between the public trust doctrine and the California water rights system, asking whether the "public trust doctrine in this context [is] subsumed in the California water rights system, or . . . [functions] independently of that system?" Our answer is "neither." The public trust doctrine and the appropriative water rights system are parts of an integrated system of water law. The public trust doctrine serves the function in that integrated system of preserving the continuing sovereign power of the state to protect public trust uses, a power which precludes anyone from acquiring a vested right to harm the public trust, and imposes a continuing duty on the state to take such uses into account in allocating water resources.

Restating its question, the federal court asked: "[Can] the plaintiffs challenge the Department's permits and licenses by arguing that those permits and licenses are limited by the

public trust doctrine, or must the plaintiffs . . . [argue] that the water diversions and uses authorized thereunder are not ‘reasonable or beneficial’ as required under the California water rights system?” We reply that plaintiffs can rely on the public trust doctrine in seeking reconsideration of the allocation of the waters of the Mono Basin.

The federal court’s second question asked whether plaintiffs must exhaust an administrative remedy before filing suit. Our response is “no.” The courts and the Water Board have concurrent jurisdiction in cases of this kind. If the nature or complexity of the issues indicate that an initial determination by the board is appropriate, the courts may refer the matter to the board.

This opinion is but one step in the eventual resolution of the Mono Lake controversy. We do not dictate any particular allocation of water. Our objective is to resolve a legal conundrum in which two competing systems of thought—the public trust doctrine and the appropriative water rights system--existed independently of each other, espousing principles which seemingly suggested opposite results. We hope by integrating these two doctrines to clear away the legal barriers which have so far prevented either the Water Board or the courts from taking a new and objective look at the water resources of the Mono Basin. The human and environmental uses of Mono Lake--uses protected by the public trust doctrine--deserve to be taken into account. Such uses should not be destroyed because the state mistakenly thought itself powerless to protect them.

Let a peremptory writ of mandate issue commanding the Superior Court of Alpine County to vacate its judgment in this action and to enter a new judgment consistent with the views stated in this opinion.

PHILLIPS PETROLEUM CO. v. MISSISSIPPI
484 U.S. 469 (1988)

White, J., delivered the opinion of the Court, in which Rehnquist, C.J., and Brennan, Marshall, and Blackmun, JJ. joined. O'Connor, J., filed a dissenting opinion, in which Stevens and Scalia, JJ. joined. Kennedy, J., took no part in the consideration or decision of the case.

The issue here is whether the State of Mississippi, when it entered the Union in 1817, took title to lands lying under waters that were influenced by the tide running in the Gulf of Mexico, but were not navigable in fact.

I

As the Mississippi Supreme Court eloquently put it: “Though great public interests and neither insignificant nor illegitimate private interests are present and in conflict, this in the end is a title suit.” *Cinque Bambini Partnership v. State*, 491 So. 2d 508, 510 (1986). More specifically, in question here is ownership of 42 acres of land underlying the north branch of Bayou LaCrox and 11 small drainage streams in southwestern Mississippi; the disputed tracts range from under one-half acre to almost 10 acres in size. Although the waters over these lands lie several miles north of the Mississippi Gulf Coast and are not navigable, they are nonetheless influenced by the tide, because they are adjacent and tributary to the Jourdan River, a navigable stream flowing into the Gulf. The Jourdan, in the area involved here, is affected by the ebb and flow of the tide. Record title to these tracts of land is held by petitioners, who trace their claims back to pre-statehood Spanish land grants.

The State of Mississippi, however, claiming that by virtue of the “equal footing doctrine” it acquired at the time of statehood and held in public trust all land lying under any waters influenced by the tide, whether navigable or not, issued oil and gas leases that included the property at issue. This quiet title suit, brought by petitioners, ensued. The Mississippi Supreme Court, affirming the Chancery Court with respect to the lands at issue here, held that by virtue of becoming a State, Mississippi acquired “fee simple title to all lands naturally subject to tidal influence, inland to today’s mean high water mark” *Ibid.* Petitioners’ submission that the State acquired title to only lands under navigable waters was rejected.

We granted certiorari to review the Mississippi Supreme Court’s decision, 479 U.S. 1084 (1987), and now affirm the judgment below.

II

As petitioners recognize, the “seminal case in American public trust jurisprudence is *Shively v. Bowlby*, 152 U.S. 1 (1894).” The issue in *Shively v. Bowlby*, 152 U.S. 1 (1894), was whether the State of Oregon or a prestatehood grantee from the United States of riparian lands near the mouth of the Columbia River at Astoria, Oregon, owned the soil below the high-water

mark. Following an extensive survey of this Court's prior cases, the English common law, and various cases from the state courts, the Court concluded:

At common law, the title and dominion in lands flowed by the tide water were in the King for the benefit of the nation Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution of the United States.

The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions. *Id.*, at 57.

Shively rested on prior decisions of this Court, which had included similar, sweeping statements of States' dominion over lands beneath tidal waters. *Knight v. United States Land Association*, 142 U.S. 161, 183 (1891), for example, had stated that "[i]t is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders." On many occasions, before and since, this Court has stated or restated these words from *Knight* and *Shively*.

Against this array of cases, it is not surprising that Mississippi claims ownership of all of the tidelands in the State. Other States have done as much. The 13 original States, joined by the Coastal States Organization (representing all coastal States), have filed a brief in support of Mississippi, insisting that ownership of thousands of acres of tidelands under nonnavigable waters would not be disturbed if the judgment below were affirmed, as it would be if petitioners' navigability-in-fact test were adopted. See Brief for 13 Original States as Amici Curiae 3-5, 26-27.

Petitioners rely on early state cases to indicate that the original States did not claim title to nonnavigable tidal waters. But it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit. *Shively v. Bowlby*, *supra*, at 26. Some of the original States, for example, did recognize more private interests in tidelands than did others of the 13—more private interests than were recognized at common law, or in the dictates of our public trusts cases. Because some of the cases which petitioners cite come from such States (i.e., from States which abandoned the common law with respect to tidelands), they are of only limited value in understanding the public trust doctrine and its scope in those States which have not relinquished their claims to all lands beneath tidal waters.

Consequently, we reaffirm our longstanding precedents which hold that the States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide. Under the well-established principles of our cases, the decision of the Mississippi

Supreme Court is clearly correct: the lands at issue here are “under tide waters,” and therefore passed to the State of Mississippi upon its entrance into the Union.

III

Petitioners do not deny that broad statements of public trust dominion over tidelands have been included in this Court’s opinions since the early 19th century. Rather, they advance two reasons why these previous statements of the public trust doctrine should not be given their apparent application in this case.

A

First, petitioners contend that these sweeping statements of state dominion over tidelands arise from an oddity of the common law, or more specifically, of English geography. Petitioners submit that in England practically all navigable rivers are influenced by the tide.

The cases relied on by petitioners, however, did not deal with tidal, nonnavigable waters. And we will not now enter the debate on what the English law was with respect to the land under such waters, for it is perfectly clear how this Court understood the common law of royal ownership, and what the Court considered the rights of the original and the later-entering States to be. As we discuss above, this Court has consistently interpreted the common law as providing that the lands beneath waters under tidal influence were given States upon their admission into the Union. See *Shively v. Bowlby*, 152 U.S., at 57. It is true that none of these cases actually dealt with lands such as those involved in this case, but it has never been suggested in any of this Court’s prior decisions that the many statements included therein—to the effect that the States owned all the soil beneath waters affected by the tide—were anything less than an accurate description of the governing law.

Petitioners, in a related argument, contend that even if the common law does not support their position, subsequent cases from this Court developing the American public trust doctrine make it clear that navigability—and not tidal influence—has become the sine qua non of the public trust interest in tidelands in this country.

That States own freshwater river bottoms as far as the rivers are navigable, however, does not indicate that navigability is or was the prevailing test for state dominion over tidelands. Rather, this rule represents the American decision to depart from what it understood to be the English rule limiting Crown ownership to the soil under tidal waters.

Finally, we observe that not the least of the difficulties with petitioners’ position is their concession that the States own the tidelands bordering the oceans, bays, and estuaries—even where these areas by no means could be considered navigable, as is always the case near the shore. It is obvious that these waters are part of the sea, and the lands beneath them are state property; ultimately, though, the only proof of this fact can be that the waters are influenced by

the ebb and flow of the tide. This is undoubtedly why the ebb-and-flow test has been the measure of public ownership of tidelands for so long.

Admittedly, there is a difference in degree between the waters in this case, and nonnavigable waters on the seashore that are affected by the tide. But there is no difference in kind. For in the end, all tidewaters are connected to the sea: the waters in this case, for example, by a navigable, tidal river. Perhaps the lands at issue here differ in some ways from tidelands directly adjacent to the sea; nonetheless, they still share those “geographical, chemical and environmental” qualities that make lands beneath tidal waters unique.

Indeed, we find the various alternatives for delineating the boundaries of public trust tidelands offered by petitioners and their supporting amici to be unpersuasive and unsatisfactory. As the State suggested at argument, and as recognized on several previous occasions, the ebb-and-flow rule has the benefit of “uniformity and certainty, and . . . eas[e] of application.” See, e.g., *Cobb v. Davenport*, 32 N.J.L. 369, 379 (1867). We are unwilling, after its lengthy history at common law, in this Court, and in many state courts, to abandon the ebb-and-flow rule now, and seek to fashion a new test to govern the limits of public trust tidelands. Consequently, we hold that the lands at issue in this case were within those given to Mississippi when the State was admitted to the Union.

V

Because we believe that our cases firmly establish that the States, upon entering the Union, were given ownership over all lands beneath waters subject to the tide’s influence, we affirm the Mississippi Supreme Court’s determination that the lands at issue here became property of the State upon its admission to the Union in 1817. Furthermore, because we find no reason to set aside that court’s state-law determination that subsequent developments did not divest the State of its ownership of these public trust lands, the judgment below is

Affirmed.

Justice O’Connor, with whom Justice Stevens and Justice Scalia join, dissenting.

Breaking a chain of title that reaches back more than 150 years, the Court today announces a rule that will disrupt the settled expectations of landowners not only in Mississippi but in every coastal State. Neither our precedents nor equitable principles require this result, and I respectfully dissent from this undoing of settled history.

I

As the Court acknowledges, this case presents an issue that we never have decided: whether a State holds in public trust all land underlying tidally influenced waters that are neither navigable themselves nor part of any navigable body of water. In holding that it does, the majority relies on general language in opinions that recognized state claims to land underlying

tidewaters. But those cases concerned land lying beneath waters that were in fact navigable, e.g., *Shively v. Bowlby*, 152 U.S. 1 (1894) (Columbia River in Oregon), or beneath waters that were part of or immediately bordering a navigable body of water, e.g., *Mann v. Tacoma Land Co.*, 153 U.S. 273 (1894) (shallow tidelands in Commencement Bay in Washington). Until today, none of our decisions recognized a State's public trust title to land underlying a discrete and wholly nonnavigable body of water that is properly viewed as separate from any navigable body of water.

In my view, the public trust properly extends only to land underlying navigable bodies of water and their borders, bays, and inlets. This Court has defined the public trust repeatedly in terms of navigability. It is true that these cases did not involve waters subject to the ebb and flow of the tide. But there is no reason to think that different tests of the scope of the public trust apply to saltwater and to freshwater. Navigability, not tidal influence, ought to be acknowledged as the universal hallmark of the public trust.

The public trust doctrine has its roots in English common law. Traditionally, all navigable waterways in England were by law common highways for the public. M. Hale, *De Jure Maris et Brachiorum ejusdem*, cap. iii (1667), reprinted in R. Hall, *Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm*, App. v (2d ed. 1875). Furthermore, the King held title to the soil beneath the sea and the arms of the sea, "where the sea flows and reflows." Hale, cap. iv, reprinted in Hall, *supra*, at App. vii, ix. When the first American States became sovereign after our Revolution, their governments succeeded to the King's rights with respect to waters within their borders. *Martin v. Waddell*, 16 Pet. 367, 410 (1842). New States like Mississippi, upon entering the Union, acquired equivalent rights under the equal-footing doctrine. *Pollard's Lessee v. Hagan*, *supra*, at 228-229. Hence both petitioners and respondents have made an effort to ascertain the extent of the King's rights under English common law.

Unfortunately, English cases of the late 18th and early 19th centuries did not directly address whether the King held title to lands underlying tidally influenced, nonnavigable waters. Certainly the public's right of navigation was limited to waterways that were navigable in fact, and did not extend to every waterway subject to the ebb and flow of the tide. As Lord Mansfield explained:

How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so, for there are many places into which the tide flows that are not navigable rivers; and the place in question may be a creek in their own private estate. *Mayor of Lynn v. Turner*, 1 Cowp. 86, 98 Eng. Rep. 980, 981 (K.B. 1774).

American cases have developed the public trust doctrine in a way that is consistent with its common-law heritage. Our precedents explain that the public trust extends to navigable

waterways because its fundamental purpose is to preserve them for common use for transportation. “It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon [navigable waterways], and consequently to the exclusion of private ownership, either of the waters or the soils under them.” *Packer v. Bird*, 137 U.S. 661, 667 (1891). Similarly, the Court has emphasized that the public trust doctrine “is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment.” *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 436 (1892).

Although the States may commit public trust waterways to uses other than transportation, such as fishing or land reclamation, this exercise of sovereign discretion does not enlarge the scope of the public trust. Even the majority does not claim that the public trust extends to every waterway that can be used for fishing or for land reclamation. Nor does the majority explain why its tidal test is superior to a navigability test for the purpose of identifying waterways that are suited to these other uses. For public trust purposes, navigable bodies of water include the nonnavigable areas at their boundaries. The question whether a body of water is navigable is answered waterway by waterway, not inch by inch. The borders of the ocean, which certainly is navigable, extend to the mean high tide line as a matter of federal common law. *United States v. Pacheco*, 2 Wall. 587, 590 (1865); see *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 376 (1977). Hence the States’ public trusts include the ocean shore over which the tide ebbs and flows. This explains why there is language in our cases describing the public trust in terms of tidewaters: each of those cases concerned the shores of a navigable body of water. This does not imply, however, that all tidally influenced waters are part of the sea any more than it implies that the Missouri River is part of the Gulf of Mexico.

The Court holds today that the public trust includes not only tidewaters along the ocean shore, but also discrete bodies of water that are influenced by the tide but far removed from the ocean or any navigable tidal water, such as the separate little streams and bayous at issue here. The majority doubts whether a satisfactory test could be devised for distinguishing between the two types of tidally influenced waters. It therefore adopts a test that will include in the public trust every body of water that is interconnected to the ocean, even indirectly, no matter how remote it is from navigable water. This is wholly inconsistent with the federal law that identifies what inland freshwaters belong to the public trust. For example, if part of a freshwater river is navigable in fact, it does not follow that all contiguous parts of the river belong to the public trust, no matter how distant they are from the navigable part. Conversely, federal law does not exclude from the public trust all nonnavigable portions of a navigable river, such as shallow areas near the banks.

“The question here is not with respect to a short interruption of navigability in a stream otherwise navigable, or of a negligible part, which boats may use, of a stream otherwise non-navigable. We are concerned with long reaches with particular characteristics of navigability or non-navigability” *United States*

v. Utah, 283 U.S. 64, 77 (1931) (footnote omitted). See *Oklahoma v. Texas*, 258 U.S. 574 (1922) (applying the navigability test to identify what parts of the Red and Arkansas Rivers belong to the public trust). To decide whether the tidewaters at issue in this case belong to the public trust, the Court should apply the same fact-specific navigability test that it applies to inland waters. It should distinguish between navigable bodies of water and connected, but discrete, bodies of tidally influenced water. To this end, Justice Field once applied the headland to headland test, a “universal rule governing the measurement of waters,” and drew a boundary dividing the navigable waters of San Francisco Bay from the tidally influenced waters of Mission Creek. *Knight v. United States Land Assn*, 142 U.S. 161, 207 (1891) (concurring opinion). Only waterways that are part of a navigable body of water belong to the public trust.

II

The controversy in this case concerns more than cold legal doctrine. The particular facts of this case to which the Court’s opinion gives short shrift, illustrate how unfortunate it is for the Court to recognize a claim that appears belated and opportunistic.

Mississippi showed no interest in the disputed land from the time it became a State until the 1970s. Petitioners, or prior titleholders, recorded deeds on the land and paid property taxes throughout this period. These waterways are not used for commercial navigation. None of the drainage streams is more than a mile long; all are nameless. Mississippi is not pressing its claim for the sake of facilitating commerce, or even to protect the public’s interest in fishing or other traditional uses of the public trust. Instead, it is leasing the land to a private party for exploitation of underlying minerals. Mississippi’s novel undertaking has caused it to press for a radical expansion of the historical limits of the public trust.

The Court’s decision today could dispossess thousands of blameless record owners and leaseholders of land that they and their predecessors in interest reasonably believed was lawfully theirs. The Court concludes that a decision favoring petitioners would be even more disruptive, because titles may have been adjudicated on the assumption that a tidal test defines the public trust. *Ante*, at 483. There is no way to ascertain, as a general matter, what assumptions about the public trust underlie existing property titles. What evidence there is suggests that the majority’s rule is the one that will upset settled expectations.

Although there is no way to predict exactly how much land will be affected by the Court’s decision, the magnitude of the problem is suggested by the fact that more than 9 million acres have been classified as fresh or saline coastal wetlands. S. Shaw & C. Fredine, *Wetlands of the United States*, United States Department of the Interior, Fish & Wildlife Service, Circular 39, p. 15 (1956).

The Court's decision departs from our precedents, and I fear that it may permit grave injustice to be done to innocent property holders in coastal States. I dissent.

MERRILL v. OHIO
2009 Ohio 4256; 2009 Ohio App. LEXIS 3653

SUBSEQUENT HISTORY: Later proceeding at State ex rel. Merrill v. Ohio Dep't of Natural Res., 2009 Ohio 6787, 124 Ohio St. 3d 1401, 918 N.E.2d 1009, 2009 Ohio LEXIS 3603 (Ohio, 2009)

COLLEEN MARY O'TOOLE, J.

The issue before us in this case is one of first impression, concerning title to the lands below the ordinary high water mark of Lake Erie. Lake Erie is a non-tidal, navigable body of water, part of which lies within the territorial boundaries of the state of Ohio. The natural shoreline of Lake Erie extends approximately 262 miles, within the eight counties of Lucas, Ottawa, Sandusky, Erie, Lorain, Cuyahoga, Lake, and Ashtabula.

The state of Ohio, through the Ohio Department of Natural Resources ("ODNR"), has asserted trust ownership rights to the area of land along the southern shore of Lake Erie up to the ordinary high water mark, set at 573.4 feet above sea level by the U.S. Army Corps of Engineers in 1985. The Ohio Lakefront Group, along with several of its members, many of whom own property adjoining Lake Erie, dispute the authority of ODNR to assert these trust ownership rights without first acquiring the property in question through ordinary land appropriation proceedings. The validity of the ordinary high water mark, set at 573.4 feet International Great Lakes Datum (IGLD)(1985) is also disputed, the argument being that the ordinary high water mark is a boundary that must be determined on a case-by-case basis with respect to each parcel bordering the lake.

Class Certification

The trial court certified [a] group of persons as a class for purposes of pursuing a declaratory judgment action. The class certification order found the following questions of law common to the class:.....

"(2) If the furthest landward boundary of the 'territory' is declared to be the natural location of the ordinary high water mark as a matter of law, may that line be located at the present time using the elevation of 573.4 feet IGLD (1985), and does the State of Ohio hold title to all such 'territory' as proprietor in trust for the people of the State.

"(3) What are the respective rights and responsibilities of the class members, the State of Ohio, and the people of the State in the 'territory.'"

Overview of Motions for Summary Judgment

A motion for summary judgment was filed on behalf of the state of Ohio, Department of Natural Resources, its director, and the state, by the Ohio Attorney General. In this motion, the state advanced three arguments:

"(1) As a matter of law, the furthest landward boundary of the 'territory' is the ordinary high water mark, and the State of Ohio holds title to all such 'territory' as proprietor in trust for the people of the state;

"(2) The furthest landward boundary of the 'territory' is the ordinary high water mark as a matter of law, and that line may be located at the present time using the elevation of 573.4 feet IGLD (1985); and

"(3) The rights and responsibilities of littoral owners in their upland property, as well as the respective rights and responsibilities of the federal government, the State of Ohio, the public, and the littoral owners in the 'territory,' have long been settled in state and federal law, as has the hierarchy of those rights."

In their motion for summary judgment OLG asserted that under Ohio's case law, public trust rights in Lake Erie, extend no farther than the actual waters and those public rights do not extend to the shores or uplands. Further, OLG maintained that "shoreline" cannot be defined as the ordinary high water mark, for this boundary would violate the rights of littoral property owners. OLG alleged that in locating the ordinary high water mark, ODNR unilaterally adopted the Army Corps of Engineers' estimate of 573.4 feet IGLD (1985), which the Corps adopted for regulatory purposes unrelated to the establishment of boundaries between private property and public trust property.

Public Trust Boundary is the Water's Edge

The Supreme Court of Ohio [has] affirmed private property rights in the "shores" of Lake Erie and held the boundary between public and private rights is, "the line at which the water usually stands when free from disturbing causes." As we have identified, the Supreme Court of Ohio recognized the public trust doctrine by holding, "[t]he title of the land under the waters of Lake Erie within the limits of the state of Ohio, is in the state as trustee for the benefit of the people, for the public uses to which it may be adapted." *Cleveland & Pittsburgh RR. Co.*, at paragraph three of the syllabus. The Supreme Court of Ohio further spoke of the title to the lands under the waters of Lake Erie, stating:

"The state of Ohio holds the title to the subaqueous soil of Lake Erie, which borders the state, as trustee for the public for its use in aid of navigation, water commerce or fishery, and may, by proper legislative action, carry out its specific duty of protecting the trust estate and regulating its use."

The court also declared that littoral owners of the upland do not have title beyond the natural shoreline, for they only have the right of access and wharfing out to navigable waters.

Based upon its decisions, the Supreme Court has identified that the waters, and the lands under the waters of Lake Erie, when submerged under such waters, are subject to the public trust, while the littoral owner holds title to the natural shoreline. As we have identified, the shoreline is the line of contact with a body of water with the land between the high and low water mark. Therefore, the shoreline, that is, the actual water's edge, is the line of demarcation between the waters of Lake Erie and the land when submerged thereunder held in trust by the state of Ohio and those natural or filled in lands privately held by littoral owners.

By setting the boundary at the water's edge, we recognize and respect the private property rights of littoral owners, while at the same time, provide for the public's use of the waters of Lake Erie and the land submerged under those waters, when submerged. The water's edge provides a readily discernible boundary for both the public and littoral landowners.

Based on principle, authority, and considerations of public policy, we determine that the waters and submerged bed of Lake Erie when under such waters is controlled by the state and held in public trust, while the littoral owner takes fee only to the water's edge.

Conclusion

Based on the above analysis, the Ohio Attorney General's assignments of error are stricken. NWF's and OEC's first and third assignments of error lack merit, while the second assignment is moot. OLG's first cross-assignment of error lacks merit, as do Taft's first and third cross-assignments of error. OLG's second cross-assignment of error, as well as Taft's, have merit to the extent indicated. The judgment of the Lake County Court of Common Pleas is modified to vacate the portion of the judgment concerning the amendment of the littoral owner's deed, and the judgment of the Lake County Court of Common Pleas is hereby affirmed as modified.

DISCUSSION QUESTION:

By Act of 1745 the Maryland General Assembly established Baltimore Town. Included therein was a provision which provided: That all Improvements of what kind so ever, Either Wharfs, or other buildings, that have, or shall be made out of water, or where it flows, as an encouragement to such Improvers, be deemed the right, Title and Inheritance of such Improver or Improvers, their Heirs and Assigns for ever. Between 1780 and 1787 tree trunks and fill dirt were placed in front of the Water Street moving the waterfront a block south to the newly extended Pratt Street. Today the resulting blocks of waterfront property are the most valuable in downtown Baltimore.

Is the Act of 1745 a violation of the public trust? [Illinois Central v. Illinois]

Are the private titles in the filled parcels defective? [Phillips Petroleum v. Mississippi]

PART III. IMPERIUM/SOVEREIGNTY

The "jurisdiction [of the proposed FEDERALIST] government of extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." JAMES MADISON, Federalist #39

Session 5. Dual Sovereignty

GIBBONS v. OGDEN 22 U.S. 1 (1824)

Mr. Chief Justice MARSHALL delivered the opinion of the Court, and, after stating the case, proceeded as follows:

As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these States, anterior to its formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government... deputed to deliberate on their common concerns, and to recommend measures of general utility, into a Legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

This instrument contains an enumeration of powers expressly granted by the people to their government.... We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.

The words are, "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one

nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation, is as expressly granted, as if that term had been added to the word "commerce."

We are now arrived at the inquiry— What is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

The appellant contends that full power to regulate a particular subject, implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it. The sole question is, can a State regulate commerce ... among the States, while Congress is regulating it?

It is obvious, that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce ... among the States, may use means that may also be employed by a State, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the State. If Congress license vessels to sail from one port to another, in the same State, the act is supposed to be, necessarily, incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a State, or to act directly on its system of police. So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the State, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution

may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

[Such] ... acts were cited at the bar for the purpose of showing an opinion in Congress, that the States possess, concurrently with the Legislature of the Union, the power to regulate commerce with foreign nations and among the States. Upon reviewing them, we think they do not establish the proposition they were intended to prove. They show the opinion, that the States retain powers enabling them to pass the laws to which allusion has been made, not that those laws proceed from the particular power which has been delegated to Congress.

It has been contended by the counsel for the appellant, that, as the word "to regulate" implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

There is great force in this argument, and the Court is not satisfied that it has been refuted.

In argument, however, it has been contended, that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the constitution, they affect the subject, and each other, like equal opposing powers. But the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the constitution, is produced by the declaration, that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.

As our whole course of legislation on this subject shows, the power of Congress has been universally understood in America, to comprehend navigation.... The subject is transferred to Congress, and no exception to the grant can be admitted, which is not proved by the words or the nature of the thing.

The Court is aware that, in stating the train of reasoning by which we have been conducted to this result, much time has been consumed in the attempt to demonstrate propositions which may have been thought axioms. It is felt that the tediousness inseparable

from the endeavour to prove that which is already clear, is imputable to a considerable part of this opinion. But it was unavoidable. The conclusion to which we have come, depends on a chain of principles which it was necessary to preserve unbroken; and, although some of them were thought nearly self-evident, the magnitude of the question, the weight of character belonging to those from whose judgment we dissent, and the argument at the bar, demanded that we should assume nothing.

Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union, are to be contracted by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding, as to obscure principles, which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and, when sustained, to make them the tests of the arguments to be examined.

DECREE. This cause came on to be heard on the transcript of the record of the Court for the Trial of Impeachments and Correction of Errors of the State of New-York, and was argued by counsel. On consideration whereof, this Court is of opinion, that the several licenses to the steam boats the Stoudinger and the Bellona, to carry on the coasting trade, which were granted under an act of Congress, passed in pursuance of the constitution of the United States, gave full authority to those vessels to navigate the waters of the United States, by steam or otherwise, for the purpose of carrying on the coasting trade, any law of the State of New-York to the contrary notwithstanding; and that so much of the several laws of the State of New-York, as prohibits vessels, licensed according to the laws of the United States, from navigating the waters of the State of New-York, by means of fire or steam, is repugnant to the said constitution, and void.

BARRON v. MAYOR AND CITY COUNCIL OF BALTIMORE
32 U.S. 243 (1833)

This case was instituted by the plaintiff in error against the city of Baltimore to recover damages for injuries to the wharf- property of the plaintiff, arising from the acts of the corporation. Craig and Barron, of whom the plaintiff is survivor, were owners of an extensive and highly productive wharf in the eastern section of Baltimore, enjoying, at the period of their purchase of it, the deepest water in the harbour.

The city, in the asserted exercise of its corporate authority over the harbour, the paving of streets, and regulating grades for paving, and over the health of Baltimore, directed from their accustomed and natural course, certain streams of water which flow from the range of hills bordering the city, and diverted them, partly by adopting new grades of streets, and partly by the necessary results of paving, and partly by mounds, embankments and other artificial means, purposely adapted to bend the course of the water to the wharf in question. These streams becoming very full and violent in rains, carried down with them from the hills and the soil over which they ran, large masses of sand and earth, which they deposited along, and widely in front of the wharf of the plaintiff. The alleged consequence was that the water was rendered so shallow that it ceased to be useful for vessels of any important burthen, lost its income, and became of little or no value as a wharf.

This injury was asserted to have been inflicted by a series of ordinances of the corporation, between the years 1815 and 1821; and that the evil was progressive; and it was active and increasing even at the institution of this suit in 1822.

At the trial of the cause in Baltimore county court, the plaintiff gave evidence tending to prove the original and natural course of the streams, the various works of the corporation from time to time to turn them in the direction of this wharf, and the ruinous consequences of these measures to the interests of the plaintiff. It was not asserted by the defendants that any compensation for the injury was ever made or proffered; but they justified under the authority they deduced from the charter of the city, granted by the legislature of Maryland, and under several acts of the legislature conferring powers on the corporation in regard to the grading and paving of streets, the regulation of the harbour and its waters, and to the health of the city.

The decision of Baltimore county court was against the defendants, and a verdict for four thousand five hundred dollars was rendered for the plaintiff. An appeal was taken to the court of appeals, which reversed the judgment of Baltimore county court, and did not remand the case to that court for a further trial. From this judgment the defendant in the court of appeals, prosecuted a writ of error to this court.

Mr. Chief Justice Marshall delivered the opinion of the Court.

The judgment brought up by this writ of error having been rendered by the court of a state, this tribunal can exercise no jurisdiction over it, unless it be shown to come within the provisions of the twenty-fifth section of the judicial act.

The plaintiff in error contends that it comes within that clause in the Fifth Amendment to the constitution, which inhibits the taking of private property for public use, without just compensation. He insists that this amendment, being in favour of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a state, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented is, we think, of great importance, but not of much difficulty.

The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the Fifth Amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no farther than they are supposed to have a common interest.

The counsel for the plaintiff insists that the constitution was intended to secure the people of the several states against the undue exercise of power by their respective state governments; as well as against that which might be attempted by their general government.

Had congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day that the great revolution which established the Constitution of the United States, was not affected without immense oppositions. Fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to

the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government- not against those of the local governments.

In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.

We are of opinion that the provision in the Fifth Amendment to the constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states. We are therefore of opinion that there is no repugnancy between the several acts of the general assembly of Maryland, given in evidence by the defendants at the trial of this cause, in the court of that state, and the constitution of the United States. This court, therefore, has no jurisdiction of the cause; and it is dismissed.

FERTILIZING COMPANY v. HYDE PARK
97 U.S. 659 (1878)

MR. JUSTICE SWAYNE delivered the opinion of the court.

This case was brought here by a writ of error to the Supreme Court of the State of Illinois.

The alleged ground of our jurisdiction is, that the record presents a question of Federal jurisprudence. A brief statement of the facts will be sufficient for the purposes of this opinion.

The plaintiff in error was incorporated by an act of the legislature, approved March 8, 1867. The act declared that the corporation should "have continued succession and existence for the term of fifty years." The fourth and fifth sections are as follows:

"SECT. 4. Said corporation is hereby authorized and empowered to establish and maintain chemical and other works at the place designated herein, for the purpose of manufacturing and converting dead animals and other animal matter into an agricultural fertilizer, and into other chemical products, by means of chemical, mechanical, and other processes.

"SECT. 5. Said chemical works shall be established in Cook County, Illinois, at any point south of the dividing line between townships 37 and 38. Said corporation may established and maintain depots in the city of Chicago, in said county, for the purpose of receiving and carrying off, from and out of the said city, any and all offal, deal animals, and other animal matter, which they may buy or own, or which may be delivered to them by the city authorities and other persons."

The company organized pursuant to the charter. Its capital stock is \$250,000, all of which has been paid up and invested in its business.

It owns ground and has its receiving depot about three miles from Chicago. The cost of both exceeded \$15,000. Thither the offal arising from the slaughtering in the city was conveyed daily. The chemical works of the company are in Cook County, south of the dividing line of townships 37 and 38, as required by the charter. When put there, the country around was swampy and neatly uninhabited, giving little promise of further improvement. They are within the present limits of the village of Hyde Park. The offal procured by the company was transported from Chicago to its works through the village by the Pittsburg, Fort Wayne, and Chicago Railroad. There was no other railroad by which it could be done. The court below, in its opinion, said:

"An examination of the evidence in this case clearly shows that this factory was an unendurable nuisance to the inhabitants for many miles around its location;

that the stench was intolerable, producing nausea, discomfort, if not sickness, to the people; that it depreciated the value of property, and was a source of immense annoyance. It is, perhaps, as great a nuisance as could be found or even created; not affecting as many persons as if located in or nearer to the city, but as intense in its noisome effects as could be produced. And the transportation of this putrid animal matter through the streets of the village, as we infer from the evidence, was offensive in a high degree both to sight and smell."

This characterization is fully sustained by the testimony.

In March, 1869, the charter of the village was revised by the legislature, and the largest powers of police and local government were conferred. The trustees were expressly authorized to "define or abate nuisances which are, or may be, injurious to the public health," -- to compel the owner of any grocery-cellar, tallow-chandler shop, soap factory, tannery, or other unwholesome place, to cleanse or abate such place, as might be necessary, and to regulate, prohibit, or license breweries, tanneries, packing-houses, butcher-shops, stock-yards, or establishments for steaming and rendering lard, tallow-offal, or other substances, and all establishments and places where any nauseous, offensive, or unwholesome business was carried on. The sixteenth section contains a proviso that the powers given should not be exercised against the Northwestern Fertilizing Company until after two years from the passage of the act. This limitation was evidently a compromise by conflicting parties.

On the 5th of March, 1867, a prior act, giving substantially the same powers to the village, was approved and became a law. This act provided that nothing contained in it should be construed to authorize the officers of the village to interfere with parties engaged in transporting any animal matter from Chicago, or from manufacturing it into a fertilizer or other chemical product. The works here in question were in existence and in operation where they now are before the proprietors were incorporated.

After the last revision of the charter the municipality passed an ordinance whereby, among other things, it was declared that no person should transport any offal or other offensive or unwholesome matter through the village, and that any person employed upon any train or team conveying such matter should be liable to a fine of not less than five nor more than fifty dollars for each offence; and that no person should maintain or carry on any offensive or unwholesome business or establishment within the limits of the village, nor within one mile of those limits. Any person violating either of these provisions was subjected to a penalty of not less than fifty nor more than two hundred dollars for each offence, and to a like fine for each day the establishment or business should be continued after the first conviction.

After the adoption of this ordinance and the expiration of two years from the passage of the act of 1869, notice was given to the company, that, if it continued to transport offal through the village as before, the ordinance would be enforced. This having no effect, thereafter, on the

8th of January, 1873, the village authorities caused the engineer and other employes of the railway company, who were engaged in carrying the offal through the village, to be arrested and tried for violating the ordinance. They were convicted, and fined each fifty dollars. This bill was thereupon filed by the company. It prays that further prosecutions may be enjoined, and for general relief. The Supreme Court of the State, upon appeal, dismissed the bill, and the company sued out this writ of error.

The plaintiff in error claims that it is protected by its charter from the enforcement against it of the ordinances complained of, and that its charter is a contract within the meaning of the contract clause of the Constitution of the United States. Whether this is so, is the question to be considered.

The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. There is silence in the charter here in question as to taxation and as to liability for nuisances. Can exemption be claimed as to one more than the other?

Continued succession is given to corporations to prevent embarrassment arising from the death of their members. One striking difference between the artificial and a natural person is, that the latter can do anything not forbidden by law, while the former can do only what is so permitted. Its powers and immunities depend primarily upon the law of its creation. Beyond that it is subject, like individuals, to the will of the law-making power.

If the intent of the legislature touching the point under consideration be sought in the charter and its history, it will be found to be in accordance with the view we have expressed as matter of law. Three days before the charter of the plaintiff in error became a law, the legislature declared that the power of the village as to nuisances should not extend to those engaged in the business to which the charter relates. The subject must have been fully present to the legislative mind when the company's charter was passed. If it were intended the exemption should be inviolable, why was it not put in the company's charter as well as in that of the village? The silence of the former, under the circumstances, is a pregnant fact. In one case it was doubtless known to all concerned that the restriction would be irrevocable, while in the other, that it could be revoked at any time. In the revised village charter of 1869, the exemption was limited to two years from the passage of the act. This was equivalent to a declaration that after the lapse of the two years the full power of the village might be applied to the extent found necessary. Corporations in such cases are usually prolific of promises, and the legislature was willing to await the event for the time named.

That a nuisance of a flagrant character existed, as found by the court below, is not controverted. We cannot doubt that the police power of the State was applicable and adequate to

give an effectual remedy. That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions. The adjudged cases showing its exercise where corporate franchises were involved are numerous.

In such cases, prescription, whatever the length of time, has no application. Every day's continuance is a new offence, and it is no justification that the party complaining came voluntarily within its reach. Pure air and the comfortable enjoyment of property are as much rights belonging to it as the right of possession and occupancy. If population, where there was none before, approaches a nuisance, it is the duty of those liable at once to put an end to it. *Brady v. Weeks*, 3 Barb. (N.Y.) 157.

Perhaps the most striking application of the police power is in the destruction of buildings to prevent the spread of a conflagration. This right existed by the common law, and the owner was entitled to no compensation. *Russel v. The Mayor of New York*, 2 Den. (N.Y.) 461; *American Print Works v. Lawrence*, 23 N.J.L. 590.

In the case before us it does not appear that factory could not be removed to some other place south of the designated line, where it could be operated, and where offal could be conveyed to it from the city by some other railroad, both without rightful objection. The company had the choice of any point within the designated limits. In that respect there is not restriction.

The charter was a sufficient license until revoked; but we cannot regard it as a contract guaranteeing, in the locality originally selected, exemption for fifty years from the exercise of the police power of the State, however serious the nuisance might become in the future, by reason of the growth of population around it. The owners had no such exemption before they were incorporated, and we think the charter did not give it to them.

There is a class of nuisances designated "legalized." These are cases which rest for their sanction upon the intent of the law under which they are created, the paramount power of the legislature, the principle of "the greatest good of the greatest number," and the importance of the public benefit and convenience involved in their continuance. The topic is full discussed in *Wood on Nuisances*, c. 23, p. 781. This case is not within that category. We need not, therefore, consider the subject in this opinion.

Decree affirmed.

MR. JUSTICE STRONG dissented.

CONCUR BY: MILLER; STRONG

CONCUR

MR. JUSTICE MILLER. I concur in the judgment of the court, but cannot agree to the principal argument by which it is supported in the opinion. As the question turns upon the existence of a contract and its nature, and not upon the power of the legislature to pass laws affecting the health and comfort of the community, a reference to them and to the power to repeal and modify them, where no contract is in question, is irrelevant. It is said that such contract as may be found in the present case was made subject to the police power of the legislature over the class of subjects to which it relates. The extent to which this is true depends upon the specific character of the contract and not upon the general doctrine. This court has repeatedly decided that a State may by contract bargain away her right of taxation. I have not concurred in that view, but it is the settled law of this court. If a State may make a contract on that subject which it cannot abrogate or repeal, it may, with far more reason, make a contract for a limited time for the removal of a continuing nuisance from a populous city.

The nuisance in the case before us was the very subject-matter of the contract. The consideration of the contract was that the company might and should do certain things which affected the health and comfort of the community; and the State can no more impair the obligation of that contract than it can resume the right of taxation which it has on valid consideration agreed not to exercise, because in either case the wisdom of its legislation has become doubtful.

If the good of the entire community requires the destruction of the company's rights under this contract, let the entire community pay therefor, by condemning the same for public use.

But I agree that contracts like this must be clearly established, and the powers of the legislature can only be limited by the express terms of the contract, or by what is necessarily implied. In the case before us, the company has two correlative rights in regard to the offal at the slaughter-houses in Chicago. One is to have within the limit of that city depots for receiving it, and the other is to carry it to a place in Cook County south of the dividing line between townships 37 and 38. The city or the State legislature is not forbidden by the contract to locate such depots within the city, where the health of the city requires; in other words, the company has not the choice of location within the city. So, in regard to the chemical works. The company, by its contract, is entitled to have them in Cook County south of the line mentioned; but the precise locality within that large space is a fair subject of regulation by the police power of the State, or of any town to which it has been delegated. If within the limits of Hyde Park, that town may pass such laws concerning its health and comfort as may require the company to seek another location south of the designated line, without impairing the terms of the contract.

It is said that the only railroad by which the company can carry offal passes through Hyde Park, and that the ordinance is fatal to the use of the road. But the State did not contract that the company might carry by railroad, still less by that road. In short, in my opinion, there is within the limits of the original designation of boundary ample space where the company may exercise

the power granted by the Contract, without violating the ordinances of Hyde Park, and they, as a police regulation of health and comfort, are therefore valid, as not infringing that contract.

For this reason alone, I think the decree should be affirmed.

MR. JUSTICE STRONG. I cannot concur in the judgment directed by the court in this case. That the charter granted by the legislature, March 8, 1867, and accepted by the company, is a contract protected by the Constitution of the United States, cannot be denied, in the face of *Dartmouth College v. Woodward* (4 Wheat. 518), and the long line of decisions that have followed in its wake and reasserted its doctrines. And if the company holds its rights under and by force of the contract, those rights cannot be taken away or impaired, either directly or indirectly, by any subsequent legislation. This I believe to be incontrovertible, though the opinion just delivered may seem to express a doubt of it.

Nothing, I admit, is more indefinite than the extent or limits of what is called police power. I will not undertake to define them. Certainly it has limits. I refer to what Judge Cooley has said in reference to the exercise of the power over private corporations. Cooley, *Const. Lim.* 577. He says, "The exercise of the police power in these cases must be this: the regulations must have reference to the comfort, safety, or welfare of society; they must not be in conflict with any of the provisions of the charter, and they must not, under the pretence of regulations, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise." This I understand to be entirely correct. In support of it he refers to numerous decisions, which I will not cite, but to which I also refer. There are many others fully sustaining the text as I have quoted it.

There is no authority to the contrary. The cases relied upon to uphold the exercise of the power which the defendants in error assert are all clearly distinguishable. They are not cases where the police power was exerted for the destruction of a chartered right distinctly granted by a contract.

I have said enough to indicate the reasons for my dissent. To me they appear very grave. In my judgment, the decision of the court denies the power of a State legislature to legalize, during a limited period, that which without its action would be a nuisance. It enables a subsequent legislature to take away, without compensation, rights which a former one has accorded, in the most positive terms, and for which a valuable consideration has been paid. And, in its application to the present case, it renders it impossible to remove from Chicago the vast bodies of animal offal there accumulated; for if the ordinance of Hyde Park can stand, every other municipality around the city can enforce similar ordinances.

MUGLER v. KANSAS
123 U.S. 623 (1887)

MR. JUSTICE HARLAN delivered the opinion of the court.

These cases involve an inquiry into the validity of certain statutes of Kansas relating to the manufacture and sale of intoxicating liquors.

In 1880, the people of Kansas adopted a stringent policy. On the 2d of November of that year, they ratified an amendment to the state constitution, which declared that the manufacture and sale of intoxicating liquors should be forever prohibited in that State, except for medical, scientific, and mechanical purposes.

In order to give effect to that amendment, the legislature passed an act, approved February 19, 1881, to take effect May 1, 1881, entitled "An act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes."

The facts necessary to a clear understanding of the questions, common to these cases, are the following: Mugler and Ziebold & Hagelin were engaged in manufacturing beer at their respective establishments, (constructed specially for that purpose,) for several years prior to the adoption of the constitutional amendment of 1880. They continued in such business in defiance of the statute of 1881.

The buildings and machinery constituting these breweries are of little value if not used for the purpose of manufacturing beer; that is to say, if the statutes are enforced against the defendants the value of their property will be very materially diminished.

The general question in each case is, whether the foregoing statutes of Kansas are in conflict with that clause of the Fourteenth Amendment, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

That legislation by a State prohibiting the manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States, is made clear by the decisions of this court, rendered before and since the adoption of the Fourteenth Amendment; to some of which, in view of questions to be presently considered, it will be well to refer.

In the License Cases, 5 How. 504, the question was, whether certain statutes of Massachusetts, Rhode Island, and New Hampshire, relating to the sale of spirituous liquors were repugnant to the Constitution of the United States. In determining that question, it became

necessary to inquire whether there was any conflict between the exercise by Congress of its power to regulate commerce with foreign countries, or among the several States, and the exercise by a State of what are called police powers. Although the members of the court did not fully agree as to the grounds upon which the decision should be placed, they were unanimous in holding that the statutes then under examination were not inconsistent with the Constitution of the United States, or with any act of Congress. Chief Justice Taney said: "If any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper." (p. 577.)

In *Beer Co. v. Massachusetts*, 97 U.S. 25, 33, it was said, that "as a measure of police regulation, looking to the preservation of public morals, a state law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States." Finally, in *Foster v. Kansas*, 112 U.S. 201, 206, the court said that the question as to the constitutional power of a State to prohibit the manufacture and sale of intoxicating liquors was no longer an open one in this court. These cases rest upon the acknowledged right of the States of the Union to control their purely internal affairs, and, in so doing, to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government, or violate rights secured by the Constitution of the United States. The power to establish such regulations, as was said in *Gibbons v. Ogden*, 9 Wheat. 1, 203, reaches everything within the territory of a State not surrendered to the national government.

It is, however, contended, that, although the State may prohibit the manufacture of intoxicating liquors for sale or barter within her limits, for general use as a beverage, "no convention or legislature has the right, under our form of government, to prohibit any citizen from manufacturing for his own use, or for export, or storage, any article of food or drink not endangering or affecting the rights of others." The argument made in support of the first branch of this proposition, briefly stated, is, that in the implied compact between the State and the citizen certain rights are reserved by the latter, which are guaranteed by the constitutional provision protecting persons against being deprived of life, liberty, or property, without due process of law, and with which the State cannot interfere; that among those rights is that of manufacturing for one's use either food or drink; and that while, according to the doctrines of the Commune, the State may control the tastes, appetites, habits, dress, food, and drink of the people, our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself.

But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites

or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, *Sinking Fund Cases*, 99 U.S. 700, 718, the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Keeping in view these principles, as governing the relations of the judicial and legislative departments of the government with each other, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to everyone, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.

Undoubtedly the State, when providing, by legislation, for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government.

[I]f we do not misapprehend the position of defendants -- it is [also] contended that, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose; the prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and

depriving the citizen of his property without due process of law. In other words, although the State, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage, legislation having that object in view cannot be enforced against those who, at the time, happen to own property, the chief value of which consists in its fitness for such manufacturing purposes, unless compensation is first made for the diminution in the value of their property, resulting from such prohibitory enactments.

This interpretation of the Fourteenth Amendment is inadmissible. It cannot be supposed that the States intended, by adopting that Amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community.

[T]he present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property 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. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. 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. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

For the reasons stated, we are of opinion that the judgments of the Supreme Court of Kansas have not denied to Mugler, the plaintiff in error, any right, privilege, or immunity secured to him by the Constitution of the United States, and its judgment, in each case, is, accordingly, affirmed.

DISSENT: MR. JUSTICE FIELD delivered the following separate opinion.

I dissent from the judgment in the last case, the one coming from the Circuit Court of the United States.

It is plain that great wrong will often be done to manufacturers of liquors, if legislation like that embodied in this thirteenth section can be upheld. The Supreme Court of Kansas admits that the legislature of the State, in destroying the values of such kinds of property, may have gone to the utmost verge of constitutional authority. In my opinion it has passed beyond that verge, and crossed the line which separates regulation from confiscation.

PENNSYLVANIA COAL CO. v. MAHON
260 U.S. 393 (1922)

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill in equity brought by the defendants in error to prevent the Pennsylvania Coal Company from mining under their property in such way as to remove the supports and cause a subsidence of the surface and of their house. The bill sets out a deed executed by the Coal Company in 1878, under which the plaintiffs claim. The deed conveys the surface, but in express terms reserves the right to remove all the coal under the same, and the grantee takes the premises with the risk, and waives all claim for damages that may arise from mining out the coal. But the plaintiffs say that whatever may have been the Coal Company's rights, they were taken away by an Act of Pennsylvania, approved May 27, 1921, P.L. 1198, commonly known there as the Kohler Act.

The Supreme Court of the State [determined] . . . that the defendant had contract and property rights protected by the Constitution of the United States, but held that the statute was a legitimate exercise of the police power and directed a decree for the plaintiffs. A writ of error was granted bringing the case to this Court.

The statute forbids the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person. As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far.

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. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

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 estate 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.

It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case, “For practical purposes, the right to coal consists in the right to mine it.” *Commonwealth v. Clearview Coal Co.*, 256 Pa. St. 328, 331. 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.

It is true that in *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, it was held competent for the legislature to require a pillar of coal to be left along the line of adjoining property, that, with the pillar on the other side of the line, would be a barrier sufficient for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water. But that was 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.

The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. 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. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

The general rule is at least that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional

cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. *Bowditch v. Boston*, 101 U.S. 16. In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. *Spade v. Lynn & Boston R.R. Co.*, 172 Mass. 488, 489. We are 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. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court.

We assume, of course, 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. But the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.

Decree reversed.

Mr. Justice Brandeis, dissenting.

The Kohler Act prohibits, under certain conditions, the mining of anthracite coal within the limits of a city in such a manner or to such an extent “as to cause the subsidence of any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed.” Coal in place is land; and the right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance; and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare. Whenever they do, the legislature has power to prohibit such uses without paying compensation; and the power to prohibit extends alike to the manner, the character and the purpose of the use. Are we justified in declaring that the Legislature of Pennsylvania has, in restricting the right to mine anthracite, exercised this power so arbitrarily as to violate the Fourteenth Amendment”?

Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it. The State merely prevents the owner from making a use which interferes with paramount rights of the public. Whenever the use prohibited ceases to be noxious,—as it may because of further change

in local or social conditions,—the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore.

It is said that one fact for consideration in determining whether the limits of the police power have been exceeded is the extent of the resulting diminution in value; and that here the restriction destroys existing rights of property and contract. But values are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property. The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil.

[I]t is said that these provisions of the act cannot be sustained as an exercise of the police power where the right to mine such coal has been reserved. The conclusion seems to rest upon the assumption that in order to justify such exercise of the police power there must be “an average reciprocity of advantage” as between the owner of the property restricted and the rest of the community; and that here such reciprocity is absent. But where the police power is exercised, not to confer benefits upon property owners, but to protect the public from detriment and danger, there is, in my opinion, no room for considering reciprocity of advantage.

PENN CENTRAL TRANSPORTATION CO. v. CITY OF NEW YORK
438 U.S. 104 (1978)

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 affecting 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. These nationwide legislative efforts have been precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. 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.

New York City, responding to similar concerns and acting pursuant to a New York State enabling Act, 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 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, but rather by involving public entities in land-use decisions affecting these properties and providing services, standards, controls, and incentives that will encourage preservation by private owners and users. 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 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), situated on a particular “landmark site,” §207-1.0 (o), n.10 or will designate an area to be a “historic district,” §207-1.0 (h). 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, 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 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, to ensure that designation does not cause economic hardship.

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 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.

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. 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 “city tax block” it occupies a “landmark site.” 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.

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, called for tearing 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 . . . 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. *Id.*, at 2251.

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.

The New York Court of Appeals summarily rejected any claim that the Landmarks Law had "taken" 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.

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 (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.

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. We need only address the question whether a “taking” has occurred.¹⁰

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. 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

¹⁰ 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.

compensated by the government, rather than remain disproportionately concentrated on a few persons.

In engaging in ... 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. 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 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.

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.

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. 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. 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."

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. 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, 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."

They first observe that the airspace above the Terminal is a valuable property interest... 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 superadjacent airspace, thus entitling them to "just compensation" measured by the fair market value of these air rights.

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. "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—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,"

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.

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. 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, and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan.

C

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

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.

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, 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. 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.

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. The owner of a building might initially be pleased that his property has been chosen by a distinguished committee of architects, historians, and city 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.

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] . . . [denotes] the group of rights inhering in the citizen's relation to the physical thing, as 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. The property has been thus subjected to a nonconsensual servitude not borne by any neighboring or similar properties.

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."

Appellees are not prohibiting a nuisance. The record is 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.

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 "[secures] an average reciprocity of advantage." *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at

415. 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.

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 surely concede for the benefit accrued. Instead, however, appellees would impose the entire cost of several million dollars per year on Penn Central. Appellees in response would argue that a taking only occurs where a property owner is denied all reasonable value of his property. 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 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.

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 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."

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 taxpayers 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.

Session 6. National Commerce Power

GILMAN v. CITY OF PHILADELPHIA 70 U.S. 713 (1865)

Mr. Justice Swayne delivered the opinion of the court.

The complainants are citizens of other States, and own a valuable and productive wharf and dock property above the site of a contemplated bridge . . . Commerce has been carried on in all kinds of vessels for many years to and from the complainants' property. The bridge will not be more than thirty feet above the ordinary high-water surface of the river, and hence will prevent the passage of vessels having masts. This will largely reduce the income from the property, and render it less valuable.

The injury to the property of the complainants will be entirely consequential. A large city is rising up on the opposite side of the river. The new bridge is called for by public convenience.

The case resolves itself into questions of law. The defendants assert that the act of the legislature, under which they are proceeding, justifies the building of the bridge. The complainants insist that such an obstruction to the navigation of the river is repugnant to the Constitution and laws of the United States, touching the subject of commerce.

These provisions of the Constitution bear upon the subject:

“Congress shall have power . . . to regulate commerce with foreign nations, among the several States, and with the Indian tribes; . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.

“This Constitution, and the laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers

which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England.

We will now turn our attention to the rights and powers of the States which are to be considered.

The national government possesses no powers but such as have been delegated to it. The States have all but such as they have surrendered. The power to authorize the building of bridges is not to be found in the Federal Constitution. It has not been taken from the States. It must reside somewhere. They had it before the Constitution was adopted, and they have it still. "When the Revolution took place the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the Constitution to the General Government." *Martin et al. v. Waddell*, 16 Peters, 410.

The power to regulate commerce covers a wide field, and embraces a great variety of subjects. Some of these subjects call for uniform rules and national legislation; others can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. To this extent the power to regulate commerce may be exercised by the States.

It must not be forgotten that bridges, which are connecting parts of turnpikes, streets, and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs.

It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other. The States have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power of the States shall be exerted within the sphere of the commercial power which belongs to the nation.

A State law, requiring an importer to pay for and take out a license before he should be permitted to sell a bale of imported goods, is void, and a State law, which requires the master of a vessel, engaged in foreign commerce, to pay a certain sum to a State officer on account of each passenger brought from a foreign country into the State, is also void. But, a State, in the exercise of its police power, may forbid spirituous liquor imported from abroad, or from another State, to be sold by retail or to be sold at all without a license; and it may visit the violation of the prohibition with such punishment as it may deem proper. Under quarantine laws, a vessel registered, or enrolled and licensed, may be stopped before entering her port of destination, or be afterwards removed and detained elsewhere, for an indefinite period; and a bale of goods, upon

which the duties have or have not been paid, laden with infection, may be seized under “health laws,” and if it cannot be purged of its poison, may be committed to the flames.

The inconsistency between the powers of the States and the nation, as thus exhibited, is quite as great as in the case before us; but it does not necessarily involve collision or any other evil. None has hitherto been found to ensue. The public good is the end and aim of both.

Congress may interpose, whenever it shall be deemed necessary, by general or special laws. It may regulate all bridges over navigable waters, remove offending bridges, and punish those who shall thereafter erect them. Within the sphere of their authority both the legislative and judicial power of the nation are supreme. A different doctrine finds no warrant in the Constitution, and is abnormal and revolutionary.

The defendants are proceeding in no wanton or aggressive spirit. The authority upon which they rely was given, and afterwards deliberately renewed by the States. The case stands before us as if the parties were the State of Pennsylvania and the United States. The river, being wholly within her limits, we cannot say the State has exceeded the bounds of her authority. Until the dormant power of the Constitution is awakened and made effective, by appropriate legislation, the reserved power of the States is plenary, and its exercise in good faith cannot be made the subject of review by this court. It is not denied that the defendants are justified if the law is valid. We find nothing in the record which would warrant us in disturbing the decree of the Circuit Court, which is, therefore, **AFFIRMED WITH COSTS.**

Mr. Justice Clifford dissenting:

Dissenting from the opinion of the majority of the court on this point, I hold that Congress has regulated the navigation of this river within the meaning of the Constitution, and that the law of the State, pleaded in justification of the acts of the respondents, so far as it authorizes an obstruction to the free navigation of the river, is an invalid law

Complete protection is afforded . . . to all ships and vessels of the United States, duly enrolled and licensed, in navigating all the public navigable rivers of the United States which empty into the sea or into the bays and gulfs, which form a part of the sea, and they are all treated as arms of the sea and public rivers of the United States Public navigable rivers, whose waters fall into the sea, are rivers of the United States in the sense of the law of nations and of the Constitution of the United States. They are so treated by all writers upon public law, and there is no well-considered decision of the Federal courts which does not treat them in the same way.

Looking at these several acts it is not surprising that Marshall, C.J., should have said, in *Gibbons v. Ogden*, that “to the court it seems clear that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies, unequivocally, an authority to licensed vessels to carry on the coasting trade.”

Conclusion is, that Congress has regulated the navigation of this river, and that the State law under which the respondents attempt to justify is in conflict with those regulations, and therefore is void, and affords no justification to the respondents. Admitting the facts to be so, then the complainants are entitled to recover even upon the principle maintained in the opinion of the majority of the court.

THE RIVERS AND HARBORS ACT OF 1899
33 U.S.C. §401

“It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: Provided, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced . . .”

33 U.S.C. §403

“The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

MISSOURI v. HOLLAND
52 U.S. 416 (1920)

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the State of Missouri to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act of July 3, 1918, c128, 40 Stat. 755, and the regulations made by the Secretary of Agriculture in pursuance of the same. The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment, and that the acts of the defendant done and threatened under that authority invade the sovereign right of the State and contravene its will manifested in statutes. The State also alleges a pecuniary interest, as owner of the wild birds within its borders and otherwise, admitted by the Government to be sufficient, but it is enough that the bill is a reasonable and proper means to assert the alleged quasi sovereign rights of a State. *Kansas v. Colorado*, 185 U.S. 125, 142. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237. *Marshall Dental Manufacturing Co. v. Iowa*, 226 U.S. 460, 462. A motion to dismiss was sustained by the District Court on the ground that the act of Congress is constitutional. 258 Fed. Rep. 479. *Acc. United States v. Thompson*, 258 Fed. Rep. 257; *United States v. Rockefeller*, 260 Fed. Rep. 346. The State appeals.

On December 8, 1916, a treaty between the United States and Great Britain was proclaimed by the President. It recited that many species of birds in their annual migrations traversed certain parts of the United States and of Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection. It therefore provided for specified close seasons and protection in other forms, and agreed that the two powers would take or propose to their law-making bodies the necessary measures for carrying the treaty out. 39 Stat. 1702. The above mentioned Act of July 3, 1918, entitled an act to give effect to the convention, prohibited the killing, capturing or selling any of the migratory birds included in the terms of the treaty except as permitted by regulations compatible with those terms, to be made by the Secretary of Agriculture. Regulations were proclaimed on July 31, and October 25, 1918. 40 Stat. 1812; 1863. It is unnecessary to go into any details, because, as we have said, the question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States.

To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, §2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article I, §8, as a necessary and proper means to execute the powers of the Government. The language of the Constitution as to the supremacy of treaties being

general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed.

It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do. An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States had been held bad in the District Court. *United States v. Shauver*, 214 Fed. Rep. 154. *United States v. McCullagh*, 221 Fed. Rep. 288. Those decisions were supported by arguments that migratory birds were owned by the States in their sovereign capacity for the benefit of their people, and that under cases like *Geer v. Connecticut*, 161 U.S. 519, this control was one that Congress had no power to displace. The same argument is supposed to apply now with equal force.

Whether the two cases cited were decided rightly or not they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found. *Andrews v. Andrews*, 188 U.S. 14, 33. What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act. We are not yet discussing the particular case before us but only are considering the validity of the test proposed. With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved.

The State as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it

does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away. If we are to be accurate we cannot put the case of the State upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and that but for the treaty the State would be free to regulate this subject itself.

As most of the laws of the United States are carried out within the States and as many of them deal with matters which in the silence of such laws the State might regulate, such general grounds are not enough to support Missouri's claim. Valid treaties of course "are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States." *Baldwin v. Franks*, 120 U.S. 678, 683. No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power. We do not have to invoke the later developments of constitution law for this proposition; it was recognized as early as *Hopkirk v. Bell*, 3 Cranch, 454, with regard to statutes [*435] of limitation, and even earlier, as to confiscation, in *Ware v. Hylton*, 3 Dall. 199. It was assumed by Chief Justice Marshall with regard to the escheat of land to the State in *Chirac v. Chirac*, 2 Wheat. 259, 275. *Hauenstein v. Lynham*, 100 U.S. 483. *Geofroy v. Riggs*, 133 U.S. 258. *Blythe v. Hinckley*, 180 U.S. 333, 340. So as to a limited jurisdiction of foreign consuls within a State. *Wildenhus's Case*, 120 U.S. 1. See *Ross v. McIntyre*, 140 U.S. 453. Further illustration seems unnecessary, and it only remains to consider the application of established rules to the present case.

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld. *Carey v. South Dakota*, 250 U.S. 118.

Decree affirmed.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE PITNEY dissent.

WICKARD v. FILBURN
317 U.S. 111 (1942)

MR. JUSTICE JACKSON delivered the opinion of the Court.

The appellee filed his complaint against the Secretary of Agriculture of the United States, three members of the County Agricultural Conservation Committee for Montgomery County, Ohio, and a member of the State Agricultural Conservation Committee for Ohio. He sought to enjoin enforcement against himself of the marketing penalty imposed by the amendment of May 26, 1941, to the Agricultural Adjustment Act of 1938, upon that part of his 1941 wheat crop which was available for marketing in excess of the marketing quota established for his farm. He also sought a declaratory judgment that the wheat marketing quota provisions of the Act as amended and applicable to him were unconstitutional because not sustainable under the Commerce Clause.

The Secretary moved to dismiss the action against him for improper venue, but later waived his objection and filed an answer. The other appellants moved to dismiss on the ground that they had no power or authority to enforce the wheat marketing quota provisions of the Act, and after their motion was denied they answered, reserving exceptions to the ruling on their motion to dismiss. The case was submitted for decision on the pleadings and upon a stipulation of facts.

The appellee for many years past has owned and operated a small farm in Montgomery County, Ohio, maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs. It has been his practice to raise a small acreage of winter wheat, sown in the Fall and harvested in the following July; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding. The intended disposition of the crop here involved has not been expressly stated.

In July of 1940, pursuant to the Agricultural Adjustment Act of 1938, as then amended, there were established for the appellee's 1941 crop a wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat an acre. He was given notice of such allotment in July of 1940, before the Fall planting of his 1941 crop of wheat, and again in July of 1941, before it was harvested. He sowed, however, 23 acres, and harvested from his 11.9 acres of excess acreage 239 bushels, which under the terms of the Act as amended on May 26, 1941, constituted farm marketing excess, subject to a penalty of 49 cents a bushel, or \$117.11 in all. The appellee has not paid the penalty and he has not postponed or avoided it by storing the excess under regulations of the Secretary of Agriculture, or by delivering it up to the Secretary. The Committee, therefore, refused him a marketing card, which was, under the terms of Regulations promulgated by the Secretary, necessary to protect a buyer from liability to the penalty and upon its protecting lien.

The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce. Within prescribed limits and by prescribed standards the Secretary of Agriculture is directed to ascertain and proclaim each year a national acreage allotment for the next crop of wheat, which is then apportioned to the states and their counties, and is eventually broken up into allotments for individual farms. Loans and payments to wheat farmers are authorized in stated circumstances.

The court below permanently enjoined appellants from collecting a marketing penalty... The Secretary and his co-defendants have appealed.

It is urged that under the Commerce Clause of the Constitution, Article I, §8, clause 3, Congress does not possess the power it has in this instance sought to exercise. Appellee says that this is a regulation of production and consumption of wheat. Such activities are, he urges, beyond the reach of Congressional power under the Commerce Clause, since they are local in character, and their effects upon interstate commerce are at most "indirect." In answer the Government argues that the statute regulates neither production nor consumption, but only marketing; and, in the alternative, that if the Act does go beyond the regulation of marketing it is sustainable as a "necessary and proper" 15 implementation of the power of Congress over interstate commerce. Constitution, Article I, §8, cl. 18.

At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. *Gibbons v. Ogden*, 9 Wheat. 1, 194-195. He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes. *Id.* at 197.

It was not until 1887, with the enactment of the Interstate Commerce Act, that the interstate commerce power began to exert positive influence in American law and life. This first important federal resort to the commerce power was followed in 1890 by the Sherman Anti-Trust Act 19 and, thereafter, mainly after 1903, by many others. These statutes ushered in new phases of adjudication, which required the Court to approach the interpretation of the Commerce Clause in the light of an actual exercise by Congress of its power thereunder.

When it first dealt with this new legislation, the Court adhered to its earlier pronouncements, and allowed but little scope to the power of Congress. *United States v. Knight Co.*, 156 U.S. 1.

Even while important opinions in this line of restrictive authority were being written, however, other cases called forth broader interpretations of the Commerce Clause destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall in *Gibbons v. Ogden*, *supra*. The present Chief Justice has said in summary of the present state of the law: "The commerce power is not confined in its exercise to the

regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. . . . The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119.

It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat, and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.

It is said, however, that this Act, forcing some farmers into the market to buy what they could provide for themselves, is an unfair promotion of the markets and prices of specializing wheat growers. It is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. ²⁹ Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do.

Reversed.

ZABEL v. TABB
430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971)

BROWN, Chief Judge:

It is the destiny of the Fifth Circuit to be in the middle of great, often times explosive issues of spectacular public importance. So it is here as we enter in depth the contemporary interest in the preservation of our environment. By an injunction requiring the issuance of a permit to fill in eleven acres of tidelands in the beautiful Boca Ciega Bay in the St. Petersburg-Tampa, Florida area for use as a commercial mobile trailer park, the District Judge held that the Secretary of the Army and his functionary, the Chief of Engineers, had no power to consider anything except interference with navigation. There being no such obstruction to navigation, they were ordered to issue a permit even though the permittees acknowledge that "there was evidence before the Corps of Engineers sufficient to justify an administrative agency finding that [the] fill would do damage to the ecology or marine life on the bottom."

We hold that nothing in the statutory structure compels the Secretary to close his eyes to all that others see or think they see. The establishment was entitled, if not required, to consider ecological factors and, being persuaded by them, to deny that which might have been granted routinely five, ten, or fifteen years ago before man's explosive increase made all, including Congress, aware of civilization's potential destruction from breathing its own polluted air and drinking its own infected water and the immeasurable loss from a silent-spring-like disturbance of nature's economy.

Genesis: The Beginning

In setting the stage we draw freely on the Government's brief. This suit was instituted by Landholders, Zabel and Russell, on May 10, 1967, to compel the Secretary of the Army to issue a permit to dredge and fill in the navigable waters of Boca Ciega Bay, in Pinellas County near St. Petersburg, Florida. After a hearing, the District Court, on February 17, 1969, granted summary judgment for Landholders and directed the Secretary of the Army to issue the permit. It granted a stay of execution of the judgment until this appeal could be heard and decided. We invert the summary judgments, reversing Appellees and rendering judgment for the United States.

Landholders own land riparian to Boca Ciega Bay and adjacent land underlying the Bay. It is navigable water of the United States on the Gulf side of Pinellas Peninsula, its length being traversed by the Intracoastal Waterway, which enters Tampa Bay from Boca Ciega Bay and is thus an arm of the Gulf of Mexico.

Landholders desire to dredge and fill on their property in the Bay for a trailer park, with a bridge or culvert to their adjoining upland. To this purpose they first applied to the state and local authorities for permission to perform the work and obtained the consent or approval of all such agencies having jurisdiction to prohibit the work, namely Pinellas County Water and Navigation

Control Authority (which originally rejected permission, but ultimately issued a permit pursuant to state Court order), Trustees of the Internal Improvement Fund of the State, of Florida, Central and South Florida Flood Control District, and Board of Pilot Commissioners for the Port of St. Petersburg.

Landholders then applied to the Corps of Engineers for a federal permit to perform the dredging and filling. The United States Fish and Wildlife Service, Department of the Interior, also opposed the dredging and filling because it "would have a distinctly harmful effect on the fish and wildlife resources of Boca Ciega Bay."

A public hearing was held in St. Petersburg in November, 1966, and on December 30, 1966, the District Engineer at Jacksonville, Florida, Colonel Tabb, recommended to his superiors that the application be denied. He said that "The proposed work would have no material adverse effect on navigation," but that:

"Careful consideration has been given to the general public interest in this case. The virtually unanimous opposition to the proposed work as expressed in the protests which were received and as exhaustively presented at the public hearing have convinced me that approval of the application would not be in the public interest. The continued opposition of the U.S. Fish & Wildlife Service despite efforts on the part of the applicants to reduce the extent of damage leads me to the conclusion that approval of the work would not be consistent with the intent of Congress as expressed in the Fish & Wildlife Coordination Act, as amended, 12 August 1958."

The Division Engineer, South Atlantic Division, Atlanta, Georgia, concurred in that recommendation stating: "In view of the wide spread opposition to the proposed work, it is apparent that approval of the application would not be in the public interest." The Chief of Engineers concurred for the same reasons. Finally, the Secretary of the Army denied the application on February 28, 1967, because issuance of the requested permit:

Would result in a distinctly harmful effect on the fish and wildlife resources in Boca Ciega Bay,

Would be inconsistent with the purposes of the Fish and Wildlife Coordination Act of 1958, as amended (16 U.S.C. 662),

Would be contrary to the public interest.

Landholders then instituted this suit to review the Secretary's determination and for an order compelling him to issue a permit. They urged that the proposed work would not hinder navigation and that the Secretary had no authority to refuse the permit on other grounds. They acknowledged that "there was evidence before the Corps of Engineers sufficient to justify an

administrative agency finding that our fill would do damage to the ecology or marine life on the bottom."

The District Court held :

"The taking, control or limitation in the use of private property interests by an exercise of the police power of the government for the public interest or general welfare should be authorized by legislation which clearly outlines procedure which comports to all constitutional standards. This is not the case here.

"As this opinion is being prepared the Congress is in session. Advocates of conservation are both able and effective. The way is open to obtain a remedy for future situations like this one if one is needed and can be legally granted by the Congress."

The Court granted summary judgment for Landholders and directed the Secretary of the Army to issue the permit. This appeal followed.

The question presented to us is whether the Secretary of the Army can refuse to authorize a dredge and fill project in navigable waters for factually substantial ecological reasons even though the project would not interfere with navigation, flood control, or the production of power. To answer this question in the affirmative, we must answer two intermediate questions affirmatively. (1) Does Congress for ecological reasons have the power to prohibit a project on private riparian submerged land in navigable waters? (2) If it does, has Congress committed the power to prohibit to the Secretary of the Army?

Constitutional Power

The starting point here is the Commerce Clause and its expansive reach. The test for determining whether Congress has the power to protect wildlife in navigable waters and thereby to regulate the use of private property for this reason is whether there is a basis for the Congressional judgment that the activity regulated has a substantial effect on interstate commerce. *Wickard v. Filburn*, 1942, 317 U.S. 111, 125, 63 S.Ct. 82, 87 L.Ed. 122, 135. That this activity meets this test is hardly questioned. In this time of awakening to the reality that we cannot continue to despoil our environment and yet exist, the nation knows, if Courts do not, that the destruction of fish and wildlife in our estuarine waters does have a substantial, and in some areas a devastating, effect on interstate commerce. Landholders do not contend otherwise. Nor is it challenged that dredge and fill projects are activities which may tend to destroy the ecological balance and thereby affect commerce substantially. Because of these potential effects Congress has the power to regulate such projects.

Prohibiting Obstructions to Navigation

The action of the Chief of Engineers and the Secretary of the Army under attack rests immediately on the Rivers and Harbors Act, 33 U.S.C.A. §403, which declares that "the creation of any obstruction * * * to the navigable capacity of any of the waters of the United States is prohibited." The Act covers both building of structures and the excavating and filling in navigable waters. It is structured as a flat prohibition unless—the unless being the issuance of approval by the Secretary after recommendation of the Chief of Engineers.

The question for us is whether under the Act the Secretary may include conservation considerations as conditions to be met to make the proposed project acceptable. Until now there has been no absolute answer to this question.

Governmental agencies in executing a particular statutory responsibility ordinarily are required to take heed of, sometimes effectuate and other times not thwart other valid statutory governmental policies. And here the government-wide policy of environmental conservation is spectacularly revealed in at least two statutes, The Fish and Wildlife Coordination Act and the National Environmental Policy Act of 1969.

The Fish and Wildlife Coordination Act clearly requires the dredging and filling agency (under a governmental permit), whether public or private, to consult with the Fish and Wildlife Service, with a view of conservation of wildlife resources. If there be any question as to whether the statute directs the licensing agency (the Corps) to so consult it can quickly be dispelled. Common sense and reason dictate that it would be incongruous for Congress, in light of the fact that it intends conservation to be considered in private dredge and fill operations (as evidenced by the clear wording of the statute), not to direct the only federal agency concerned with licensing such projects both to consult and to take such factors into account.

The intent of the three branches has been unequivocally expressed: The Secretary must weigh the effect a dredge and fill project will have on conservation before he issues a permit lifting the Congressional ban.

The parallel of momentum as the three branches shape a national policy gets added impetus from the National Environmental Policy Act of 1969, Public Law 91-190, 42 U.S.C.A. §§4331-47. This Act essentially states that every federal agency shall consider ecological factors when dealing with activities which may have an impact on man's environment.

When the National Environmental Policy Act of 1969 [is]... considered together with the Fish and Wildlife Coordination Act and its interpretations, there is no doubt that the Secretary can refuse on conservation grounds to grant a permit under the Rivers and Harbors Act.

Taking Without Compensation

Landholders last contention is that their private submerged property was taken for public use without just compensation. They proceed this way: (i) the denial of a permit constitutes a taking since this is the only use to which the property could be put; (ii) the public use is as a breeding ground for wildlife; and (iii) for that use just compensation is due.

Our discussion of this contention begins and ends with the idea that there is no taking. The waters and underlying land are subject to the paramount servitude in the federal government.

Conclusion

Landholders' contentions fail on all grounds. The case is reversed and since there are no questions remaining to be resolved by the District Court, judgment is rendered for the Government and the associated agent-defendants.

REVERSED and RENDERED.

RANCHO VIEJO, LLC v. NORTON
323 F.3d 1062 (D.C. Cir. 2003)

US Supreme Court certiorari denied

Before: GINSBURG, Chief Judge, and EDWARDS and GARLAND, Circuit Judges. Opinion for the Court filed by Circuit Judge GARLAND. Concurring opinion filed by Chief Judge GINSBURG.

GARLAND, Circuit Judge: Rancho Viejo is a real estate development company that wishes to construct a 202-acre housing development in San Diego County, California. The United States Fish and Wildlife Service determined that Rancho Viejo's construction plan was likely to jeopardize the continued existence of the arroyo southwestern toad, which the Secretary of the Interior has listed as an endangered species since 1994. Rather than accept an alternative plan proposed by the Service, Rancho Viejo filed suit challenging the application of the Endangered Species Act, 16 U.S.C. §§1531 et seq., to its project as an unconstitutional exercise of federal authority under the Commerce Clause. The district court dismissed the suit. We conclude that this case is governed by our prior decision in *National Association of Home Builders v. Babbitt*, 327 U.S. App. D.C. 248, 130 F.3d 1041 (D.C. Cir. 1997), and therefore affirm.

I

The Endangered Species Act (ESA), 16 U.S.C. §§1531 et seq., is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180, 57 L. Ed. 2d 117, 98 S. Ct. 2279 (1978). Finding that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation," 16 U.S.C. §1531(a)(1), Congress passed the ESA "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," *id.* §1531(b).

The ESA directs the Secretary of the Interior to list fish, wildlife, or plant species that she determines are endangered or threatened. 16 U.S.C. §1533(a). Section 9 of the Act makes it unlawful to "take" any such listed species without a permit. *Id.* §1538(a)(1)(B). "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* §1532(19). The Secretary has promulgated, and the Supreme Court has upheld, a regulation that defines "harm" as including "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding." 50 C.F.R. §17.3; see *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708, 132 L. Ed. 2d 597, 115 S. Ct. 2407 (1995) (sustaining 50 C.F.R. §17.3 as a reasonable interpretation of 16 U.S.C. §1532(19)).

Section 7 of the ESA requires all federal agencies to ensure that none of their activities, including the granting of licenses and permits, will "jeopardize the continued existence of any endangered species ... or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary ... to be critical." When an agency concludes that its activities may adversely affect a listed species, it must engage in a formal consultation with the Interior Department's Fish and Wildlife Service (FWS). 50 C.F.R. §402.14. Where applicable, such consultations result in the issuance of a Biological Opinion that includes a "jeopardy" or "no jeopardy" determination. If the FWS decides that the proposed action is likely to "jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat," the opinion must set forth "reasonable and prudent alternatives," if any, that will avoid such consequences.

The Secretary listed the arroyo toad as an endangered species on December 16, 1994. The toads live in scattered populations from California's Monterey County in the north to Mexico's Baja California in the south. They breed in shallow, sandy, or gravelly pools along streams, and spend most of their adult lives in upland habitats. The toads range no farther than 1.2 miles from the streams where they breed, and none in the area at issue in this case travel outside the state of California. Habitat destruction has driven the toad from approximately 76% of its former California range.

Plaintiff Rancho Viejo plans to build a 280-home residential development on a 202-acre site in San Diego County. The property is bordered on the south by Keys Creek, a major tributary of the San Luis Rey River, and is just east of Interstate 15. FWS, Biological/Conference Opinion on the Rancho Viejo Residential Development at 8, 26 (Aug. 24, 2000). The company's construction plan is to build homes in an upland area of approximately 52 acres, and to use an additional 77 acres of its upland property and portions of the Keys Creek streambed as a "borrow area" to provide fill for the project. Rancho Viejo wants to remove six feet or more of soil from the surface of the borrow area, amounting to approximately 750,000 cubic yards of material, and to transport that soil to the 52-acre housing site to the north. Surveys of Keys Creek have confirmed the presence of arroyo toads on and adjacent to the project site.

Because Rancho Viejo's plan would involve the discharge of "fill into waters of the United States, including wetlands," the company was required by section 404 of the Clean Water Act, 33 U.S.C. §1344, to obtain a permit from the U.S. Army Corps of Engineers (the "Corps"). The Corps determined that the project "may affect" the arroyo toad population in the area, and sought a formal consultation with the FWS pursuant to ESA §7.

In May 2000, Rancho Viejo excavated a trench and erected a fence, each running parallel to the bank of Keys Creek. Arroyo toads were observed on the upland side of the fence. In the FWS's view, the fence has prevented and may continue to impede movement of the toads between their upland habitat and their breeding habitat in the creek. On May 22, the FWS informed Rancho Viejo that construction of the fence "has resulted in the illegal take and will

result in the future illegal take of federally endangered" arroyo toads "in violation of the Endangered Species Act."

In August 2000, the FWS issued a Biological Opinion that determined that excavation of the 77-acre borrow area would result in the taking of arroyo toads and was "likely to jeopardize the continued existence" of the species. The FWS proposed an alternative that would, without jeopardizing the continued existence of the toad, allow Rancho Viejo to complete its development by obtaining fill dirt from off-site sources instead of from the proposed borrow area.

Rancho Viejo neither removed the fence nor adopted the FWS's proposed alternative. Instead, it filed a complaint in the United States District Court for the District of Columbia against the Secretary of the Interior and other federal defendants, alleging that the listing of the arroyo toad as an endangered species under the ESA, and the application of the ESA to Rancho Viejo's construction plans, exceeded the federal government's power under the Commerce Clause. See U.S. CONST. art. I, §8, cl. 3 ("The Congress shall have Power ... to regulate Commerce ... among the several States....").

The parties filed cross motions for summary judgment. In ruling on those motions, the district court noted that this circuit had only recently sustained, against a Commerce Clause challenge, a determination by the FWS that hospital construction in San Bernardino County, California would likely lead to the take of the Delhi Sands Flower-Loving Fly in violation of the ESA. See *National Ass'n of Home Builders v. Babbitt* ("NAHB"), 327 U.S. App. D.C. 248, 130 F.3d 1041 (D.C. Cir. 1997). Holding that Rancho Viejo's case was indistinguishable from NAHB, and finding nothing in subsequent Supreme Court opinions to cast doubt on that decision, the court granted the government's motion.

II

We review the district court's grant of summary judgment de novo, and in so doing accord the ESA a "presumption of constitutionality," *United States v. Morrison*, 529 U.S. 598, 607, 146 L. Ed. 2d 658, 120 S. Ct. 1740 (2000). In this Part, we first discuss the NAHB decision, focusing particularly on the Supreme Court opinion that provided that case's analytic framework, *United States v. Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995). We then consider the application of NAHB and Lopez to the complaint filed by Rancho Viejo.

A

In Lopez, the Supreme Court considered whether a provision of the Gun-Free School Zones Act, 18 U.S.C. §922(q)(1)(A) (1988 ed., Supp. V), which made it a federal offense to possess a firearm near a school, exceeded Congress' authority under the Commerce Clause. 514 U.S. at 551. The Court held that the clause authorizes Congress to regulate "three broad categories of activity":

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.

In NAHB, this circuit applied *Lopez* in a case challenging the application of the ESA to a construction project in an area that contained the habitat of the Delhi Sands Flower-Loving Fly. 130 F.3d at 1043 . The fly, an endangered species, is found in only two counties, both in California. *Id.* One of those counties reported to the FWS that it planned to construct a hospital and power plant on a site occupied by the fly, and to expand a highway intersection in connection with that work. 130 F.3d at 1044-45. The FWS informed the county that the expansion of the intersection would likely lead to a take of the fly in violation of section 9 of the ESA. Thereafter, the county filed suit against the Secretary of the Interior, contending that application of the ESA in those circumstances exceeded the authority of the federal government under the Commerce Clause.

A majority of the NAHB court held that the take provision of ESA §9, and its application to the facts of that case, constituted a valid exercise of Congress' commerce power. The court found that application of the ESA fell within the third *Lopez* category, concluding that the regulated activity "substantially affects" interstate commerce. In so holding, the majority agreed upon two rationales: (1) "the loss of biodiversity itself has a substantial effect on our ecosystem and likewise on interstate commerce"; and (2) "the Department's protection of the flies regulates and substantially affects commercial development activity which is plainly interstate." Examining those two rationales within the context of *Lopez*' the NAHB court concluded that application of the ESA to the county's proposed construction project was constitutional. Because the second NAHB rationale readily resolves this case, it is the focus of the balance of our discussion.¹¹

¹¹ In focusing on the second NAHB rationale, we do not mean to discredit the first. Nor do we mean to discredit rationales that other circuits have relied upon in upholding endangered species legislation. We simply have no need to consider those other rationales to dispose of the case before us. See, e.g., *Gibbs v. Babbitt*, 214 F.3d 483, 497 (4th Cir. 2000) ("The protection of the red wolf on both federal and private land substantially affects interstate commerce through tourism, trade, scientific research, and other potential economic activities."); *United States v. Bramble*, 103 F.3d 1475, 1477, 1481 (9th Cir. 1996) (upholding the Bald and Golden Eagle Protection Act's prohibition on the possession of eagle feathers, see 16 U.S.C. §668(a), because "extinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity," including "future commerce in eagles," "future interstate travel for the purpose of ... studying eagles," "or future commerce in beneficial products derived ... from analysis of their genetic material").

B

Secretary Norton argues, and the district court concluded, that application of ... four Lopez factors leads to the same result here as it did in NAHB. We agree.

The first Lopez factor is whether the regulated activity has anything "to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." Lopez, 514 U.S. at 561; accord Morrison, 529 U.S. at 610. The regulated activity at issue in NAHB—the construction of a hospital, power plant, and supporting infrastructure—was plainly an economic enterprise. The same is true here, where the regulated activity is the construction of a 202-acre commercial housing development.

Second, the court must consider whether the statute in question contains an "express jurisdictional element." Lopez, 514 U.S. at 561-62. Section 9 of the ESA has no express jurisdictional hook that limits its application, for example, to takes "in or affecting commerce." Lopez did not indicate that such a hook is required, however, and its absence did not dissuade the NAHB court from finding application of the ESA constitutional. Rather, in a case like this, "the absence of such a jurisdictional element simply means that courts must determine independently whether the statute regulates activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect interstate commerce." *United States v. Moghadam*, 175 F.3d 1269, 1276 (11th Cir. 1999).

The third Lopez factor looks to whether there are "express congressional findings" or legislative history "regarding the effects upon interstate commerce" of the regulated activity. Lopez, 514 U.S. at 561-62. There are no such findings or history with respect to the specific rationale that we rely upon here, the effect of commercial housing construction on interstate commerce. But neither findings nor legislative history is necessary. As Lopez acknowledged, "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce." *Id.* at 562. Rather, such evidence merely "enables [the court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye." Lopez, 514 U.S. at 563. As we discuss in the remainder of this section, the naked eye requires no assistance here.

The fourth Lopez factor is whether the relationship between the regulated activity and interstate commerce is too attenuated to be regarded as substantial. See Lopez, 514 U.S. at 563-67. Although Rancho Viejo avers that the effect on interstate commerce of preserving endangered species is too tenuous to satisfy this test, it does not argue that the effect of commercial construction projects is similarly attenuated. Because the rationale upon which we rely focuses on the activity that the federal government seeks to regulate in this case (the construction of Rancho Viejo's housing development), and because we are required to accord congressional legislation a "presumption of constitutionality," plaintiff's failure to demonstrate

(or even to argue) that its project and those like it are without substantial interstate effect is fatal to its cause.

This conclusion is not diminished by the fact that the arroyo toad, like the Flower-Loving Fly, does not travel outside of California, or that Rancho Viejo's development, like the San Bernardino hospital, is located wholly within the state. As Judge Henderson said in NAHB, the regulation of commercial land development, quite "apart from the characteristics or range of the specific endangered species involved, has a plain and substantial effect on interstate commerce." There, "the regulation related to both the proposed redesigned traffic intersection and the hospital it [was] intended to serve, each of which had an obvious connection with interstate commerce." *Id.* (Henderson, J., concurring). Here, Rancho Viejo's 202-acre project, located near a major interstate highway, is likewise one that "is presumably being constructed using materials and people from outside the state and which will attract" construction workers and purchasers "from both inside and outside the state." *Id.* at 1048.¹²

This analysis is perfectly consistent with *Lopez*. In that case, the Court noted that it had "upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce." 514 U.S. at 559. Such conclusions were often based upon viewing "regulations of activities that arise out of or are connected with a commercial transaction ... in the aggregate." *Id.* at 561.¹³ To survive Commerce Clause review, all the government must establish is that "a rational basis exists for concluding that a regulated activity sufficiently affects interstate commerce." *Id.* at 557. And there can be no doubt that such a relationship exists for costly commercial developments like Rancho Viejo's. As Judge Henderson made clear in NAHB, "insofar as application of section 9(a)(1) of [the] ESA ... acts to regulate commercial development of the land inhabited by the endangered species, 'it may ... be reached by Congress' because 'it asserts a substantial economic effect on interstate commerce.'" 130 F.3d at 1059-60 (quoting *Lopez*, 514 U.S. at 556 (quoting *Wickard v. Filburn*, 317 U.S. 111, 125, 87 L. Ed. 122, 63 S. Ct. 82 (1942))).

III

Rancho Viejo does not seriously dispute that NAHB is indistinguishable from this case. Rather, plaintiff argues that, as a result of subsequent Supreme Court decisions in *United States v. Morrison*, 529 U.S. 598, 146 L. Ed. 2d 658, 120 S. Ct. 1740 (2000), and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("SWANCC"), 531 U.S. 159, 148 L. Ed. 2d 576, 121 S. Ct. 675 (2001), NAHB is no longer "good law."

¹² Application of the ESA to habitat degradation has a further impact on interstate commerce by removing the incentives for states "to adopt lower standards of endangered species protection in order to attract development," thereby preventing a destructive "race to the bottom." NAHB, 130 F.3d at 1054-56 (Wald, J.).

¹³ The cases cited by the Court include: *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981).

A

Rancho Viejo contends that Morrison stands for the proposition that whether the regulated activity is economic is not simply a factor in the analysis, but instead is outcome determinative: that noneconomic activity, whatever its effect on interstate commerce, cannot be regulated under the Commerce Clause. But how close the Court came to embracing plaintiff's view is irrelevant to the disposition of this appeal, because the ESA regulates takings, not toads. Morrison instructs that "the proper inquiry" is whether the challenge is to "a regulation of activity that substantially affects interstate commerce." 529 U.S. at 609 (emphasis added). Similarly, SWANCC declares that what is required is an evaluation of "the precise object or activity that, in the aggregate, substantially affects interstate commerce." 531 U.S. at 173 (emphasis added). When, as directed, we turn our attention to the precise activity that is regulated in this case, there is no question but that it is economic in nature.

That regulated activity is Rancho Viejo's planned commercial development, not the arroyo toad that it threatens. The ESA does not purport to tell toads what they may or may not do. Rather, section 9 limits the taking of listed species, and its prohibitions and corresponding penalties apply to the persons who do the taking, not to the species that are taken. See 16 U.S.C. §1538(a)(1), (a)(1)(B) (making it "unlawful for any person ... to take any such species") (emphasis added). In this case, the prohibited taking is accomplished by commercial construction, and the unlawful taker is Rancho Viejo.

B

Rancho Viejo suggests that even if the regulated activity here is the taking of the toads through economic activity, that fact still does not end the matter. Although the ESA may regulate economic activity, plaintiff insists that the statute has a noneconomic purpose: the preservation of biodiversity, and, in this case, the preservation of toads that Rancho Viejo maintains are without commercial value. Asserting that to survive Commerce Clause scrutiny a statute must be aimed at economic activity and not simply regulate it for some other purpose, Rancho Viejo concludes that the ESA (at least as applied to its project) must fall. This argument suffers from a number of serious defects.

First, the ESA, like many statutes, has multiple purposes. Whether or not economic considerations were the primary motivation for the Act, there is no question that the commercial value of preserving species diversity played an important role in Congress' deliberations. Thus, to use a "noneconomic purpose" test to overturn a multi-purpose statute like the ESA, we would have to do so on the ground that economic concerns were not the Act's "true" or "primary" motivation. Such an enterprise is fraught with both difficulty and danger. The enterprise is difficult because distilling the true or primary legislative purpose out of the motivations of 435 representatives and 100 senators is inherently problematic. And it is that difficulty that makes the project a dangerous one -- dangerous because the indeterminacy of outcome leaves courts open

to the charge that they have manipulated the determination of purpose in order to achieve their own policy preferences, and because rejecting a stated congressional purpose as "untrue" reflects considerable disrespect for the pronouncements of a democratically elected branch of government. Is the ESA's true purpose to preserve the economic potential of species whose commercial value we cannot now foresee, or did Congress regard species protection as a moral imperative? Did Congress pass the Clean Air and Clean Water Acts out of concern that pollution hurts the economy, or out of a fundamental concern for the health of the citizenry? For courts to insist on making these kinds of determinations a prerequisite for upholding the validity of congressional legislation is a recipe for judicial intervention in the political process.

Moreover, the Supreme Court has long held that Congress may act under the Commerce Clause to achieve noneconomic ends through the regulation of commercial activity. Perhaps the most important of the ... cases is *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261-62, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964), in which the Court rebuffed a Commerce Clause attack on Title II of the Civil Rights Act of 1964, 42 U.S.C. §§2000a et seq. The Court acknowledged that "the Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Id.* at 250 (internal quotation marks omitted). But the fact that Congress passed the statute to attack the moral outrage of racial discrimination did not lead the Supreme Court to find it unconstitutional.

The position urged by Rancho Viejo puts the constitutionality of many of the above-described statutes at risk. There is nothing in *Morrison* or *Lopez* to put the *Heart of Atlanta* line of precedent in doubt. Thus, neither case precludes the conclusion that it is constitutional to apply the ESA to a commercial construction project like Rancho Viejo's. And a court must hesitate before extending those two cases, neither of which involved economic regulation of any kind, to require the unraveling of a vast fabric of Supreme Court precedent and congressional legislation.

C

Rancho Viejo next argues that even if the taking regulated in this case is commercial in character, the ESA bans other takings that are not. Because the ESA's prohibition on takings applies as much to a hiker's "casual walk in the woods" as to the commercial activities of a real estate company, Rancho Viejo contends that the statute cannot constitutionally be applied to its taking of arroyo toads. Plaintiff's "overbreadth" argument is unavailing.

In *Lopez*, the Supreme Court noted that "where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence." Hence, because much activity regulated by the ESA does bear a substantial relation to commerce, it may well be that the hiker hypothetical proffered by the plaintiff is "of no consequence" to the statute's constitutionality.

But we need not decide that question here because there is a more basic answer to Rancho Viejo's hiker hypothetical: it is not this case. Plaintiff characterizes its complaint as "fundamentally ... an as-applied challenge to the constitutionality of the Defendants' regulation of the 'taking' of Arroyo toads under the ESA." And as we have already discussed, the particular application before us involves the regulation of Rancho Viejo's commercial real estate development, which falls well within the powers granted Congress under the Commerce Clause.

Before leaving this point, we further note that the constitutional circumstances we rely on here -- takings by commercial developers -- are neither an unintended nor an insignificant portion of the activities regulated by the ESA. In that statute, "Congress expressly found that 'economic growth and development untempered by adequate concern and conservation' was the cause for 'various species of fish, wildlife, and plants in the United States having been rendered extinct.'" NAHB, 130 F.3d at 1059 (Henderson, J., concurring) (quoting 16 U.S.C. §1531(a)(1)). Moreover, as Secretary Norton points out, "the activities that cause the loss of endangered species and that are regulated by the take prohibition are themselves generally commercial and economic activities." Appellees' Br. at 34. Finally, in listing the arroyo toad as an endangered species, the FWS specifically found that "development projects in riparian wetlands have caused permanent losses of riparian habitats and are the most conspicuous factor in the decline of the arroyo toad." 59 Fed. Reg. at 64,863. Because Congress has constitutional authority to regulate such development projects, Rancho Viejo's complaint fails regardless of whether it is characterized as an as-applied or facial challenge.

D

Finally, Rancho Viejo draws our attention to Morrison's declaration that "the Constitution requires a distinction between what is truly national and what is truly local." 529 U.S. at 617-18. Plaintiff argues that the ESA represents an unlawful assertion of congressional power over local land use decisions, which it describes as an area of traditional state regulation. The ESA, however, does not constitute a general regulation of land use. Far from encroaching upon territory that has traditionally been the domain of state and local government, the ESA represents a national response to a specific problem of "truly national" concern.

IV

"Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." Morrison, 529 U.S. at 607 (citations omitted). Rancho Viejo has not made that "plain showing" here. Rather, its attack on the constitutionality of the application of the ESA to its commercial housing development is indistinguishable from the attack we turned back in NAHB, and nothing in subsequent Supreme Court jurisprudence has undermined the precedential authority of that decision. Accordingly, NAHB controls our decision in this case, and the district court's grant of summary judgment in favor of Secretary Norton is therefore

Affirmed.

GINSBURG, Chief Judge, concurring: Although I do not disagree with anything in the opinion of the court, I write separately because I do not believe our opinion makes clear, as the Supreme Court requires, that there is a logical stopping point to our rationale for upholding the constitutionality of the exercise of the Congress's power under the Commerce Clause here challenged. See *Lopez*, 514 U.S. at 564 ("if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate").

In this case I think it clear that our rationale for concluding the take of the arroyo toad affects interstate commerce does indeed have a logical stopping point, though it goes unremarked in the opinion of the court. Our rationale is that, with respect to a species that is not an article in interstate commerce and does not affect interstate commerce, a take can be regulated if - but only if - the take itself substantially affects interstate commerce. The large-scale residential development that is the take in this case clearly does affect interstate commerce. Just as important, however, the lone hiker in the woods, or the homeowner who moves dirt in order to landscape his property, though he takes the toad, does not affect interstate commerce.

Without this limitation, the Government could regulate as a take any kind of activity, regardless whether that activity had any connection with interstate commerce. With this understanding of the rationale of the case, I concur in the opinion of the court.

Session 7. Waters of the United States

UNITED STATES v. APPALACHIAN ELECTRIC POWER CO. . 311 U.S. 377 (1940)

Mr. Justice Reed delivered the opinion of the Court.

This case involves the scope of the federal commerce power in relation to conditions in licenses, required by the Federal Power Commission, for the construction of hydroelectric dams in navigable rivers of the United States. To reach this issue requires, preliminarily, a decision as to the navigability of the New River, a watercourse flowing through Virginia and West Virginia. The district court and the circuit court of appeals have both held that the New River is not navigable, and that the United States cannot enjoin the respondent from constructing and putting into operation a hydroelectric dam situated in the river just above Radford, Virginia.

Sections 9 and 10 of the Rivers and Harbors Act of 1899 make it unlawful to construct a dam in any navigable water of the United States without the consent of Congress. By the Federal Water Power Act of 1920, however, Congress created a Federal Power Commission with authority to license the construction of such dams upon specified conditions.

The Radford Dam project was initiated by respondent's predecessor On October 12, 1932, the [Federal Power] Commission without notice adopted a resolution that the New River, from the mouth of Wilson Creek, Virginia, north, was navigable. The respondent began construction work on the dam about June 1, 1934.

On May 6, 1935, the United States filed this bill for an injunction against the construction or maintenance of the proposed dam otherwise than under a license from the Federal Power Commission. It alleged that the New River is navigable; that the dam would constitute an obstruction to navigation and would impair the navigable capacity of the navigable waters of the United States on the New, Kanawha and Ohio Rivers; that the Commission had found the dam would affect the interests of interstate or foreign commerce; and that its construction therefore violated both the Rivers and Harbors Act and the Federal Water Power Act. Respondent denied these allegations, and also set forth a number of separate defenses based on the assumption that the New River was non-navigable.

Navigability. The power of the United States over its waters which are capable of use as interstate highways arises from the commerce clause of the Constitution. "The Congress shall have Power . . . To regulate Commerce . . . among the several States." It was held early in our history that the power to regulate commerce necessarily included power over navigation. To make its control effective the Congress may keep the "navigable waters of the United States" open and free and provide by sanctions against any interference with the country's water assets. It may legislate to forbid or license dams in the waters; its power over improvements for navigation in rivers is "absolute."

The states possess control of the waters within their borders, “subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers.” It is this subordinate local control that, even as to navigable rivers, creates between the respective governments a contrariety of interests relating to the regulation and protection of waters through licenses, the operation of structures and the acquisition of projects at the end of the license term. But there is no doubt that the United States possesses the power to control the erection of structures in navigable waters.

The navigability of the New River is, of course, a factual question but to call it a fact cannot obscure the diverse elements that enter into the application of the legal tests as to navigability. We are dealing here with the sovereign powers of the Union, the Nation’s right that its waterways be utilized for the interests of the commerce of the whole country. It is obvious that the uses to which the streams may be put vary from the carriage of ocean liners to the floating out of logs; that the density of traffic varies equally widely from the busy harbors of the seacoast to the sparsely settled regions of the Western mountains. The tests as to navigability must take these variations into consideration.

Both lower courts based their investigation primarily upon the generally accepted definition of *The Daniel Ball*.¹⁴ In so doing they were in accord with the rulings of this Court on the basic concept of navigability.

To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. “Natural and ordinary condition” refers to volume of water, the gradients and the regularity of the flow. A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. These limits are necessarily a matter of degree. There must be a balance between cost and need at a time when the improvement would be useful. When once found to be navigable, a waterway remains so. The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic. In determining the navigable character of the New River it is proper to consider the feasibility of interstate use after reasonable improvements which might be made.

The evidence of actual use of the Radford-Wiley’s Falls section for commerce and for private convenience when taken in connection with its physical condition, makes it quite plain

¹⁴ 10 Wall. 557, 563: “. . . Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.”

that by reasonable improvement the reach would be navigable for the type of boats employed on the less obstructed sections. Respondent denied the practicability of artificial means to bring about the navigability of the New River and the effectiveness of any improvement to make the river a navigable water of the United States. The Government supported its allegation of improbability by pointing out that the use of the section for through navigation and local boating on favorable stretches of the Radford-Wiley's Falls reach showed the feasibility of such use and that little was needed in the way of improvements to make the section a thoroughfare for the typical, light commercial traffic of the area. From the use of the Radford-Wiley's Falls stretch and the evidence as to its ready improvability at a low cost for easier keelboat use, we conclude that this section of the New River is navigable. It follows from this, together with the undisputed commercial use that the New River from Allisonia, Virginia, to Hinton, West Virginia, is a navigable water of the United States.

License Provisions. The determination that the New River is navigable eliminates from this case issues which may arise only where the river involved is nonnavigable. But even accepting the navigability of the New River, the respondent urges that certain provisions of the license, which seek to control affairs of the licensee, are unconnected with navigation and are beyond the power of the Commission, indeed beyond the constitutional power of Congress to authorize.

The respondent's objections to the statutory and license provisions, as applied to navigable streams, are based on the contentions (1) that the United States' control of the waters is limited to control for purposes of navigation, (2) that certain license provisions take its property without due process, and (3) that the claimed right to acquire this project and to regulate its financing, records and affairs, is an invasion of the rights of the states, contrary to the Tenth Amendment.

Forty-one states join as amici in support of the respondent's arguments. While conceding, as of course, that Congress may prohibit the erection in navigable waters of the United States of any structure deemed to impair navigation, the Attorneys General speaking for the states insist that this power of prohibition does not comprehend a power to exact conditions, which are unrelated to navigation, for the permission to erect such structures. To permit, the argument continues, the imposition of licenses involving conditions such as this acquisition clause, enabling the Federal Government to take over a natural resource such as water-power, allows logically similar acquisition of mines, oil or farmlands as consideration for the privilege of doing an interstate business. The states thus lose control of their resources and property is withdrawn from taxation in violation of the Tenth Amendment.

Further, the point is made that a clash of sovereignty arises between the license provisions of the Power Act and state licensing provisions. The Commonwealth of Virginia advances forcibly its contention that the affirmative regulation of water-power projects on its navigable streams within its boundaries rests with the state, beyond that needed for navigation.

In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. By navigation respondent means no more than operation of boats and improvement of the waterway itself. In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole. Flood protection, watershed development, and recovery of the cost of improvements through utilization of power are likewise parts of commerce control. As respondent soundly argues, the United States cannot by calling a project of its own "a multiple purpose dam" give to itself additional powers, but equally truly the respondent cannot, by seeking to use a navigable waterway for power generation alone, avoid the authority of the Government over the stream. That authority is as broad as the needs of commerce. Water power development from dams in navigable streams is from the public's standpoint a by-product of the general use of the rivers for commerce. To this general power, the respondent must submit its single purpose of electrical production. The fact that the Commission is willing to give a license for a power dam only is of no significance in appraising the type of conditions allowable. It may well be that this portion of the river is not needed for navigation at this time. Or that the dam proposed may function satisfactorily with others, contemplated or intended. It may fit in as a part of the river development. The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government. The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. Even if there were no such relationship the plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. It may likewise grant the privilege on terms. It is no objection to the terms and to the exertion of the power that "its exercise is attended by the same incidents which attend the exercise of the police power of the states." The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment.

Such an acquisition or such an option to acquire is not an invasion of the sovereignty of a state. At the formation of the Union, the states delegated to the Federal Government authority to regulate commerce among the states. So long as the things done within the states by the United States are valid under that power, there can be no interference with the sovereignty of the state. It is the non-delegated power which under the Tenth Amendment remains in the state or the people.

Reversed and remanded to the District Court with instructions to enter an order enjoining the construction, maintenance or operation of the Radford project otherwise than under a license, accepted by the respondent within a reasonable time, substantially in the form tendered respondent by the Federal Power Commission on or about May 5, 1931, or in the alternative, as prayed in the bill.

Reversed.

UNITED STATES v. RIVERSIDE BAYVIEW HOMES, INC. .
474 U.S. 121 (1985)

Justice White delivered the opinion of the Court.

This case presents the question whether the Clean Water Act (CWA), 33 U. S. C. §1251 et seq., together with certain regulations promulgated under its authority by the Army Corps of Engineers, authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries.

The relevant provisions of the Clean Water Act originated in the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, and have remained essentially unchanged since that time. Under §§301 and 502 of the Act, 33 U. S. C. §§1311 and 1362, any discharge of dredged or fill materials into “navigable waters”—defined as the “waters of the United States”—is forbidden unless authorized by a permit issued by the Corps of Engineers pursuant to §404, 33 U. S. C. §1344.

After initially construing the Act to cover only waters navigable in fact, in 1975 the Corps issued interim final regulations redefining “the waters of the United States” to include not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce. 40 Fed. Reg. 31320 (1975). More importantly for present purposes, the Corps construed the Act to cover all “freshwater wetlands” that were adjacent to other covered waters. A “freshwater wetland” was defined as an area that is “periodically inundated” and is “normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction.” 33 CFR §209.120(d)(2)(h) (1976). In 1977, the Corps refined its definition of wetlands by eliminating the reference to periodic inundation and making other minor changes. The 1977 definition reads as follows:

“The term ‘wetlands’ means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.” 33 CFR §323.2(c) (1978).

In 1982, the 1977 regulations were replaced by substantively identical regulations that remain in force today. See 33 CFR §323.2 (1985).

Respondent Riverside Bayview Homes, Inc. (hereafter respondent), owns 80 acres of low-lying, marshy land near the shores of Lake St. Clair in Macomb County, Michigan. In 1976, respondent began to place fill materials on its property as part of its preparations for construction of a housing development. The Corps of Engineers, believing that the property was an “adjacent wetland” under the 1975 regulation defining “waters of the United States,” filed suit in the

United States District Court for the Eastern District of Michigan, seeking to enjoin respondent from filling the property without the permission of the Corps.

The District Court held that the portion of respondent's property lying below 575.5 feet above sea level was a covered wetland and enjoined respondent from filling it without a permit. Respondent appealed, and the Court of Appeals remanded for consideration of the effect of the intervening 1977 amendments to the regulation. 615 F.2d 1363 (1980). On remand, the District Court again held the property to be a wetland subject to the Corps' permit authority.

Respondent again appealed, and the Sixth Circuit reversed. 729 F.2d 391 (1984). The court construed the Corps' regulation to exclude from the category of adjacent wetlands—and hence from that of “waters of the United States”—wetlands that were not subject to flooding by adjacent navigable waters at a frequency sufficient to support the growth of aquatic vegetation. The court adopted this construction of the regulation because, in its view, a broader definition of wetlands might result in the taking of private property without just compensation. The court also expressed its doubt that Congress, in granting the Corps jurisdiction to regulate the filling of “navigable waters,” intended to allow regulation of wetlands that were not the result of flooding by navigable waters. Under the court's reading of the regulation, respondent's property was not within the Corps' jurisdiction, because its semiaquatic characteristics were not the result of frequent flooding by the nearby navigable waters. Respondent was therefore free to fill the property without obtaining a permit.

We granted certiorari to consider the proper interpretation of the Corps' regulation defining “waters of the United States” and the scope of the Corps' jurisdiction under the Clean Water Act, both of which were called into question by the Sixth Circuit's ruling. 469 U.S. 1206 (1985). We now reverse.

II

The question whether the Corps of Engineers may demand that respondent obtain a permit before placing fill material on its property is primarily one of regulatory and statutory interpretation: we must determine whether respondent's property is an “adjacent wetland” within the meaning of the applicable regulation, and, if so, whether the Corps' jurisdiction over “navigable waters” gives it statutory authority to regulate discharges of fill material into such a wetland.

The question whether the regulation at issue requires respondent to obtain a permit before filling its property is an easy one. The regulation extends the Corps' authority under §404 to all wetlands adjacent to navigable or interstate waters and their tributaries. Wetlands, in turn, are defined as lands that are “inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” 33 CFR §323.2(c) (1985) (emphasis added). The plain language of the regulation refutes the Court of Appeals' conclusion

that inundation or “frequent flooding” by the adjacent body of water is a sine qua non of a wetland under the regulation. Indeed, the regulation could hardly state more clearly that saturation by either surface or ground water is sufficient to bring an area within the category of wetlands, provided that the saturation is sufficient to and does support wetland vegetation.

The history of the regulation underscores the absence of any requirement inundation. The interim final regulation that the current regulation replaced explicitly included a requirement of “[periodic] inundation.” 33 CFR §209.120(d)(2)(h) (1976). In deleting the reference to “periodic inundation” from the regulation as finally promulgated, the Corps explained that it was repudiating the interpretation of that language “as requiring inundation over a record period of years.” 42 Fed. Reg. 37128 (1977). In fashioning its own requirement of “frequent flooding” the Court of Appeals improperly reintroduced into the regulation precisely what the Corps had excised.

Without the nonexistent requirement of frequent flooding, the regulatory definition of adjacent wetlands covers the property here. The District Court found that respondent’s property was “characterized by the presence of vegetation that requires saturated soil conditions for growth and reproduction,” App. to Pet. for Cert. 24a, and that the source of the saturated soil conditions on the property was ground water. There is no plausible suggestion that these findings are clearly erroneous, and they plainly bring the property within the category of wetlands as defined by the current regulation. In addition, the court found that the wetland located on respondent’s property was adjacent to a body of navigable water, since the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of respondent’s property to Black Creek, a navigable waterway. Again, the court’s finding is not clearly erroneous. Together, these findings establish that respondent’s property is a wetland adjacent to a navigable waterway. Hence, it is part of the “waters of the United States” as defined by 33 CFR §323.2 (1985), and if the regulation itself is valid as a construction of the term “waters of the United States” as used in the Clean Water Act, a question which we now address, the property falls within the scope of the Corps’ jurisdiction over “navigable waters” under §404 of the Act.

On a purely linguistic level, it may appear unreasonable to classify “lands,” wet or otherwise, as “waters.” Such a simplistic response, however, does justice neither to the problem faced by the Corps in defining the scope of its authority under §404(a) nor to the realities of the problem of water pollution that the Clean Water Act was intended to combat. In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of “waters” is far from obvious.

Faced with such a problem of defining the bounds of its regulatory authority, an agency may appropriately look to the legislative history and underlying policies of its statutory grants of authority. Neither of these sources provides unambiguous guidance for the Corps in this case, but together they do support the reasonableness of the Corps' approach of defining adjacent wetlands as "waters" within the meaning of §404(a). Section 404 originated as part of the Federal Water Pollution Control Act Amendments of 1972, which constituted a comprehensive legislative attempt "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA §101, 33 U. S. C. §1251. This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, "the word 'integrity' . . . refers to a condition in which the natural structure and function of ecosystems [are] maintained." H. R. Rep. No. 92-911, p. 76 (1972). Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for "[water] moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414, p. 77 (1972).

In keeping with these views, Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into "navigable waters," see CWA §§301(a), 404(a), 502(12), 33 U. S. C. §§1311(a), 1344(a), 1362(12), the Act's definition of "navigable waters" as "the waters of the United States" makes it clear that the term "navigable" as used in the Act is of limited import. In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term. See S. Conf. Rep. No. 92-1236, p. 144 (1972); 118 Cong. Rec. 33756-33757 (1972) (statement of Rep. Dingell).

Of course, it is one thing to recognize that Congress intended to allow regulation of waters that might not satisfy traditional tests of navigability; it is another to assert that Congress intended to abandon traditional notions of "waters" and include in that term "wetlands" as well. Nonetheless, the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term "waters" to encompass wetlands adjacent to waters as more conventionally defined. Following the lead of the Environmental Protection Agency, see 38 Fed. Reg. 10834 (1973), the Corps has determined that wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality:

"The regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system.

“For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system.” 42 Fed. Reg. 37128 (1977).

We cannot say that the Corps’ conclusion that adjacent wetlands are inseparably bound up with the “waters” of the United States—based as it is on the Corps’ and EPA’s technical expertise—is unreasonable. In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.

This holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water. The Corps has concluded that wetlands may affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands. For example, wetlands that are not flooded by adjacent waters may still tend to drain into those waters. In such circumstances, the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, see 33 CFR §320.4(b)(2)(vii) (1985), and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion, see §§320.4(b)(2)(iv) and (v). In addition, adjacent wetlands may “serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species.” §320.4(b)(2)(i). In short, the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water. Again, we cannot say that the Corps’ judgment on these matters is unreasonable, and we therefore conclude that a definition of “waters of the United States” encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act. Because respondent’s property is part of a wetland that actually abuts on a navigable waterway, respondent was required to have a permit in this case.

B

Following promulgation of the Corps’ interim final regulations in 1975, the Corps’ assertion of authority under §404 over waters not actually navigable engendered some congressional opposition. The controversy came to a head during Congress’ consideration of the Clean Water Act of 1977, a major piece of legislation aimed at achieving “interim improvements within the existing framework” of the Clean Water Act. H. R. Rep. No. 95-139, pp. 1-2 (1977). In the end, however, as we shall explain, Congress acquiesced in the administrative construction.

In both Chambers, debate on the proposals to narrow the definition of navigable waters centered largely on the issue of wetlands preservation. See *id.*, at 10426-10432 (House debate); *id.*, at 26710-26729 (Senate debate). Proponents of a more limited §404 jurisdiction contended that the Corps' assertion of jurisdiction over wetlands and other nonnavigable "waters" had far exceeded what Congress had intended in enacting §404. Opponents of the proposed changes argued that a narrower definition of "navigable waters" for purposes of §404 would exclude vast stretches of crucial wetlands from the Corps' jurisdiction, with detrimental effects on wetlands ecosystems, water quality, and the aquatic environment generally.

The significance of Congress' treatment of the Corps' §404 jurisdiction in its consideration of the Clean Water Act of 1977 is twofold. First, the scope of the Corps' asserted jurisdiction over wetlands was specifically brought to Congress' attention, and Congress rejected measures designed to curb the Corps' jurisdiction in large part because of its concern that protection of wetlands would be unduly hampered by a narrowed definition of "navigable waters." Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it. See *Bob Jones University v. United States*, 461 U.S. 574, 599-601 (1983); *United States v. Rutherford*, 442 U.S. 544, 554, and n. 10 (1979).

Second, it is notable that even those who would have restricted the reach of the Corps' jurisdiction would have done so not by removing wetlands altogether from the definition of "waters of the United States," but only by restricting the scope of "navigable waters" under §404 to waters navigable in fact and their adjacent wetlands. In amending the definition of "navigable waters" for purposes of §404 only, the backers of the House bill would have left intact the existing definition of "navigable waters" for purposes of §301 of the Act, which generally prohibits discharges of pollutants into navigable waters. As the House Report explained: "Navigable waters' as used in section 301 includes all of the waters of the United States including their adjacent wetlands." H. R. Rep. No. 95-139, p. 24 (1977). Thus, even those who thought that the Corps' existing authority under §404 was too broad recognized (1) that the definition of "navigable waters" then in force for both §301 and §404 was reasonably interpreted to include adjacent wetlands, (2) that the water quality concerns of the Clean Water Act demanded regulation of at least some discharges into wetlands, and (3) that whatever jurisdiction the Corps would retain over discharges of fill material after passage of the 1977 legislation should extend to discharges into wetlands adjacent to any waters over which the Corps retained jurisdiction. These views provide additional support for a conclusion that Congress in 1977 acquiesced in the Corps' definition of waters as including adjacent wetlands.

We are thus persuaded that the language, policies, and history of the Clean Water Act compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of fill material into wetlands adjacent to the "waters of the United States." The

regulation in which the Corps has embodied this interpretation by its terms includes the wetlands on respondent's property within the class of waters that may not be filled without a permit; and, as we have seen, there is no reason to interpret the regulation more narrowly than its terms would indicate. Accordingly, the judgment of the Court of Appeals is Reversed.

**SOLID WASTE AGENCY OF NORTHERN COOK COUNTY v. UNITED STATES
ARMY CORPS OF ENGINEERS
531 U.S. 159 (2000)**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Section 404(a) of the Clean Water Act (CWA or Act regulates the discharge of dredged or fill material into “navigable waters.” The United States Army Corps of Engineers (Corps), has interpreted §404(a) to confer federal authority over an abandoned sand and gravel pit in northern Illinois which provides habitat for migratory birds. We are asked to decide whether the provisions of §404(a) may be fairly extended to these waters, and, if so, whether Congress could exercise such authority consistent with the Commerce Clause, U.S. Const., Art. I, §8, cl. 3. We answer the first question in the negative and therefore do not reach the second.

Petitioner, the Solid Waste Agency of Northern Cook County (SWANCC), is a consortium of 23 suburban Chicago cities and villages that united in an effort to locate and develop a disposal site for baled nonhazardous solid waste. The Chicago Gravel Company informed the municipalities of the availability of a 533-acre parcel, bestriding the Illinois counties Cook and Kane, which had been the site of a sand and gravel pit mining operation for three decades up until about 1960. Long since abandoned, the old mining site eventually gave way to a successional stage forest, with its remnant excavation trenches evolving into a scattering of permanent and seasonal ponds of varying size (from under one-tenth of an acre to several acres) and depth (from several inches to several feet).

The municipalities decided to purchase the site for disposal of their baled nonhazardous solid waste. By law, SWANCC was required to file for various permits from Cook County and the State of Illinois before it could begin operation of its balefill project. In addition, because the operation called for the filling of some of the permanent and seasonal ponds, SWANCC contacted federal respondents (hereinafter respondents), including the Corps, to determine if a federal landfill permit was required under §404(a) of the CWA, 33 U.S.C. §1344(a).

Section 404(a) grants the Corps authority to issue permits “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” The term “navigable waters” is defined under the Act as “the waters of the United States, including the territorial seas.” §1362(7). The Corps has issued regulations defining the term “waters of the United States” to include:

“waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . .” 33 CFR §328.3(a)(3) (1999).

In 1986, in an attempt to “clarify” the reach of its jurisdiction, the Corps stated that §404(a) extends to intrastate waters:

“a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

“b. Which are or would be used as habitat by other migratory birds which cross state lines; or

“c. Which are or would be used as habitat for endangered species; or

“d. Used to irrigate crops sold in interstate commerce.” 51 Fed. Reg. 41217.

This last promulgation has been dubbed the “Migratory Bird Rule.”

The Corps asserted jurisdiction over the balefill site pursuant to subpart (b) of the “Migratory Bird Rule.”

Despite SWANCC’s securing the required water quality certification from the Illinois Environmental Protection Agency, the Corps refused to issue a §404(a) permit. The Corps found that the impact of the project upon area-sensitive species was “unmitigatable since a landfill surface cannot be redeveloped into a forested habitat.”

Petitioner challenged both the Corps’ jurisdiction over the site and the merits of its denial of the §404(a) permit. Petitioner argued that respondents had exceeded their statutory authority in interpreting the CWA to cover non-navigable, isolated, intrastate waters based upon the presence of migratory birds and, in the alternative, that Congress lacked the power under the Commerce Clause to grant such regulatory jurisdiction.

The Court of Appeals held that the CWA reaches as many waters as the Commerce Clause allows and, given its earlier Commerce Clause ruling, it therefore followed that respondents’ “Migratory Bird Rule” was a reasonable interpretation of the Act. See 191 F.3d at 851-852.

We granted certiorari, 529 U.S. 1129 (2000), and now reverse.

Congress passed the CWA for the stated purpose of “restoring and maintaining the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. §1251(a). In so doing, Congress chose to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.” §1251(b). Relevant here, §404(a) authorizes respondents to regulate the discharge of fill material into “navigable waters,” 33 U.S.C. §1344(a), which the statute defines as “the waters of the United States, including the territorial seas,” §1362(7). Respondents have interpreted these words to cover the abandoned

gravel pit at issue here because it is used as habitat for migratory birds. We conclude that the “Migratory Bird Rule” is not fairly supported by the CWA.

This is not the first time we have been called upon to evaluate the meaning of §404(a). In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985), we held that the Corps had §404(a) jurisdiction over wetlands that actually abutted on a navigable waterway. In so doing, we noted that the term “navigable” is of “limited import” and that Congress evidenced its intent to “regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.” *Id.* at 133. But our holding was based in large measure upon Congress’ unequivocal acquiescence to, and approval of, the Corps’ regulations interpreting the CWA to cover wetlands adjacent to navigable waters. See 474 U.S. at 135-139. We found that Congress’ concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands “inseparably bound up with the ‘waters’ of the United States.” 474 U.S. at 134.

It was the significant nexus between the wetlands and “navigable waters” that informed our reading of the CWA in *Riverside Bayview Homes*. Indeed, we did not “express any opinion” on the “question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water” 474 U.S. at 131-132. In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this.

Section 404(g) is unenlightening. In *Riverside Bayview Homes* we recognized that Congress intended the phrase “navigable waters” to include “at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.” 474 U.S. at 133. But §404(g) gives no intimation of what those waters might be; it simply refers to them as “other . . . waters.” The exact meaning of §404(g) is not before us and we express no opinion on it, but for present purposes it is sufficient to say, as we did in *Riverside Bayview Homes*, that “§404(g)(1) does not conclusively determine the construction to be placed on the use of the term ‘waters’ elsewhere in the Act (particularly in §502(7), which contains the relevant definition of ‘navigable waters’)” 474 U.S. at 138, n. 11.

We thus decline respondents’ invitation to take what they see as the next ineluctable step after *Riverside Bayview Homes*: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under §404(a)’s definition of “navigable waters” because they serve as habitat for migratory birds. We cannot agree that Congress’ separate definitional use of the phrase “waters of the United States” constitutes a basis for reading the term “navigable waters” out of the statute. We said in *Riverside Bayview Homes* that the word “navigable” in the statute was of “limited effect” and went on to hold that §404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term “navigable” has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over

waters that were or had been navigable in fact or which could reasonably be so made. See, e.g., *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408, 85 L. Ed. 243, 61 S. Ct. 291 (1940).

Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited. See *United States v. Morrison*, 529 U.S. 598, 146 L. Ed. 2d 658, 120 S. Ct. 1740 (2000); *United States v. Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995). Respondents argue that the “Migratory Bird Rule” falls within Congress’ power to regulate intrastate activities that “substantially affect” interstate commerce. They note that the protection of migratory birds is a “national interest of very nearly the first magnitude,” *Missouri v. Holland*, 252 U.S. 416, 435, 64 L. Ed. 641, 40 S. Ct. 382 (1920), and that, as the Court of Appeals found, millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds. These arguments raise significant constitutional questions. For example, we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce. This is not clear, for although the Corps has claimed jurisdiction over petitioner’s land because it contains water areas used as habitat by migratory birds, respondents now, post litem motam, focus upon the fact that the regulated activity is petitioner’s municipal landfill, which is “plainly of a commercial nature.” But this is a far cry, indeed, from the “navigable waters” and “waters of the United States” to which the statute by its terms extends.

We find nothing approaching a clear statement from Congress that it intended §404(a) to reach an abandoned sand and gravel pit such as we have here. Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the “Migratory Bird Rule” would result in a significant impingement of the States’ traditional and primary power over land and water use. See, e.g., *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44, 130 L. Ed. 2d 245, 115 S. Ct. 394 (1994) (“Regulation of land use [is] a function traditionally performed by local governments”). Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to “recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources” 33 U.S.C. §1251(b). We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents’ interpretation, and therefore reject the request for administrative deference.

We hold that 33 CFR §328.3(a)(3) (1999), as clarified and applied to petitioner’s balefill site pursuant to the “Migratory Bird Rule,” 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents under §404(a) of the CWA. The judgment of the Court of Appeals for the Seventh Circuit is therefore Reversed.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

It is fair to characterize the Clean Water Act as “watershed” legislation. The statute endorsed fundamental changes in both the purpose and the scope of federal regulation of the Nation’s waters. In §13 of the Rivers and Harbors Appropriation Act of 1899 (RHA), 30 Stat. 1152, as amended, 33 U.S.C. §407, Congress had assigned to the Army Corps of Engineers (Corps) the mission of regulating discharges into certain waters in order to protect their use as highways for the transportation of interstate and foreign commerce; the scope of the Corps’ jurisdiction under the RHA accordingly extended only to waters that were “navigable.” In the CWA, however, Congress broadened the Corps’ mission to include the purpose of protecting the quality of our Nation’s waters for esthetic, health, recreational, and environmental uses. The scope of its jurisdiction was therefore redefined to encompass all of “the waters of the United States, including the territorial seas.” That definition requires neither actual nor potential navigability.

The Court has previously held that the Corps’ broadened jurisdiction under the CWA properly included an 80-acre parcel of low-lying marshy land that was not itself navigable, directly adjacent to navigable water, or even hydrologically connected to navigable water, but which was part of a larger area, characterized by poor drainage, that ultimately abutted a navigable creek. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985). Moreover, once Congress crossed the legal watershed that separates navigable streams of commerce from marshes and inland lakes, there is no principled reason for limiting the statute’s protection to those waters or wetlands that happen to lie near a navigable stream.

In its decision today, the Court draws a new jurisdictional line, one that invalidates the 1986 migratory bird regulation as well as the Corps’ assertion of jurisdiction over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each. Its holding rests on two equally untenable premises: (1) that when Congress passed the 1972 CWA, it did not intend “to exert anything more than its commerce power over navigation,”; and (2) that in 1972 Congress drew the boundary defining the Corps’ jurisdiction at the odd line on which the Court today settles.

As I shall explain, the text of the 1972 amendments affords no support for the Court’s holding, and amendments Congress adopted in 1977 do support the Corps’ present interpretation of its mission as extending to so-called “isolated” waters. Indeed, simple common sense cuts against the particular definition of the Corps’ jurisdiction favored by the majority.

I

The significance of the FWPCA Amendments of 1972 is illuminated by a reference to the history of federal water regulation, a history that the majority largely ignores. Federal regulation of the Nation’s waters began in the 19th century with efforts targeted exclusively at “promoting water transportation and commerce.” Kalen, “Commerce to Conservation: The Call for a

National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands,” 69 N. D. L. Rev. 873, 877 (1993). This goal was pursued through the various Rivers and Harbors Acts, the most comprehensive of which was the RHA of 1899. Section 13 of the 1899 RHA, commonly known as the Refuse Act, prohibited the discharge of “refuse” into any “navigable water” or its tributaries, as well as the deposit of “refuse” on the bank of a navigable water “whereby navigation shall or may be impeded or obstructed” without first obtaining a permit from the Secretary of the Army. 30 Stat. 1152.

During the middle of the 20th century, the goals of federal water regulation began to shift away from an exclusive focus on protecting navigability and toward a concern for preventing environmental degradation. This awakening of interest in the use of federal power to protect the aquatic environment was helped along by efforts to reinterpret §13 of the RHA in order to apply its permit requirement to industrial discharges into navigable waters, even when such discharges did nothing to impede navigability. See, e.g., *United States v. Republic Steel Corp.*, 362 U.S. 482, 490-491, 4 L. Ed. 2d 903, 80 S. Ct. 884 (1960) (noting that the term “refuse” in §13 was broad enough to include industrial waste).¹ Seeds of this nascent concern with pollution control can also be found in the FWPCA, which was first enacted in 1948 and then incrementally expanded in the following years.

The shift in the focus of federal water regulation from protecting navigability toward environmental protection reached a dramatic climax in 1972, with the passage of the CWA. The Act, which was passed as an amendment to the existing FWPCA, was universally described by its supporters as the first truly comprehensive federal water pollution legislation. The “major purpose” of the CWA was “to establish a comprehensive long-range policy for the elimination of water pollution.” S. Rep. No. 92-414, p. 95 (1971).

Section 404 of the CWA resembles §13 of the RHA, but, unlike the earlier statute, the primary purpose of which is the maintenance of navigability, §404 was principally intended as a pollution control measure.

Because of the statute’s ambitious and comprehensive goals, it was, of course, necessary to expand its jurisdictional scope. Thus, although Congress opted to carry over the traditional jurisdictional term “navigable waters” from the RHA and prior versions of the FWPCA, it broadened the definition of that term to encompass all “waters of the United States.” §1362(7). Indeed, the 1972 conferees arrived at the final formulation by specifically deleting the word

¹ In 1970, the House Committee on Government Operations followed the Court’s lead and advocated the use of §13 as a pollution control provision. H. R. Rep. No. 91-917, pp. 14-18 (1970). President Nixon responded by issuing Executive Order No. 11574, 35 Fed. Reg. 19627 (1970) (revoked by Exec. Order No. 12553, 51 Fed. Reg. 7237 (1986)), which created the Refuse Act Permit Program. Power, *The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers*, 63 Va. L. Rev. 503, 512 (1977) (hereinafter Power).

“navigable” from the definition that had originally appeared in the House version of the Act. The majority today undoes that deletion.

By 1972, Congress’ Commerce Clause power over “navigation” had long since been established. The *Daniel Ball*, 77 U.S. 557, 10 Wall. 557, 19 L. Ed. 999 (1871); *Gilman v. Philadelphia*, 70 U.S. 713, 3 Wall. 713, 18 L. Ed. 96 (1866); *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 6 L. Ed. 23 (1824). Why should Congress intend that its assertion of federal jurisdiction be given the “broadest possible constitutional interpretation” if it did not intend to reach beyond the very heartland of its commerce power? The activities regulated by the CWA have nothing to do with Congress’ “commerce power over navigation.” Indeed, the goals of the 1972 statute have nothing to do with navigation at all.

As we recognized in *Riverside Bayview*, the interests served by the statute embrace the protection of “significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites” for various species of aquatic wildlife. 474 U.S. at 134-135. For wetlands and “isolated” inland lakes, that interest is equally powerful, regardless of the proximity of the swamp or the water to a navigable stream. Nothing in the text, the stated purposes, or the legislative history of the CWA supports the conclusion that in 1972 Congress contemplated—much less commanded—the odd jurisdictional line that the Court has drawn today.

The majority accuses respondents of reading the term “navigable” out of the statute. But that was accomplished by Congress when it deleted the word from the §502(7) definition. Viewed in light of the history of federal water regulation, the broad §502(7) definition, and Congress’ unambiguous instructions in the Conference Report, it is clear that the term “navigable waters” operates in the statute as a shorthand for “waters over which federal authority may properly be asserted.”

II

As the majority correctly notes, when the Corps first promulgated regulations pursuant to §404 of the 1972 Act, it construed its authority as being essentially the same as it had been under the 1899 RHA. The reaction to those regulations in the federal courts, in the Environmental Protection Agency (EPA), and in Congress, convinced the Corps that the statute required it “to protect water quality to the full extent of the Commerce Clause” and to extend federal regulation over discharges “to many areas that have never before been subject to Federal permits or to this form of water quality protection.” 40 Fed. Reg. 31320 (1975).

As we noted in [*Riverside Bayview*] case, the new regulations understood “the waters of the United States” to include, not only navigable waters and their tributaries, but also “nonnavigable intrastate waters whose use or misuse could affect interstate commerce.” 474 U.S. at 123. The final version of these regulations, adopted in 1977, made clear that the covered waters included “isolated lakes and wetlands, intermittent streams, prairie potholes, and other

waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.”

III

Although it might have appeared problematic on a “linguistic” level for the Corps to classify “lands” as “waters” in *Riverside Bayview*, 474 U.S. at 131-132, we squarely held that the agency’s construction of the statute that it was charged with enforcing was entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). Contrary to the Court’s suggestion, the Corps’ interpretation of the statute does not “encroach” upon “traditional state power” over land use. “Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits.” *California Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 587, 94 L. Ed. 2d 577, 107 S. Ct. 1419 (1987). The CWA is not a land-use code; it is a paradigm of environmental regulation. Such regulation is an accepted exercise of federal power. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 282, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981).

V

Because I am convinced that the Court’s miserly construction of the statute is incorrect, I shall comment briefly on petitioner’s argument that Congress is without power to prohibit it from filling any part of the 31 acres of ponds on its property in Cook County, Illinois. The Corps’ exercise of its §404 permitting power over “isolated” waters that serve as habitat for migratory birds falls well within the boundaries set by this Court’s Commerce Clause jurisprudence.

In *United States v. Lopez*, 514 U.S. 549, 558-559, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), this Court identified “three broad categories of activity that Congress may regulate under its commerce power”: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons and things in interstate commerce; and (3) activities that “substantially affect” interstate commerce. *Ibid.* The migratory bird rule at issue here is properly analyzed under the third category. In order to constitute a proper exercise of Congress’ power over intrastate activities that “substantially affect” interstate commerce, it is not necessary that each individual instance of the activity substantially affect commerce; it is enough that, taken in the aggregate, the class of activities in question has such an effect. *Perez v. United States*, 402 U.S. 146, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971) (noting that it is the “class” of regulated activities, not the individual instance, that is to be considered in the “affects” commerce analysis); see also *Hodel*, 452 U.S. at 277; *Wickard v. Filburn*, 317 U.S. 111, 127-128, 87 L. Ed. 122, 63 S. Ct. 82 (1942).

The power to regulate commerce among the several States necessarily and properly includes the power to preserve the natural resources that generate such commerce. Cf. *Sporhase*

v. Nebraska ex rel. Douglas, 458 U.S. 941, 953, 73 L. Ed. 2d 1254, 102 S. Ct. 3456 (1982) (holding water to be an “article of commerce”). Migratory birds, and the waters on which they rely, are such resources. Moreover, the protection of migratory birds is a well-established federal responsibility. As Justice Holmes noted in *Missouri v. Holland*, the federal interest in protecting these birds is of “the first magnitude.” 252 U.S. at 435. Because of their transitory nature, they “can be protected only by national action.” *Ibid.*

Whether it is necessary or appropriate to refuse to allow petitioner to fill those ponds is a question on which we have no voice. Whether the Federal Government has the power to require such permission, however, is a question that is easily answered. If, as it does, the Commerce Clause empowers Congress to regulate particular “activities causing air or water pollution, or other environmental hazards that may have effects in more than one State,” *Hodel*, 452 U.S. at 282, it also empowers Congress to control individual actions that, in the aggregate, would have the same effect. *Perez*, 402 U.S. at 154; *Wickard*, 317 U.S. at 127-128. n18 There is no merit in petitioner’s constitutional argument.

Because I would affirm the judgment of the Court of Appeals, I respectfully dissent.

RAPANOS v. UNITED STATES
547 U.S. 715 (2006)

SCALIA, J., announced the judgment of the Court, and delivered an opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined. ROBERTS, C. J., filed a concurring opinion. KENNEDY, J., filed an opinion concurring in the judgment. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a dissenting opinion.

JUSTICE SCALIA announced the judgment of the Court, and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO join.

In April 1989, petitioner John A. Rapanos backfilled wetlands on a parcel of land in Michigan that he owned and sought to develop. This parcel included 54 acres of land with sometimes-saturated soil conditions. The nearest body of navigable water was 11 to 20 miles away. Regulators had informed Mr. Rapanos that his saturated fields were "waters of the United States," 33 U.S.C. §1362(7), that could not be filled without a permit. Twelve years of criminal and civil litigation ensued.

The burden of federal regulation on those who would deposit fill material in locations denominated "waters of the United States" is not trivial. In deciding whether to grant or deny a permit, the U.S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot, relying on such factors as "economics," "aesthetics," "recreation," and "in general, the needs and welfare of the people," 33 CFR §320.4(a) (2004).¹⁵ The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915 -- not counting costs of mitigation or design changes. Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 *Natural Resources J.* 59, 74-76 (2002). "Over \$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits." *Id.*, at 81. These costs cannot be avoided, because the Clean Water Act "imposes criminal liability," as well as steep civil fines, "on a broad range of ordinary industrial and commercial activities." *Hanousek v. United States*, 528 U.S. 1102, 1103, 120 S. Ct. 860, 145 L. Ed. 2d 710 (2000) (THOMAS, J., dissenting from denial of certiorari). In this litigation, for example, for backfilling his own wet fields, Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines. See *United States v. Rapanos*, 235 F.3d 256, 260 (CA6 2000).

¹⁵ In issuing permits, the Corps directs that "all factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people." §320.4(a).

The enforcement proceedings against Mr. Rapanos are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act -- without any change in the governing statute -- during the past five Presidential administrations. In the last three decades, the Corps and the Environmental Protection Agency (EPA) have interpreted their jurisdiction over "the waters of the United States" to cover 270-to-300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 States. And that was just the beginning. The Corps has also asserted jurisdiction over virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow. On this view, the federally regulated "waters of the United States" include storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years. Because they include the land containing storm sewers and desert washes, the statutory "waters of the United States" engulf entire cities and immense arid wastelands. In fact, the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls. Any plot of land containing such a channel may potentially be regulated as a "water of the United States."

I

Congress passed the Clean Water Act (CWA or Act) in 1972. The Act's stated objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 86 Stat. 816, 33 U.S.C. §1251(a). The Act also states that "it is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." §1251(b).

One of the statute's principal provisions is 33 U.S.C. §1311(a), which provides that "the discharge of any pollutant by any person shall be unlawful." "The discharge of a pollutant" is defined broadly to include "any addition of any pollutant to navigable waters from any point source," §1362(12), and "pollutant" is defined broadly to include not only traditional contaminants but also solids such as "dredged spoil, . . . rock, sand, [and] cellar dirt," §1362(6). And, most relevant here, the CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." §1362(7).

The Act also provides certain exceptions to its prohibition of "the discharge of any pollutant by any person." §1311(a). Section 1342(a) authorizes the Administrator of the EPA to "issue a permit for the discharge of any pollutant, . . . notwithstanding section 1311(a) of this title." Section 1344 authorizes the Secretary of the Army, acting through the Corps, to "issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." §1344(a), (d). It is the discharge of "dredged or fill material" -- which, unlike

traditional water pollutants, are solids that do not readily wash downstream -- that we consider today.

For a century prior to the CWA, we had interpreted the phrase "navigable waters of the United States" in the Act's predecessor statutes to refer to interstate waters that are "navigable in fact" or readily susceptible of being rendered so. *The Daniel Ball*, 77 U.S. 557, 10 Wall. 557, 563, 19 L. Ed. 999 (1871); see also *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406, 61 S. Ct. 291, 85 L. Ed. 243 (1940). After passage of the CWA, the Corps initially adopted this traditional judicial definition for the Act's term "navigable waters." See 39 Fed. Reg. 12119, codified at 33 CFR §209.120(d)(1) (1974); see also *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 168, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) (SWANCC). After a District Court enjoined these regulations as too narrow, *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (DC 1975), the Corps adopted a far broader definition. See 40 Fed. Reg. 31324-31325 (1975); 42 Fed. Reg. 37144 (1977). The Corps' new regulations deliberately sought to extend the definition of "the waters of the United States" to the outer limits of Congress's commerce power.

The Corps' current regulations interpret "the waters of the United States" to include, in addition to traditional interstate navigable waters, 33 CFR §328.3(a)(1) (2004), "all interstate waters including interstate wetlands," §328.3(a)(2); "all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce," §328.3(a)(3); "tributaries of [such] waters," §328.3(a)(5); and "wetlands adjacent to [such] waters [and tributaries] (other than waters that are themselves wetlands)," §328.3(a)(7). The regulation defines "adjacent" wetlands as those "bordering, contiguous [to], or neighboring" waters of the United States. §328.3(c). It specifically provides that "wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" *Ibid.*

We first addressed the proper interpretation of 33 U.S.C. §1362(7)'s phrase "the waters of the United States" in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985). That case concerned a wetland that "was adjacent to a body of navigable water," because "the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of respondent's property to . . . a navigable waterway." *Id.*, at 131, 106 S. Ct. 455, 88 L. Ed. 2d 419; see also 33 CFR §328.3(b) (2004). Noting that "the transition from water to solid ground is not necessarily or even typically an abrupt one," and that "the Corps must necessarily choose some point at which water ends and land begins," 474 U.S., at 132, 106 S. Ct. 455, 88 L. Ed. 2d 419, we upheld the Corps' interpretation of "the waters of the United States" to include wetlands that "actually abutted on" traditional navigable waters. *Id.*, at 135, 106 S. Ct. 455, 88 L. Ed. 2d 419.

Following our decision in *Riverside Bayview*, the Corps adopted increasingly broad interpretations of its own regulations under the Act. For example, in 1986, to "clarify" the reach of its jurisdiction, the Corps announced the so-called "Migratory Bird Rule," which purported to extend its jurisdiction to any intrastate waters "which are or would be used as habitat" by migratory birds. 51 Fed. Reg. 41217; see also *SWANCC*, supra, at 163-164, 121 S. Ct. 675, 148 L. Ed. 2d 576. In addition, the Corps interpreted its own regulations to include "ephemeral streams" and "drainage ditches" as "tributaries" that are part of the "waters of the United States," see 33 CFR §328.3(a)(5), provided that they have a perceptible "ordinary high water mark" as defined in §328.3(e). 65 Fed. Reg. 12823 (2000). This interpretation extended "the waters of the United States" to virtually any land feature over which rainwater or drainage passes and leaves a visible mark -- even if only "the presence of litter and debris." 33 CFR §328.3(e). Prior to our decision in *SWANCC*, lower courts upheld the application of this expansive definition of "tributaries" to such entities as storm sewers that contained flow to covered waters during heavy rainfall, *United States v. Eidson*, 108 F.3d 1336, 1340-1342 (CA11 1997), and dry arroyos connected to remote waters through the flow of groundwater over "centuries," *Quivira Mining Co. v. EPA*, 765 F.2d 126, 129 (CA10 1985).

In *SWANCC*, we considered the application of the Corps' "Migratory Bird Rule" to "an abandoned sand and gravel pit in northern Illinois." 531 U.S., at 162, 121 S. Ct. 675, 148 L. Ed. 2d 576. Observing that "it was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview*," *id.*, at 167, 121 S. Ct. 675, 148 L. Ed. 2d 576 (emphasis added), we held that *Riverside Bayview* did not establish "that the jurisdiction of the Corps extends to ponds that are not adjacent to open water." 531 U.S., at 168, 121 S. Ct. 675, 148 L. Ed. 2d 576 (emphasis deleted). On the contrary, we held that "nonnavigable, isolated, intrastate waters," *id.*, at 171, 121 S. Ct. 675, 148 L. Ed. 2d 576 -- which, unlike the wetlands at issue in *Riverside Bayview*, did not "actually abut on a navigable waterway," 531 U.S., at 167, 121 S. Ct. 675, 148 L. Ed. 2d 576 -- were not included as "waters of the United States."

Following our decision in *SWANCC*, the Corps did not significantly revise its theory of federal jurisdiction under §1344(a). The Corps provided notice of a proposed rulemaking in light of *SWANCC*, 68 Fed. Reg. 1991 (2003), but ultimately did not amend its published regulations. Because *SWANCC* did not directly address tributaries, the Corps notified its field staff that they "should continue to assert jurisdiction over traditional navigable waters . . . and, generally speaking, their tributary systems (and adjacent wetlands)." 68 Fed. Reg. 1998. In addition, because *SWANCC* did not overrule *Riverside Bayview*, the Corps continues to assert jurisdiction over waters "neighboring" traditional navigable waters and their tributaries. 68 Fed. Reg. 1997 (quoting 33 CFR §328.3(c) (2003)).

Even after *SWANCC*, the lower courts have continued to uphold the Corps' sweeping assertions of jurisdiction over ephemeral channels and drains as "tributaries." For example, courts have held that jurisdictional "tributaries" include the "intermittent flow of surface water

through approximately 2.4 miles of natural streams and manmade ditches (paralleling and crossing under I-64)," *Treacy v. Newdunn Assocs., LLP*, 344 F.3d 407, 410 (CA4 2003); a "roadside ditch" whose water took "a winding, thirty-two-mile path to the Chesapeake Bay," *United States v. Deaton*, 332 F.3d 698, 702 (CA4 2003); irrigation ditches and drains that intermittently connect to covered waters, *Community Assn. for Restoration of Environment v. Henry Bosma Dairy*, 305 F.3d 943, 954-955 (CA9 2002); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 534 (CA9 2001); and (most implausibly of all) the "washes and arroyos" of an "arid development site," located in the middle of the desert, through which "water courses . . . during periods of heavy rain," *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1118 (CA9 2005).¹⁶

These judicial constructions of "tributaries" are not outliers. Rather, they reflect the breadth of the Corps' determinations in the field. The Corps' enforcement practices vary somewhat from district to district because "the definitions used to make jurisdictional determinations" are deliberately left "vague." GAO Report 26; see also *id.*, at 22. But district offices of the Corps have treated, as "waters of the United States," such typically dry land features as "arroyos, coulees, and washes," as well as other "channels that might have little water flow in a given year." *Id.*, at 20-21. They have also applied that definition to such manmade, intermittently flowing features as "drain tiles, storm drains systems, and culverts." *Id.*, at 24 (footnote omitted).

In addition to "tributaries," the Corps and the lower courts have also continued to define "adjacent" wetlands broadly after SWANCC. For example, some of the Corps' district offices have concluded that wetlands are "adjacent" to covered waters if they are hydrologically connected "through directional sheet flow during storm events," GAO Report 18, or if they lie within the "100-year floodplain" of a body of water -- that is, they are connected to the navigable water by flooding, on average, once every 100 years. Others have concluded that presence within 200 feet of a tributary automatically renders a wetland "adjacent" and jurisdictional. *Id.*, at 19. And the Corps has successfully defended such theories of "adjacency" in the courts, even after SWANCC's excision of "isolated" waters and wetlands from the Act's coverage. And even the most insubstantial hydrologic connection may be held to constitute a "significant nexus."

¹⁶ We are indebted to the Sonoran court for a famous exchange, from the movie *Casablanca* (Warner Bros. 1942), which portrays most vividly the absurdity of finding the desert filled with waters:

"Captain Renault [Claude Rains]: "What in heaven's name brought you to Casablanca?"

"Rick [Humphrey Bogart]: "My health. I came to Casablanca for the waters."

"Captain Renault: "The waters? What waters? We're in the desert."

"Rick: "I was misinformed." 408 F.3d at 1117.

II

In these consolidated cases, we consider whether four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute "waters of the United States" within the meaning of the Act. The Rapanos and their affiliated businesses, deposited fill material without a permit into wetlands on three sites near Midland, Michigan. It is not clear whether the connections between these wetlands and the nearby drains and ditches are continuous or intermittent, or whether the nearby drains and ditches contain continuous or merely occasional flows of water.

The United States brought civil enforcement proceedings against the Rapanos petitioners. The District Court found that the three described wetlands were "within federal jurisdiction" because they were "adjacent to other waters of the United States," and held petitioners liable for violations of the CWA at those sites. On appeal, the United States Court of Appeals for the Sixth Circuit affirmed, holding that there was federal jurisdiction over the wetlands at all three sites because "there were hydrological connections between all three sites and corresponding adjacent tributaries of navigable waters." 376 F.3d at 643.

We granted certiorari to decide whether these wetlands constitute "waters of the United States" under the Act, and if so, whether the Act is constitutional.

III

The Rapanos petitioners contend that the terms "navigable waters" and "waters of the United States" in the Act must be limited to the traditional definition of *The Daniel Ball*, which required that the "waters" be navigable in fact, or susceptible of being rendered so. See 77 U.S. 557, 10 Wall., at 563, 19 L. Ed. 999. But this definition cannot be applied wholesale to the CWA. The Act uses the phrase "navigable waters" as a defined term, and the definition is simply "the waters of the United States." 33 U.S.C. §1362(7). Moreover, the Act provides, in certain circumstances, for the substitution of state for federal jurisdiction over "navigable waters . . . other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . including wetlands adjacent thereto." §1344(g)(1) (emphasis added). This provision shows that the Act's term "navigable waters" includes something more than traditional navigable waters. We have twice stated that the meaning of "navigable waters" in the Act is broader than the traditional understanding of that term, *SWANCC*, 531 U.S., at 167, 121 S. Ct. 675, 148 L. Ed. 2d 576; *Riverside Bayview*, 474 U.S., at 133, 106 S. Ct. 455, 88 L. Ed. 2d 419. We have also emphasized, however, that the qualifier "navigable" is not devoid of significance, *SWANCC*, *supra*, at 172, 121 S. Ct. 675, 148 L. Ed. 2d 576.

We need not decide the precise extent to which the qualifiers "navigable" and "of the United States" restrict the coverage of the Act. Whatever the scope of these qualifiers, the CWA authorizes federal jurisdiction only over "waters." 33 U.S.C. §1362(7). The only natural

definition of the term "waters," our prior and subsequent judicial constructions of it, clear evidence from other provisions of the statute, and this Court's canons of construction all confirm that "the waters of the United States" in §1362(7) cannot bear the expansive meaning that the Corps would give it.

The Corps' expansive approach might be arguable if the CWA defined "navigable waters" as "water of the United States." But "the waters of the United States" is something else. The use of the definite article ("the") and the plural number ("waters") show plainly that §1362(7) does not refer to water in general. In this form, "the waters" refers more narrowly to water "as found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes," or "the flowing or moving masses, as of waves or floods, making up such streams or bodies." Webster's New International Dictionary 2882 (2d ed. 1954) (hereinafter Webster's Second). On this definition, "the waters of the United States" include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in "streams," "oceans," "rivers," "lakes," and "bodies" of water "forming geographical features." *Ibid.* All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Even the least substantial of the definition's terms, namely "streams," connotes a continuous flow of water in a permanent channel -- especially when used in company with other terms such as "rivers," "lakes," and "oceans." None of these terms encompasses transitory puddles or ephemeral flows of water.

The restriction of "the waters of the United States" to exclude channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term. In applying the definition to "ephemeral streams," "wet meadows," storm sewers and culverts, "directional sheet flow during storm events," drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term "waters of the United States" beyond parody. The plain language of the statute simply does not authorize this "Land Is Waters" approach to federal jurisdiction.

Even if the phrase "the waters of the United States" were ambiguous as applied to intermittent flows, our own canons of construction would establish that the Corps' interpretation of the statute is impermissible. As we noted in *SWANCC*, the Government's expansive interpretation would "result in a significant impingement of the States' traditional and primary power over land and water use." 531 U.S., at 174, 121 S. Ct. 675, 148 L. Ed. 2d 576. Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power. See *FERC v. Mississippi*, 456 U.S. 742, 768, n. 30, 102 S. Ct. 2126, 72 L. Ed. 2d 532 (1982); *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994). The extensive federal jurisdiction urged by the Government would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land -- an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board. See 33 CFR §320.4(a)(1) (2004). We ordinarily expect a "clear and manifest" statement from Congress

to authorize an unprecedented intrusion into traditional state authority. See *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 544, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994). The phrase "the waters of the United States" hardly qualifies.

Likewise, just as we noted in *SWANCC*, the Corps' interpretation stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power. See 531 U.S., at 173, 121 S. Ct. 675, 148 L. Ed. 2d 576. (In developing the current regulations, the Corps consciously sought to extend its authority to the farthest reaches of the commerce power. See 42 Fed. Reg. 37127 (1977).) Even if the term "the waters of the United States" were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988).

In sum, on its only plausible interpretation, the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] . . . oceans, rivers, [and] lakes." See Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of the "the waters of the United States" is thus not "based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

IV

In *Rapanos*, the Sixth Circuit under §328.3(a)(5). 376 F.3d at 643 stated that, even if the ditches were not "waters of the United States," the wetlands were "adjacent" to remote traditional navigable waters in virtue of the wetlands' "hydrological connection" to them. This statement reflects the practice of the Corps' district offices, which may "assert jurisdiction over a wetland without regulating the ditch connecting it to a water of the United States." GAO Report 23. We therefore address in this Part whether a wetland may be considered "adjacent to" remote "waters of the United States," because of a mere hydrologic connection to them.

In *Riverside Bayview*, we acknowledged that there was an inherent ambiguity in drawing the boundaries of any "waters":

"The Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lay shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly

aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of 'waters' is far from obvious." *Ibid.*

Because of this inherent ambiguity, we deferred to the agency's inclusion of wetlands "actually abutting" traditional navigable waters: "Faced with such a problem of defining the bounds of its regulatory authority," we held, the agency could reasonably conclude that a wetland that "adjoined" waters of the United States is itself a part of those waters. The difficulty of delineating the boundary between water and land was central to our reasoning in the case: "In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act." *Id.*, at 134, 106 S. Ct. 455, 88 L. Ed. 2d 419 (emphasis added).

When we characterized the holding of *Riverside Bayview* in *SWANCC*, we referred to the close connection between waters and the wetlands that they gradually blend into: "It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." 531 U.S., at 167, 121 S. Ct. 675, 148 L. Ed. 2d 576 (emphasis added). In particular, *SWANCC* rejected the notion that the ecological considerations upon which the Corps relied in *Riverside Bayview* -- and upon which the dissent repeatedly relies today provided an independent basis for including entities like "wetlands" (or "ephemeral streams") within the phrase "the waters of the United States." *SWANCC* found such ecological considerations irrelevant to the question whether physically isolated waters come within the Corps' jurisdiction. It thus confirmed that *Riverside Bayview* rested upon the inherent ambiguity in defining where water ends and abutting ("adjacent") wetlands begin, permitting the Corps' reliance on ecological considerations only to resolve that ambiguity in favor of treating all abutting wetlands as waters. Isolated ponds were not "waters of the United States" in their own right, see 531 U.S., at 167, 171, 121 S. Ct. 675, 148 L. Ed. 2d 576, and presented no boundary-drawing problem that would have justified the invocation of ecological factors to treat them as such.

Therefore, only those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands, are "adjacent to" such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to "waters of the United States" do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a "significant nexus" in *SWANCC*, 531 U.S., at 167, 121 S. Ct. 675, 148 L. Ed. 2d 576. Thus, establishing that wetlands such as those at the *Rapanos* sites are covered by the Act requires two findings: First, that the adjacent channel contains a "water of the United States," (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface

connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.

V

Respondents and their amici urge that such restrictions on the scope of "navigable waters" will frustrate enforcement against traditional water polluters under 33 U.S.C. §§1311 and 1342. Because the same definition of "navigable waters" applies to the entire statute, respondents contend that water polluters will be able to evade the permitting requirement of §1342(a) simply by discharging their pollutants into noncovered intermittent watercourses that lie upstream of covered waters.

That is not so. Though we do not decide this issue, there is no reason to suppose that our construction today significantly affects the enforcement of §1342, inasmuch as lower courts applying §1342 have not characterized intermittent channels as "waters of the United States." The Act does not forbid the "addition of any pollutant directly to navigable waters from any point source," but rather the "addition of any pollutant to navigable waters." §1362(12)(A) (emphasis added); §1311(a). Thus, from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates §1311(a), even if the pollutants discharged from a point source do not emit "directly into" covered waters, but pass "through conveyances" in between. *United States v. Velsicol Chemical Corp.*, 438 F. Supp. 945, 946-947 (WD Tenn. 1976) (a municipal sewer system separated the "point source" and covered navigable waters). See also *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1137, 1141 (CA10 2005) (2.5 miles of tunnel separated the "point source" and "navigable waters").

In contrast to the pollutants normally covered by the permitting requirement of §1342(a), "dredged or fill material," which is typically deposited for the sole purpose of staying put, does not normally wash downstream, and thus does not normally constitute an "addition . . . to navigable waters" when deposited in upstream isolated wetlands. §§1344(a), 1362(12). The Act recognizes this distinction by providing a separate permitting program for such discharges in §1344(a). It does not appear, therefore, that the interpretation we adopt today significantly reduces the scope of §1342 of the Act.

Finally, respondents and many amici admonish that narrowing the definition of "the waters of the United States" will hamper federal efforts to preserve the Nation's wetlands. It is not clear that the state and local conservation efforts that the CWA explicitly calls for, see 33 U.S.C. §1251(b), are in any way inadequate for the goal of preservation. In any event, a Comprehensive National Wetlands Protection Act is not before us, and the "wisdom" of such a statute, post, at 19 (opinion of STEVENS, J.), is beyond our ken. What is clear, however, is that Congress did not enact one when it granted the Corps jurisdiction over only "the waters of the United States."

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VIII

Because the Sixth Circuit applied the wrong standard to determine if these wetlands are covered "waters of the United States," and because of the paucity of the record in both of these cases, the lower courts should determine, in the first instance, whether the ditches or drains near each wetland are "waters" in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are "adjacent" to these "waters" in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview*.

We vacate the judgments of the Sixth Circuit and remand both cases for further proceedings.

It is so ordered.

CHIEF JUSTICE ROBERTS, concurring.

Five years ago, this Court rejected the position of the Army Corps of Engineers on the scope of its authority to regulate wetlands under the Clean Water Act, 86 Stat. 816, as amended, 33 U.S.C. §1251 et seq. *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) (SWANCC). The Corps had taken the view that its authority was essentially limitless; this Court explained that such a boundless view was inconsistent with the limiting terms Congress had used in the Act. *Id.*, at 167-174, 121 S. Ct. 675, 148 L. Ed. 2d 576.

In response to the SWANCC decision, the Corps and the Environmental Protection Agency (EPA) initiated a rulemaking to consider "issues associated with the scope of waters that are subject to the Clean Water Act (CWA), in light of the U.S. Supreme Court decision in [SWANCC]." 68 Fed. Reg. 1991 (2003). The "goal of the agencies" was "to develop proposed regulations that will further the public interest by clarifying what waters are subject to CWA jurisdiction and affording full protection to these waters through an appropriate focus of Federal and State resources consistent with the CWA."

Agencies delegated rulemaking authority are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer under a statute such as the Clean Water Act. See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-845, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms

Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate in developing some notion of an outer bound to the reach of their authority.

The proposed rulemaking went nowhere. Rather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.

It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis.

JUSTICE KENNEDY, concurring in the judgment.

This case requires the Court to decide whether the term "navigable waters" in the Clean Water Act extends to wetlands that do not contain and are not adjacent to waters that are navigable in fact. In *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) (*SWANCC*), the Court held, under the circumstances presented there, that to constitute "navigable waters" under the Act, a water or wetland must possess a "significant nexus" to waters that are or were navigable in fact or that could reasonably be so made. *Id.*, at 167, 172, 121 S. Ct. 675, 148 L. Ed. 2d 576. In the instant cases neither the plurality opinion nor the dissent by JUSTICE STEVENS chooses to apply this test; and though the Court of Appeals recognized the test's applicability, it did not consider all the factors necessary to determine whether the lands in question had, or did not have, the requisite nexus. In my view the cases ought to be remanded to the Court of Appeals for proper consideration of the nexus requirement.

Twice before the Court has construed the term "navigable waters" in the Clean Water Act. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985), the Court upheld the Corps' jurisdiction over wetlands adjacent to navigable-in-fact waterways. *Id.*, at 139, 106 S. Ct. 455, 88 L. Ed. 2d 419.. The Court reserved, however the question of the Corps' authority to regulate wetlands other than those adjacent to open waters.

In *SWANCC*, the Court considered the validity of the Corps' jurisdiction over ponds and mudflats that were isolated in the sense of being unconnected to other waters covered by the Act. 531 U.S., at 171, 121 S. Ct. 675, 148 L. Ed. 2d 576. Asserting jurisdiction pursuant to a regulation called the "Migratory Bird Rule," the Corps argued that these isolated ponds were "waters of the United States" (and thus "navigable waters" under the Act) because they were used as habitat by migratory birds. The Court rejected this theory. "It was the significant nexus between wetlands and 'navigable waters,'" the Court held, "that informed our reading of the [Act] in *Riverside Bayview Homes*." Because such a nexus was lacking with respect to isolated ponds, the Court held that the plain text of the statute did not permit the Corps' action. *Id.*, at 172, 121 S. Ct. 675, 148 L. Ed. 2d 576.

Riverside Bayview and SWANCC establish the framework for the inquiry in the cases now before the Court: Do the Corps' regulations, as applied to the three wetlands parcels in Rapanos, constitute a reasonable interpretation of "navigable waters" as in Riverside Bayview or an invalid construction as in SWANCC? Taken together these cases establish that in some instances, as exemplified by Riverside Bayview, the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a "navigable water" under the Act. In other instances, as exemplified by SWANCC, there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking.

In sum the plurality's opinion is inconsistent with the Act's text, structure, and purpose. The concerns addressed in SWANCC do not support the plurality's interpretation of the Act. In SWANCC, by interpreting the Act to require a significant nexus with navigable waters, the Court avoided applications -- those involving waters without a significant nexus—that appeared likely, as a category, to raise constitutional difficulties and federalism concerns. Here, in contrast, the plurality's interpretation does not fit the avoidance concerns it raises. On the one hand, when a surface-water connection is lacking, the plurality forecloses jurisdiction over wetlands that abut navigable-in-fact waters—even though such navigable waters were traditionally subject to federal authority. On the other hand, by saying the Act covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small), the plurality's reading would permit applications of the statute as far from traditional federal authority as are the waters it deems beyond the statute's reach. Even assuming, then, that federal regulation of remote wetlands and nonnavigable waterways would raise a difficult Commerce Clause issue notwithstanding those waters' aggregate effects on national water quality, but cf. *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942); the plurality's reading is not responsive to this concern.

While the plurality reads nonexistent requirements into the Act, the dissent reads a central requirement out -- namely, the requirement that the word "navigable" in "navigable waters" be given some importance. Although the Court has held that the statute's language invokes Congress' traditional authority over waters navigable in fact or susceptible of being made so, *SWANCC*, 531 U.S., at 172, 121 S. Ct. 675, 148 L. Ed. 2d 576 (citing *Appalachian Power*, 311 U.S., at 407-408, 61 S. Ct. 291, 85 L. Ed. 243), the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far.

I would vacate the judgment of the Court of Appeals and remand for consideration whether the specific wetlands at issue possess a significant nexus with navigable waters.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The question is whether regulations that have protected the quality of our waters for decades, that were implicitly approved by Congress, and that have been repeatedly enforced in case after case, must now be revised in light of the creative criticisms voiced by the plurality and JUSTICE KENNEDY today. Rejecting more than 30 years of practice by the Army Corps, the plurality disregards the nature of the congressional delegation to the agency and the technical and complex character of the issues at stake. JUSTICE KENNEDY similarly fails to defer sufficiently to the Corps, though his approach is far more faithful to our precedents and to principles of statutory interpretation than is the plurality's.

In my view, the proper analysis is straightforward. The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation's waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow. The Corps' resulting decision to treat these wetlands as encompassed within the term "waters of the United States" is a quintessential example of the Executive's reasonable interpretation of a statutory provision. See *Chevron U.S. A. Inc. v. NRDC*, 467 U.S. 837, 842-845, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

Our unanimous decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985), was faithful to our duty to respect the work product of the Legislative and Executive Branches of our Government. Today's judicial amendment of the Clean Water Act is not. Our unanimous opinion in *Riverside Bayview* squarely controls these cases.

I would affirm the judgments in both cases, and respectfully dissent from the decision of five Members of this Court to vacate and remand. I close, however, by noting an unusual feature of the Court's judgments in these cases. It has been our practice in a case coming to us from a lower federal court to enter a judgment commanding that court to conduct any further proceedings pursuant to a specific mandate. In these cases, however, while both the plurality and JUSTICE KENNEDY agree that there must be a remand for further proceedings, their respective opinions define different tests to be applied on remand. Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases -- and in all other cases in which either the plurality's or JUSTICE KENNEDY's test is satisfied -- on remand each of the judgments should be reinstated if either of those tests is met.

Session 8. Cooperative Federalism

HODEL v. VIRGINIA SURFACE MINING & RECLAMATION ASS'N, INC. 452 U.S. 264 (1981)

JUSTICE MARSHALL delivered the opinion of the Court.

These cases arise out of a pre-enforcement challenge to the constitutionality of the Surface Mining Control and Reclamation Act of 1977 (Surface Mining Act or Act), 91 Stat. 447, 30 U. S. C. §1201 et seq. (1976 ed., Supp. III). The United States District Court for the Western District of Virginia declared several central provisions of the Act unconstitutional and permanently enjoined their enforcement. 483 F.Supp. 425 (1980). In these appeals, we consider whether Congress, in adopting the Act, exceeded its powers under the Commerce Clause of the Constitution, or transgressed affirmative limitations on the exercise of that power contained in the . . . Tenth Amendment. We conclude that in the context of a facial challenge, the Surface Mining Act does not suffer from any of these alleged constitutional defects, and we uphold the Act as constitutional.

I

A

The Surface Mining Act is a comprehensive statute designed to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." §102 (a), 30 U. S. C. §1202 (a) (1976 ed., Supp. III). Section 501 (a) directs the Secretary to promulgate regulations establishing an interim regulatory program during which mine operators will be required to comply with some of the Act's performance standards ...governing: (a) restoration of land after mining to its prior condition; (b) restoration of land to its approximate original contour; (c) segregation and preservation of topsoil; (d) minimization of disturbance to the hydrologic balance; (e) construction of coal mine waste piles used as dams and embankments; (f) revegetation of mined areas; and (g) spoil disposal. The interim regulations are currently in effect in most States, including Virginia.

Under §503, any State wishing to assume permanent regulatory authority over the surface coal mining operations within its borders must submit a proposed permanent program to the Secretary for his approval. The proposed program must demonstrate that the state legislature has enacted laws implementing the environmental protection standards established by the Act and accompanying regulations, and that the State has the administrative and technical ability to enforce these standards. 30 U. S. C. §1253 (1976 ed., Supp. III). In addition, the Secretary must

develop and implement a federal permanent program for each State that fails to submit or enforce a satisfactory state program. §504, 30 U. S. C. §1254 (1976 ed., Supp. III).¹⁷

B

On October 23, 1978, the Virginia Surface Mining and Reclamation Assoc., Inc., an association of coal producers engaged in surface coal mining operations in Virginia, 63 of its member coal companies, and 4 individual landowners filed suit in Federal District Court seeking declaratory and injunctive relief against various provisions of the Act. The Commonwealth of Virginia and the town of Wise, Va., intervened as plaintiffs. Plaintiffs' challenge was primarily directed at the interim regulatory program. Plaintiffs alleged that these provisions violate the Commerce Clause, the equal protection and due process guarantees of the Due Process Clause of the Fifth Amendment, the Tenth Amendment, and the Just Compensation Clause of the Fifth Amendment.

The District Court held a 13-day trial on plaintiffs' request for a permanent injunction. The court subsequently issued an order and opinion declaring several central provisions of the Act unconstitutional. 483 F.Supp. 425 (1980). The court rejected plaintiffs' Commerce Clause, equal protection, and substantive due process challenges to the Act. The court held, however, that the Act "operates to 'displace the States' freedom to structure integral operations in areas of traditional functions,' . . . and, therefore, is in contravention of the Tenth Amendment." *Id.*, at 435, quoting *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976). The court also ruled that various provisions of the Act effect an uncompensated taking of private property in violation of the Just Compensation Clause of the Fifth Amendment. Finally, the court agreed with plaintiffs' due process challenges to some of the Act's enforcement provisions. The court permanently enjoined the Secretary from enforcing various provisions of the Act.

The Secretary appeals from that portion of the District Court's judgment declaring various sections of the Act unconstitutional and permanently enjoining their enforcement. Plaintiffs cross-appeal from the District Court's rejection of their Commerce Clause challenge to the Act. We shall usually refer to plaintiffs as "appellees."

II

Appellees argue that the District Court erred in rejecting their challenge to the Act as beyond the scope of congressional power under the Commerce Clause. They insist that the Act's principal goal is regulating the use of private lands within the borders of the States and not, as

¹⁷ With the exception of Alaska, Georgia, and Washington, all States in which surface mining is either conducted or is expected to be conducted submitted proposed state programs to the Secretary by March 3, 1980. The Secretary has made his initial decisions on these programs. Three programs were approved, 8 were approved on condition that the States agree to some modifications, 10 were approved in part and disapproved in part, and 3 were disapproved because the state legislatures had failed to enact the necessary implementing statutes. Virginia's program was among those approved in part and disapproved in part. See 45 Fed. Reg. 69977 (1980).

the District Court found, regulating the interstate commerce effects of surface coal mining. Consequently, appellees contend that the ultimate issue presented is "whether land as such is subject to regulation under the Commerce Clause, i.e., whether land can be regarded as 'in commerce.'" Brief for Virginia Surface Mining & Reclamation Association, Inc., et al. 12 (emphasis in original). In urging us to answer "no" to this question, appellees emphasize that the Court has recognized that land-use regulation is within the inherent police powers of the States and their political subdivisions, and argue that Congress may regulate land use only insofar as the Property Clause grants it control over federal lands.

We do not accept either appellees' framing of the question or the answer they would have us supply. The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding. Here, Congress rationally determined that regulation of surface coal mining is necessary to protect interstate commerce from adverse effects that may result from that activity. This congressional finding is sufficient to sustain the Act as a valid exercise of Congress' power under the Commerce Clause.

In sum, we conclude that the District Court properly rejected appellees' Commerce Clause challenge to the Act. We therefore turn to the court's ruling that the Act contravenes affirmative constitutional limitations on congressional exercise of the commerce power.

III

The District Court invalidated §§515 (d) and (e) of the Act, which prescribe performance standards for surface coal mining on "steep slopes," on the ground that they violate a constitutional limitation on the commerce power imposed by the Tenth Amendment. These provisions require "steep-slope" operators: (i) to reclaim the mined area by completely covering the highwall and returning the site to its "approximate original contour"; (ii) to refrain from dumping spoil material on the downslope below the bench or mining cut; and (iii) to refrain from disturbing land above the highwall unless permitted to do so by the regulatory authority. §515 (d), 30 U. S. C. §1265 (d) (1976 ed., Supp. III). Under §515 (e), a "steep-slope" operator may obtain a variance from the approximate-original-contour requirement by showing that it will allow a postreclamation use that is "deemed to constitute an equal or better economic or public use" than would otherwise be possible. 30 U. S. C. §1265 (e)(3)(A) (1976 ed., Supp. III).

The District Court's ruling relied heavily on our decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976). The District Court viewed the central issue as whether the Act governs the activities of private individuals, or whether it instead regulates the governmental decisions of the States. And although the court acknowledged that the Act "ultimately affects the coal mine operator," 483 F.Supp., at 432, it concluded that the Act contravenes the Tenth Amendment because it interferes with the States' "traditional governmental function" of

regulating land use. *Id.*, at 435. The court held that, as applied to Virginia, the Act's steep-slope provisions impermissibly constrict the State's ability to make "essential decisions." The court found the Act accomplishes this result "through forced relinquishment of state control of land use planning; through loss of state control of its economy; and through economic harm, from expenditure of state funds to implement the act and from destruction of the taxing power of certain counties, cities, and towns." *Id.*, at 435. The court therefore permanently enjoined enforcement of §§515 (d) and (e).

As the District Court itself acknowledged, the steep-slope provisions of the Surface Mining Act govern only the activities of coal mine operators who are private individuals and businesses. Moreover, the States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program. The most that can be said is that the Surface Mining Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.

Appellees argue, however, that the threat of federal usurpation of their regulatory roles coerces the States into enforcing the Surface Mining Act. Appellees also contend that the Act directly regulates the States as States because it establishes mandatory minimum federal standards. In essence, appellees urge us to join the District Court in looking beyond the activities actually regulated by the Act to its conceivable effects on the States' freedom to make decisions in areas of "integral governmental functions." And appellees emphasize, as did the court below, that the Act interferes with the States' ability to exercise their police powers by regulating land use.

The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers. It would therefore be a radical departure from long-established precedent for this Court to hold that the Tenth Amendment prohibits Congress from displacing state police power laws regulating private activity.¹⁸

¹⁸ The remaining justification asserted by the District Court for its Tenth Amendment ruling, one that appellees urge here, is that the steep-slope mining requirements will harm Virginia's economy and destroy the taxing power of some towns and counties in the Commonwealth. In *Oklahoma v. Atkinson Co.*, 313 U.S. 508, 534-535 (1941), the Court rejected the assertion that an adverse impact on state and local economies is a barrier to Congress'

V

The District Court held that two of the Act's provisions violate the Just Compensation Clause of the Fifth Amendment. First, the court found that the steep-slope provisions discussed above effect an uncompensated taking of private property by requiring operators to perform the "economically and physically impossible" task of restoring steep-slope surface mines to their approximate original contour. The court further held that, even if steep-slope surface mines could be restored to their approximate original contour, the value of the mined land after such restoration would have "been diminished to practically nothing." Second, the court found that §522 of the Act effects an unconstitutional taking because it expressly prohibits mining in certain locations and "clearly [prevents] a person from mining his own land or having it mined." Relying on this Court's decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Court held that both of these provisions are unconstitutional because they "[deprive] [coal mine operators] of any use of [their] land, not only the most profitable"

We conclude that the District Court's ruling on the "taking" issue suffers from a fatal deficiency: neither appellees nor the court identified any property in which appellees have an interest that has allegedly been taken by operation of the Act. By proceeding in this fashion, the 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. 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" The Surface Mining Act easily survives scrutiny under this test.

VI

Our examination of appellees' constitutional challenges to the Surface Mining Act persuades us that the Act is not vulnerable to their pre-enforcement challenge. . . . The cases are remanded to the District Court with instructions to dissolve the injunction issued against the Secretary, and for further proceedings consistent with this opinion.

So ordered.

exercise of its power under the Commerce Clause to regulate private activities affecting interstate commerce. We are not persuaded that there are compelling reasons presented in the instant cases for reversing the Court's position.

NEW YORK v. UNITED STATES
505 U.S. 144 (1992)

JUSTICE O'CONNOR delivered the opinion of the Court.

This case implicates one of our Nation's newest problems of public policy and perhaps our oldest question of constitutional law. The public policy issue involves the disposal of radioactive waste: In this case, we address the constitutionality of three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. 99-240, 99 Stat. 1842, 42 U.S.C. §2021b et seq. The constitutional question is as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States. We conclude that while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so. We therefore find that only two of the Act's three provisions at issue are consistent with the Constitution's allocation of power to the Federal Government.

I

We live in a world full of low level radioactive waste. Radioactive material is present in luminous watch dials, smoke alarms, measurement devices, medical fluids, research materials, and the protective gear and construction materials used by workers at nuclear power plants. Low level radioactive waste is generated by the Government, by hospitals, by research institutions, and by various industries. The waste must be isolated from humans for long periods of time, often for hundreds of years. Millions of cubic feet of low level radioactive waste must be disposed of each year. See Berkovitz, "Waste Wars: Did Congress "Nuke" State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985?," 11 Harv. Envtl. L. Rev. 437, 439-440 (1987).

Our Nation's first site for the land disposal of commercial low level radioactive waste opened in 1962 in Beatty, Nevada. Five more sites opened in the following decade: Maxey Flats, Kentucky (1963), West Valley, New York (1963), Hanford, Washington (1965), Sheffield, Illinois (1967), and Barnwell, South Carolina (1971). Between 1975 and 1978, the Illinois site closed because it was full, and water management problems caused the closure of the sites in Kentucky and New York. As a result, since 1979 only three disposal sites— those in Nevada, Washington, and South Carolina —have been in operation. Waste generated in the rest of the country must be shipped to one of these three sites for disposal. See Low-Level Radioactive Waste Regulation 39-40 (M. Burns ed. 1988).

In 1979, both the Washington and Nevada sites were forced to shut down temporarily, leaving South Carolina to shoulder the responsibility of storing low level radioactive waste produced in every part of the country. The Governor of South Carolina, understandably

perturbed, ordered a 50% reduction in the quantity of waste accepted at the Barnwell site. The Governors of Washington and Nevada announced plans to shut their sites permanently.

Faced with the possibility that the Nation would be left with no disposal sites for low level radioactive waste, Congress responded by enacting the Low-Level Radioactive Waste Policy Act, Pub. L. 96-573, 94 Stat. 3347. Relying largely on a report submitted by the National Governors' Association, Congress declared a federal policy of holding each State "responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders," and found that such waste could be disposed of "most safely and efficiently . . . on a regional basis." §4(a)(1), 94 Stat. 3348. The 1980 Act authorized States to enter into regional compacts that, once ratified by Congress, would have the authority beginning in 1986 to restrict the use of their disposal facilities to waste generated within member States. §4(a)(2)(B), 94 Stat. 3348. The 1980 Act included no penalties for States that failed to participate in this plan.

By 1985, only three approved regional compacts had operational disposal facilities; not surprisingly, these were the compacts formed around South Carolina, Nevada, and Washington, the three sited States. The following year, the 1980 Act would have given these three compacts the ability to exclude waste from nonmembers, and the remaining 31 States would have had no assured outlet for their low level radioactive waste. With this prospect looming, Congress once again took up the issue of waste disposal. The result was the legislation challenged here, the Low-Level Radioactive Waste Policy Amendments Act of 1985.

The 1985 Act was again based largely on a proposal submitted by the National Governors' Association. In broad outline, the Act embodies a compromise among the sited and unsited States. The sited States agreed to extend for seven years the period in which they would accept low level radioactive waste from other States. In exchange, the unsited States agreed to end their reliance on the sited States by 1992.

The mechanics of this compromise are intricate. The Act directs: "Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of . . . low-level radioactive waste generated within the State." The Act authorizes States to "enter into such [interstate] compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste." For an additional seven years beyond the period contemplated by the 1980 Act, from the beginning of 1986 through the end of 1992, the three existing disposal sites "shall make disposal capacity available for low-level radioactive waste generated by any source," with certain exceptions not relevant here. But the three States in which the disposal sites are located are permitted to exact a graduated surcharge for waste arriving from outside the regional compact - in 1986-1987, \$10 per cubic foot; in 1988-1989, \$20 per cubic foot; and in 1990-1992, \$40 per cubic foot. After the seven-year transition period expires, approved regional compacts may exclude radioactive waste generated outside the region.

The Act provides three types of incentives to encourage the States to comply with their statutory obligation to provide for the disposal of waste generated within their borders.

Monetary incentives. One quarter of the surcharges collected by the sited States must be transferred to an escrow account held by the Secretary of Energy. The Secretary then makes payments from this account to each State that has complied with a series of deadlines. By July 1, 1986, each State was to have ratified legislation either joining a regional compact or indicating an intent to develop a disposal facility within the State. By January 1, 1988, each unsited compact was to have identified the State in which its facility would be located, and each compact or stand-alone State was to have developed a siting plan and taken other identified steps. By January 1, 1990, each State or compact was to have filed a complete application for a license to operate a disposal facility, or the Governor of any State that had not filed an application was to have certified that the State would be capable of disposing of all waste generated in the State after 1992. The rest of the account is to be paid out to those States or compacts able to dispose of all low level radioactive waste generated within their borders by January 1, 1993. Each State that has not met the 1993 deadline must either take title to the waste generated within its borders or forfeit to the waste generators the incentive payments it has received.

Access incentives. The second type of incentive involves the denial of access to disposal sites. States that fail to meet the July 1986 deadline may be charged twice the ordinary surcharge for the remainder of 1986 and may be denied access to disposal facilities thereafter. States that fail to meet the 1988 deadline may be charged double surcharges for the first half of 1988 and quadruple surcharges for the second half of 1988, and may be denied access thereafter. States that fail to meet the 1990 deadline may be denied access. Finally, States that have not filed complete applications by January 1, 1992, for a license to operate a disposal facility, or States belonging to compacts that have not filed such applications, may be charged triple surcharges..

The take title provision. The third type of incentive is the most severe. The Act provides:

"If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment."

These three incentives are the focus of petitioners' constitutional challenge.

In the seven years since the Act took effect, Congress has approved nine regional compacts, encompassing 42 of the States. All six unsited compacts and four of the unaffiliated

States have met the first three statutory milestones. New York, a State whose residents generate a relatively large share of the Nation's low level radioactive waste, did not join a regional compact. Instead, the State complied with the Act's requirements by enacting legislation providing for the siting and financing of a disposal facility in New York. The State has identified five potential sites, three in Allegany County and two in Cortland County. Residents of the two counties oppose the State's choice of location..

Petitioners—the State of New York and the two counties—filed this suit against the United States in 1990. They sought a declaratory judgment that the Act is inconsistent with the Tenth and Eleventh Amendments to the Constitution, with the Due Process Clause of the Fifth Amendment, and with the Guarantee Clause of Article IV of the Constitution. The States of Washington, Nevada, and South Carolina intervened as defendants. The District Court dismissed the complaint. 757 F. Supp. 10 (NDNY 1990). The Court of Appeals affirmed. 942 F. 2d 114 (CA2 1991). Petitioners have abandoned their Due Process and Eleventh Amendment claims on their way up the appellate ladder; as the case stands before us, petitioners claim only that the Act is inconsistent with the Tenth Amendment and the Guarantee Clause.

II

A

In 1788, in the course of explaining to the citizens of New York why the recently drafted Constitution provided for federal courts, Alexander Hamilton observed: "The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties." The Federalist No. 82, p. 491 (C. Rossiter ed. 1961). Hamilton's prediction has proved quite accurate. While no one disputes the proposition that "the Constitution created a Federal Government of limited powers," *Gregory v. Ashcroft*, 501 U.S. , (1991); and while the Tenth Amendment makes explicit that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"; the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases. At least as far back as *Martin v. Hunter's Lessee*, 1 Wheat. 304, 324 (1816), the Court has resolved questions "of great importance and delicacy" in determining whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States.

These questions can be viewed in either of two ways. In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution. See, e.g., *Perez v. United States*, 402 U.S. 146 (1971); *McCulloch v. Maryland*, 4 Wheat. 316 (1819). In other cases the Court has sought to determine whether an

Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment. See, e.g., *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985); *Lane County v. Oregon*, 7 Wall. 71 (1869). In a case like this one, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

It is in this sense that the Tenth Amendment "states but a truism that all is retained which has not been surrendered." *United States v. Darby*, 312 U.S. 100, 124 (1941). As Justice Story put it, "this amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities." 3 J. Story, *Commentaries on the Constitution of the United States* 752 (1833). This has been the Court's consistent understanding: "The States unquestionably do retain a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." *Garcia v. San Antonio Metropolitan Transit Authority*, *supra*, at 549 (internal quotation marks omitted).

Congress exercises its conferred powers subject to the limitations contained in the Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.

This framework has been sufficiently flexible over the past two centuries to allow for enormous changes in the nature of government. The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role. Among the provisions of the Constitution that have been particularly important in this regard, three concern us here.

First, the Constitution allocates to Congress the power "to regulate Commerce . . . among the several States." Art. I, §8, cl. 3. Interstate commerce was an established feature of life in the

late 18th century. See, e.g., *The Federalist* No. 42, p. 267 (C. Rossiter ed. 1961) ("The defect of power in the existing Confederacy to regulate the commerce between its several members [has] been clearly pointed out by experience"). The volume of interstate commerce and the range of commonly accepted objects of government regulation have, however, expanded considerably in the last 200 years, and the regulatory authority of Congress has expanded along with them. As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942).

Second, the Constitution authorizes Congress "to pay the Debts and provide for the . . . general Welfare of the United States." Art. I, §8, cl. 1. As conventional notions of the proper objects of government spending have changed over the years, so has the ability of Congress to "fix the terms on which it shall disburse federal money to the States." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). Compare, e.g., *United States v. Butler*, *supra*, at 72-75 (spending power does not authorize Congress to subsidize farmers), with *South Dakota v. Dole*, 483 U.S. 203 (1987) (spending power permits Congress to condition highway funds on States' adoption of minimum drinking age). While the spending power is "subject to several general restrictions articulated in our cases," *id.*, at 207, these restrictions have not been so severe as to prevent the regulatory authority of Congress from generally keeping up with the growth of the federal budget.

The Court's broad construction of Congress' power under the Commerce and Spending Clauses has of course been guided, as it has with respect to Congress' power generally, by the Constitution's Necessary and Proper Clause, which authorizes Congress "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." U.S. Const., Art. I., §8, cl. 18. See, e.g., *Legal Tender Case (Juilliard v. Greenman)*, 110 U.S. 421, 449-450 (1884); *McCulloch v. Maryland*, 4 Wheat., at 411-421.

Finally, the Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. As the Federal Government's willingness to exercise power within the confines of the Constitution has grown, the authority of the States has correspondingly diminished to the extent that federal and state policies have conflicted. See, e.g., *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). We have observed that the Supremacy Clause gives the Federal Government "a decided advantage in the delicate balance" the Constitution strikes between State and Federal power. *Gregory v. Ashcroft*, 501 U.S., at .

The actual scope of the Federal Government's authority with respect to the States has changed over the years, therefore, but the constitutional structure underlying and limiting that authority has not. In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in this case as one of ascertaining the limits of the power

delegated to the Federal Government under the affirmative provisions on the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment. Either way, we must determine whether any of the three challenged provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 oversteps the boundary between federal and state authority.

B

Petitioners do not contend that Congress lacks the power to regulate the disposal of low level radioactive waste. Space in radioactive waste disposal sites is frequently sold by residents of one State to residents of another. Regulation of the resulting interstate market in waste disposal is therefore well within Congress' authority under the Commerce Clause. Cf. *Philadelphia v. New Jersey*, 437 U.S. 617, 621-623 (1978); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. _____, (1992) (slip op., at 5). Petitioners likewise do not dispute that under the Supremacy Clause Congress could, if it wished, pre-empt state radioactive waste regulation. Petitioners contend only that the Tenth Amendment limits the power of Congress to regulate in the way it has chosen. Rather than addressing the problem of waste disposal by directly regulating the generators and disposers of waste, petitioners argue, Congress has impermissibly directed the States to regulate in this field.

This case concerns the circumstances under which Congress may use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way. Our cases have established a few principles that guide our resolution of the issue.

1. As an initial matter, Congress may not simply "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981). In *Hodel*, the Court upheld the Surface Mining Control and Reclamation Act of 1977 precisely because it did not "commandeer" the States into regulating mining. The Court found that "the States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government." *Ibid*.

While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions. See *Coyle v. Oklahoma*, 221 U.S. 559, 565 (1911). The Court has been explicit about this distinction. "Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted

with powers, greatly restricted, only upon the States." *Lane County v. Oregon*, 7 Wall., at 76 (emphasis added).

Indeed, the question whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the Framers. In providing for a stronger central government the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. E.g., *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S., at 288-289. The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

2. This is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices. Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests. Two of these methods are of particular relevance here.

First, under Congress' spending power, "Congress may attach conditions on the receipt of federal funds." *South Dakota v. Dole*, 483 U.S., at 206. Such conditions must (among other requirements) bear some relationship to the purpose of the federal spending, *id.*, at 207-208, and n. 3; otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority. Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State's legislative choices.

Second, where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, *supra*, at 288. This arrangement, which has been termed "a program of cooperative federalism," *Hodel*, *supra*, at 289, is replicated in numerous federal statutory schemes. These include the Clean Water Act, 86 Stat. 816, as amended, 33 U.S.C. §1251 et seq. denied, 491 U.S. 905 (1989).

By either of these two methods, as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those

deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not preempted. Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.

By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be preempted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation. See Merritt, 88 Colum. L. Rev., at 61-62; La Pierre, Political Accountability in the National Political Process - The Alternative to Judicial Review of Federalism Issues, 80 Nw. U. L. Rev. 577, 639-665 (1985).

With these principles in mind, we turn to the three challenged provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985.

III

Construed as a whole, the Act comprises three sets of "incentives" for the States to provide for the disposal of low level radioactive waste generated within their borders. We consider each in turn.

A

The first set of incentives works in three steps. First, Congress has authorized States with disposal sites to impose a surcharge on radioactive waste received from other States. Second, the Secretary of Energy collects a portion of this surcharge and places the money in an escrow account. Third, States achieving a series of milestones receive portions of this fund.

The first of these steps is an unexceptionable exercise of Congress' power to authorize the States to burden interstate commerce. While the Commerce Clause has long been understood to limit the States' ability to discriminate against interstate commerce, that limit may be lifted, as it has been here, by an expression of the "unambiguous intent" of Congress. Whether or not the States would be permitted to burden the interstate transport of low level radioactive waste in the

absence of Congress' approval, the States can clearly do so with Congress' approval, which is what the Act gives them.

The second step, the Secretary's collection of a percentage of the surcharge, is no more than a federal tax on interstate commerce, which petitioners do not claim to be an invalid exercise of either Congress' commerce or taxing power. Cf. *United States v. Sanchez*, 340 U.S. 42, 44-45 (1950); *Steward Machine Co. v. Davis*, 301 U.S. 548, 581-583 (1937).

The third step is a conditional exercise of Congress' authority under the Spending Clause: Congress has placed conditions—the achievement of the milestones—on the receipt of federal funds. Petitioners do not contend that Congress has exceeded its authority in any of the four respects our cases have identified. See generally *South Dakota v. Dole*, 483 U.S., at 207-208. The expenditure is for the general welfare, *Helvering v. Davis*, 301 U.S. 619, 640-641 (1937); the States are required to use the money they receive for the purpose of assuring the safe disposal of radioactive waste. 42 U.S.C. §2021e(d)(2)(E). The conditions imposed are unambiguous, *Pennhurst State School and Hospital v. Halderman*, 451 U.S., at 17; the Act informs the States exactly what they must do and by when they must do it in order to obtain a share of the escrow account. The conditions imposed are reasonably related to the purpose of the expenditure, *Massachusetts v. United States*, 435 U.S., at 461; both the conditions and the payments embody Congress' efforts to address the pressing problem of radioactive waste disposal. Finally, petitioners do not claim that the conditions imposed by the Act violate any independent constitutional prohibition. *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 269-270 (1985).

That the States are able to choose whether they will receive federal funds does not make the resulting expenditures any less federal; indeed, the location of such choice in the States is an inherent element in any conditional exercise of Congress' spending power.

The Act's first set of incentives, in which Congress has conditioned grants to the States upon the States' attainment of a series of milestones, is thus well within the authority of Congress under the Commerce and Spending Clauses. Because the first set of incentives is supported by affirmative constitutional grants of power to Congress, it is not inconsistent with the Tenth Amendment.

B

In the second set of incentives, Congress has authorized States and regional compacts with disposal sites gradually to increase the cost of access to the sites, and then to deny access altogether, to radioactive waste generated in States that do not meet federal deadlines. As a simple regulation, this provision would be within the power of Congress to authorize the States to discriminate against interstate commerce. See *Northeast Bancorp, Inc. v. Board of Governors, Fed. Reserve System*, 472 U.S. 159, 174-175 (1985). Where federal regulation of private activity is within the scope of the Commerce Clause, we have recognized the ability of Congress to offer

states the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. See *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S., at 288.

This is the choice presented to non-sited States by the Act's second set of incentives: States may either regulate the disposal of radioactive waste according to federal standards by attaining local or regional self-sufficiency, or their residents who produce radioactive waste will be subject to federal regulation authorizing sited States and regions to deny access to their disposal sites. The affected States are not compelled by Congress to regulate, because any burden caused by a State's refusal to regulate will fall on those who generate waste and find no outlet for its disposal, rather than on the State as a sovereign. A State whose citizens do not wish it to attain the Act's milestones may devote its attention and its resources to issues its citizens deem more worthy; the choice remains at all times with the residents of the State, not with Congress. The State need not expend any funds, or participate in any federal program, if local residents do not view such expenditures or participation as worthwhile. Cf. *Hodel*, *supra*, at 288. Nor must the State abandon the field if it does not accede to federal direction; the State may continue to regulate the generation and disposal of radioactive waste in any manner its citizens see fit.

The Act's second set of incentives thus represents a conditional exercise of Congress' commerce power, along the lines of those we have held to be within Congress' authority. As a result, the second set of incentives does not intrude on the sovereignty reserved to the States by the Tenth Amendment.

C

The take title provision is of a different character. This third so-called "incentive" offers States, as an alternative to regulating pursuant to Congress' direction, the option of taking title to and possession of the low level radioactive waste generated within their borders and becoming liable for all damages waste generators suffer as a result of the States' failure to do so promptly. In this provision, Congress has crossed the line distinguishing encouragement from coercion.

The take title provision offers state governments a "choice" of either accepting ownership of waste or regulating according to the instructions of Congress. Respondents do not claim that the Constitution would authorize Congress to impose either option as a freestanding requirement. On one hand, the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments. Such a forced transfer, standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers. The same is true of the provision requiring the States to become liable for the generators' damages. Standing alone, this provision would be indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents. Either type of federal action would "commandeer" state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority

between federal and state governments. On the other hand, the second alternative held out to state governments—regulating pursuant to Congress' direction—would, standing alone, present a simple command to state governments to implement legislation enacted by Congress. As we have seen, the Constitution does not empower Congress to subject state governments to this type of instruction.

Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two. Unlike the first two sets of incentives, the take title incentive does not represent the conditional exercise of any congressional power enumerated in the Constitution. In this provision, Congress has not held out the threat of exercising its spending power or its commerce power; it has instead held out the threat, should the States not regulate according to one federal instruction, of simply forcing the States to submit to another federal instruction. A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, "the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program," *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, *supra*, at 288, an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution.

The take title provision appears to be unique. No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress. Whether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution.

VII

Some truths are so basic that, like the air around us, they are easily overlooked. Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day. The shortage of disposal sites for radioactive waste is a pressing national problem, but a judiciary that licensed extra-constitutional government with each issue of comparable gravity would, in the long run, be far worse.

States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions

occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," *The Federalist* No. 39, p. 245 (C. Rossiter ed. 1961), reserved explicitly to the States by the Tenth Amendment.

Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program. The Constitution permits both the Federal Government and the States to enact legislation regarding the disposal of low level radioactive waste. The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States to provide for the disposal of the radioactive waste generated within their borders. While there may be many constitutional methods of achieving regional self-sufficiency in radioactive waste disposal, the method Congress has chosen is not one of them. The judgment of the Court of Appeals is accordingly:

Affirmed in part and reversed in part.

SEMINOLE TRIBE OF FLORIDA v. FLORIDA
517 U.S. 44 (1996)

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion. SOUTER, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The Indian Gaming Regulatory Act provides that an Indian tribe may conduct certain gaming activities only in conformance with a valid compact between the tribe and the State in which the gaming activities are located. 102 Stat. 2475, 25 U.S.C. §2710(d)(1)(C). The Act, passed by Congress under the Indian Commerce Clause, U.S. Const., Art. I, §10, cl. 3, imposes upon the States a duty to negotiate in good faith with an Indian tribe toward the formation of a compact, §2710(d)(3)(A), and authorizes a tribe to bring suit in federal court against a State in order to compel performance of that duty, §2710(d)(7). We hold that notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power, and therefore §2710(d)(7) cannot grant jurisdiction over a State that does not consent to be sued. We further hold that the doctrine of *Ex parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908), may not be used to enforce §2710(d)(3) against a state official.¹⁹

It is so ordered.

JUSTICE STEVENS, dissenting.[omitted]

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

In holding the State of Florida immune to suit under the Indian Gaming Regulatory Act, the Court today holds for the first time since the founding of the Republic that Congress has no authority to subject a State to the jurisdiction of a federal court at the behest of an individual asserting a federal right. Although the Court invokes the Eleventh Amendment as authority for this proposition, the only sense in which that amendment might be claimed as pertinent here was tolerantly phrased by JUSTICE STEVENS in his concurring opinion in *Pennsylvania v. Union Gas*, 491 U.S. 1, 23, 105 L. Ed. 2d 1, 109 S. Ct. 2273 (1989) (STEVENS, J., concurring). There, he explained how it has come about that we have two Eleventh Amendments, the one ratified in 1795, the other (so-called) invented by the Court nearly a century later in *Hans v. Louisiana*, 134

¹⁹ Respondents also contend that the Act mandates state regulation of Indian gaming and therefore violates the Tenth Amendment by allowing federal officials to avoid political accountability for those actions for which they are in fact responsible. See *New York v. United State*, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992). This argument was not considered below by either the Eleventh Circuit or the District Court, and is not fairly within the question presented. Therefore we do not consider it here.

U.S. 1, 33 L. Ed. 842, 10 S. Ct. 504 (1890). JUSTICE STEVENS saw in that second Eleventh Amendment no bar to the exercise of congressional authority under the Commerce Clause in providing for suits on a federal question by individuals against a State, and I can only say that after my own canvass of the matter I believe he was entirely correct in that view, for reasons given below.

I

It is useful to separate three questions: (1) whether the States enjoyed sovereign immunity if sued in their own courts in the period prior to ratification of the National Constitution; (2) if so, whether after ratification the States were entitled to claim some such immunity when sued in a federal court exercising jurisdiction either because the suit was between a State and a non-state litigant who was not its citizen, or because the issue in the case raised a federal question; and (3) whether any state sovereign immunity recognized in federal court may be abrogated by Congress.

The answer to the first question is not clear, although some of the Framers assumed that States did enjoy immunity in their own courts. The second question was not debated at the time of ratification, except as to citizen-state diversity jurisdiction; there was no unanimity, but in due course the Court in *Chisholm v. Georgia*, 2 U.S. 419, 2 Dall. 419, 1 L. Ed. 440 (1793), answered that a state defendant enjoyed no such immunity.

The adoption of the Eleventh Amendment soon changed the result in *Chisholm*, not by mentioning sovereign immunity, but by eliminating citizen-state diversity jurisdiction over cases with state defendants. The Court [in *Hans v. Louisiana*, 134 U.S. 1, 33 L. Ed. 842, 10 S. Ct. 504 (1890)] erroneously assumed that a State could plead sovereign immunity against a noncitizen suing under federal question jurisdiction, and for that reason held that a State must enjoy the same protection in a suit by one of its citizens.

The Court's answer today to the third question is likewise at odds with the Founders' view that common law, when it was received into the new American legal systems, was always subject to legislative amendment. In ignoring the reasons for this pervasive understanding at the time of the ratification, and in holding that a non-textual common-law rule limits a clear grant of congressional power under Article I, the Court follows a course that has brought it to grief before in our history, and promises to do so again.

We have assumed, without deciding, that congressional power to abrogate state sovereign immunity exists even when §5 of the Fourteenth Amendment has an application. A majority of this Court was willing to make that assumption in *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96, 101, 106 L. Ed. 2d 76, 109 S. Ct. 2818 (1989) (plurality opinion), in *Welch v. Texas Dept. of Highways and Public Transp.*, *supra*, at 475 (plurality opinion). The Court could not have been unaware that its decision of cases like *Hoffman* and *Welch*, on the ground that the statutes at issue lacked a plain statement of intent to abrogate, would invite

Congress to attempt abrogation in statutes like the Indian Gaming Regulatory Act, 25 U.S.C. §2701 et seq. (IGRA).

American reluctance to import English common law wholesale into the New World is traceable to the early colonial period. One scholar of that time has written that "the process which we may call the reception of the English common law by the colonies was not so simple as the legal theory would lead us to assume. While their general legal conceptions were conditioned by, and their terminology derived from, the common law, the early colonists were far from applying it as a technical system, they often ignored it or denied its subsidiary force, and they consciously departed from many of its most essential principles." P. Reinsch, *English Common Law in the Early American Colonies* 58 (1899). For a variety of reasons, including the absence of trained lawyers and judges, the dearth of law books, the religious and ideological commitments of the early settlers, and the novel conditions of the New World, the colonists turned to a variety of other sources in addition to principles of common law.

The Framers and their contemporaries did not agree about the place of common-law state sovereign immunity even as to federal jurisdiction resting on the Citizen-State Diversity Clauses. On the other hand, James Madison, John Marshall, and Alexander Hamilton all appear to have believed that the common-law immunity from suit would survive the ratification so as to be at a State's disposal when jurisdiction would depend on diversity. This would have left the States free to enjoy a traditional immunity as defendants without barring the exercise of judicial power over them if they chose to enter the federal courts as diversity plaintiffs or to waive their immunity as diversity defendants.

Hamilton says that a State is "not . . . amenable to the suit of an individual without its consent . . . unless . . . there is a surrender of this immunity in the plan of the convention." *The Federalist* No. 81, at 548-549. He immediately adds, however, that:

"As the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act exclusively delegated to the United States. This exclusive delegation or rather this alienation of State sovereignty would only exist in three cases; where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant."

The Federalist No. 32, at 200 (emphasis in original).

The majority sees in these statements, and chiefly in Hamilton's discussion of sovereign immunity in *Federalist* No. 81, an unequivocal mandate "which would preclude all federal jurisdiction over an unconsenting State." But there is no such mandate to be found.

The first embarrassment Hamilton's discussion creates for the majority turns on the fact that the power to regulate commerce with Indian Tribes has been interpreted as making "Indian relations . . . the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234, 84 L. Ed. 2d 169, 105 S. Ct. 1245 (1985).²⁰ We have accordingly recognized that "state laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170-171, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973) (internal quotation marks omitted); see also *Rice v. Olson*, 324 U.S. 786, 789, 89 L. Ed. 1367, 65 S. Ct. 989 (1945) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history"). We have specifically held, moreover, that the states have no power to regulate gambling on Indian lands. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-222, 94 L. Ed. 2d 244, 107 S. Ct. 1083 (1987). In sum, since the States have no sovereignty in the regulation of commerce with the tribes, on Hamilton's view there is no source of sovereign immunity to assert in a suit based on congressional regulation of that commerce. If Hamilton is good authority, the majority of the Court today is wrong.

In sum, either the majority reads Hamilton as I do, to say nothing about sovereignty or immunity in such a case, or it will have to read him to say something about it that bars any state immunity claim. That is the dilemma of the majority's reliance on Hamilton's Federalist No. 81, with its reference to No. 32. Either way, he is no authority for the Court's position.

Thus, the Court's attempt to convert isolated statements by the Framers into answers to questions not before them is fundamentally misguided. The Court's difficulty is far more fundamental however, than inconsistency with a particular quotation, for the Court's position runs afoul of the general theory of sovereignty that gave shape to the Framers' enterprise. An enquiry into the development of that concept demonstrates that American political thought had so revolutionized the concept of sovereignty itself that calling for the immunity of a State as against the jurisdiction of the national courts would have been sheer illogic.

We said in *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779, 115 L. Ed. 2d 686, 111 S. Ct. 2578 (1991) that "the States entered the federal system with their sovereignty intact," but we surely did not mean that they entered that system with the sovereignty they would have claimed if each State had assumed independent existence in the community of nations, for even the Articles of Confederation allowed for less than that. While there is no need here to calculate exactly how close the American States came to sovereignty in the classic sense prior to ratification of the Constitution, it is clear that the act of ratification affected their sovereignty in a way different from any previous political event in America or anywhere else. For the adoption of

²⁰ See also *Worcester v. Georgia*, 6 Pet. 515, 561 (1832) ("The Cherokee nation . . . is a distinct community . . . in which the laws of Georgia can have no force. . . . The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States"). This Court has repeatedly rejected state attempts to assert sovereignty over Indian lands.

the Constitution made them members of a novel federal system that sought to balance the States' exercise of some sovereign prerogatives delegated from their own people with the principle of a limited but centralizing federal supremacy.

As a matter of political theory, this federal arrangement of dual delegated sovereign powers truly was a more revolutionary turn than the late war had been. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S., (1995) (slip op., at 1) (KENNEDY, J., concurring) ("Federalism was our Nation's own discovery. The Framers split the atom of sovereignty"). Before the new federal scheme appeared, 18th-century political theorists had assumed that "there must reside somewhere in every political unit a single, undivided, final power, higher in legal authority than any other power, subject to no law, a law unto itself." B. Bailyn, *The Ideological Origins of the American Revolution* 198 (1967); see also Wood 345. The American development of divided sovereign powers, which "shattered . . . the categories of government that had dominated Western thinking for centuries," *id.*, at 385, was made possible only by a recognition that the ultimate sovereignty rests in the people themselves. See *id.*, at 530 (noting that because "none of these arguments about 'joint jurisdictions' and 'coequal sovereignties' convincingly refuted the Antifederalist doctrine of a supreme and indivisible sovereignty," the Federalists could succeed only by emphasizing that the supreme power "'resides in the PEOPLE, as the fountain of government'" (citing *1 Pennsylvania and the Federal Constitution, 1787-1788*, p. 302 (J. McMaster & F. Stone, eds. 1888) (quoting James Wilson). The people possessing this plenary bundle of specific powers were free to parcel them out to different governments and different branches of the same government as they saw fit.

Given this metamorphosis of the idea of sovereignty in the years leading up to 1789, the question whether the old immunity doctrine might have been received as something suitable for the new world of federal question jurisdiction is a crucial one. The answer is that sovereign immunity as it would have been known to the Framers before ratification thereafter became inapplicable as a matter of logic in a federal suit raising a federal question. The old doctrine, after all, barred the involuntary subjection of a sovereign to the system of justice and law of which it was itself the font, since to do otherwise would have struck the common-law mind from the Middle Ages onward as both impractical and absurd. But the ratification demonstrated that state governments were subject to a superior regime of law in a judicial system established, not by the State, but by the people through a specific delegation of their sovereign power to a National Government that was paramount within its delegated sphere. When individuals sued States to enforce federal rights, the Government that corresponded to the "sovereign" in the traditional common-law sense was not the State but the National Government, and any state immunity from the jurisdiction of the Nation's courts would have required a grant from the true sovereign, the people, in their Constitution, or from the Congress that the Constitution had empowered.

Given the Framers' general concern with curbing abuses by state governments, it would be amazing if the scheme of delegated powers embodied in the Constitution had left the National Government powerless to render the States judicially accountable for violations of federal rights.

Today's majority discounts this concern. Without citing a single source to the contrary, the Court dismisses the historical evidence regarding the Framers' vision of the relationship between national and state sovereignty, and reassures us that "the Nation survived for nearly two centuries without the question of the existence of [the abrogation] power ever being presented to this Court." Although for reasons of stare decisis I would not today disturb the century-old precedent, I surely would not extend its error by placing the common-law immunity it mistakenly recognized beyond the power of Congress to abrogate.

Session 9. State Sovereignty

HADACHECK v. SEBASTIAN 239 U.S. 394 (1915)

Mr. Justice McKenna delivered the opinion of the court.

Petitioner was convicted of a misdemeanor for the violation of an ordinance of the City of Los Angeles which makes it unlawful for any person to establish or operate a brick yard or brick kiln, or any establishment, factory or place for the manufacture or burning of brick within described limits in the city. Sentence was pronounced against him and he was committed to the custody of defendant in error as Chief of Police of the City of Los Angeles.

Being so in custody he filed a petition in the Supreme Court of the State for a writ of habeas corpus. The court rendered judgment discharging the writ and remanding petitioner to custody.

The petition sets forth the reason for resorting to habeas corpus and that petitioner is the owner of a tract of land within the limits described in the ordinance upon which tract of land there is a very valuable bed of clay, of great value for the manufacture of brick of a fine quality, worth to him not less than \$100,000 per acre or about \$800,000 for the entire tract for brick-making purposes, and not exceeding \$60,000 for residential purposes or for any purpose other than the manufacture of brick. That he has made excavations of considerable depth and covering a very large area of the property and that on account thereof the land cannot be utilized for residential purposes or any purpose other than that for which it is now used. That he purchased the land because of such bed of clay and for the purpose of manufacturing brick; that it was at the time of purchase outside of the limits of the city and distant from dwellings and other habitations and that he did not expect or believe, nor did other owners of property in the vicinity expect or believe, that the territory would be annexed to the city. That he has erected expensive machinery for the manufacture of bricks of fine quality which have been and are being used for building purposes in and about the city.

That if the ordinance be declared valid he will be compelled to entirely abandon his business and will be deprived of the use of his property.

That the manufacture of brick must necessarily be carried on where suitable clay is found and the clay cannot be transported to some other location, and, besides, the clay upon his property is particularly fine and clay of as good quality cannot be found in any other place within the city where the same can be utilized for the manufacture of brick. That within the prohibited district there is one other brick yard besides that of plaintiff in error.

That there is no reason for the prohibition of the business; that its maintenance cannot be and is not in the nature of a nuisance as defined in §3479 of the Civil Code of the State, and

cannot be dangerous or detrimental to health or the morals or safety or peace or welfare or convenience of the people of the district or city.

That the business is so conducted as not to be in any way or degree a nuisance; no noises arise therefrom, and no noxious odors, and that by the use of certain means (which are described) provided and the situation of the brick yard an extremely small amount of smoke is emitted from any kiln and what is emitted is so dissipated that it is not a nuisance nor in any manner detrimental to health or comfort. That during the seven years which the brick yard has been conducted no complaint has been made of it, and no attempt has ever been made to regulate it.

That the city embraces 107.62 square miles in area and 75% of it is devoted to residential purposes; that the district described in the ordinance includes only about three square miles, is sparsely settled and contains large tracts of unsubdivided and unoccupied land; and that the boundaries of the district were determined for the sole and specific purpose of prohibiting and suppressing the business of petitioner and that of the other brick yard.

That there are and were at the time of the adoption of the ordinance in other districts of the city thickly built up with residences brick yards maintained more detrimental to the inhabitants of the city. That a petition was filed, signed by several hundred persons, representing such brick yards to be a nuisance and no ordinance or regulation was passed in regard to such petition and the brick yards are operated without hindrance or molestation. That other brick yards are permitted to be maintained without prohibition or regulation.

That no ordinance or regulation of any kind has been passed at any time regulating or attempting to regulate brick yards or inquiry made whether they could be maintained without being a nuisance or detrimental to health.

That the ordinance does not state a public offense and is in violation of the constitution of the State and the Fourteenth Amendment to the Constitution of the United States.

That the business of petitioner is a lawful one, none of the materials used in it are combustible, the machinery is of the most approved pattern and its conduct will not create a nuisance.

There is an allegation that the ordinance if enforced fosters and will foster a monopoly and protects and will protect other persons engaged in the manufacture of brick in the city, and discriminates and will discriminate against petitioner in favor of such other persons who are his competitors, and will prevent him from entering into competition with them.

The petition, after almost every paragraph, charges a deprivation of property, the taking of property without compensation, and that the ordinance is in consequence invalid.

We have given this outline of the petition as it presents petitioner's contentions, with the circumstances (which we deem most material) that give color and emphasis to them.

But there are substantial traverses made by the return to the writ, among others, a denial of the charge that the ordinance was arbitrarily directed against the business of petitioner, and it is alleged that there is another district in which brick yards are prohibited.

There was a denial of the allegations that the brick yard was conducted or could be conducted sanitarily or was not offensive to health. And there were affidavits supporting the denials. In these it was alleged that the fumes, gases, smoke, soot, steam and dust arising from petitioner's brick-making plant have from time to time caused sickness and serious discomfort to those living in the vicinity.

There was no specific denial of the value of the property or that it contained deposits of clay or that the latter could not be removed and manufactured into brick elsewhere. There was, however, a general denial that the enforcement of the ordinance would "entirely deprive petitioner of his property and the use thereof."

How the Supreme Court dealt with the allegations, denials and affidavits we can gather from its opinion. The court said, through Mr. Justice Sloss, 165 California, p. 416:

"The district to which the prohibition was applied contains about three square miles. The petitioner is the owner of a tract of land, containing eight acres, more or less, within the district described in the ordinance. He acquired his land in 1902, before the territory to which the ordinance was directed had been annexed to the city of Los Angeles. His land contains valuable deposits of clay suitable for the manufacture of brick, and he has, during the entire period of his ownership, used the land for brickmaking, and has erected thereon kilns, machinery and buildings necessary for such manufacture. The land, as he alleges, is far more valuable for brickmaking than for any other purpose."

The court considered the business one which could be regulated and that regulation was not precluded by the fact "that the value of investments made in the business prior to any legislative action will be greatly diminished," and that no complaint could be based upon the fact that petitioner had been carrying on the trade in that locality for a long period.

And, considering the allegations of the petition, the denials of the return and the evidence of the affidavits, the court said that the latter tended to show that the district created had become primarily a residential section and that the occupants of the neighboring dwellings are seriously incommoded by the operations of petitioner; and that such evidence, "when taken in connection with the presumptions in favor of the propriety of the legislative determination, overcame the contention that the prohibition of the ordinance was a mere arbitrary invasion of private right, not supported by any tenable belief that the continuance of the business was so detrimental to the interests of others as to require suppression."

The court, on the evidence, rejected the contention that the ordinance was not in good faith enacted as a police measure and that it was intended to discriminate against petitioner or that it was actuated by any motive of injuring him as an individual.

The charge of discrimination between localities was not sustained. The court expressed the view that the determination of prohibition was for the legislature and that the court, without regard to the fact shown in the return that there was another district in which brick-making was prohibited, could not sustain the claim that the ordinance was not enacted in good faith but was designed to discriminate against petitioner and the other brick yard within the district. "The facts before us," the court finally said, "would certainly not justify the conclusion that the ordinance here in question was designed, in either its adoption or its enforcement, to be anything but what it purported to be, viz., a legitimate regulation, operating alike upon all who came within its terms."

We think the conclusion of the court is justified by the evidence and makes it unnecessary to review the many cases cited by petitioner in which it is decided that the police power of a state cannot be arbitrarily exercised. The principle is familiar, but in any given case it must plainly appear to apply. It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. *Chicago & Alton R.R. v. Tranbarger*, 238 U.S. 67, 78. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community. The logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground and that if it grows at all it can only grow as the environment of the occupations that are usually banished to the purlieus.

The police power and to what extent it may be exerted we have recently illustrated in *Reinman v. Little Rock*, 237 U.S. 171. The circumstances of the case were very much like those of the case at bar and give reply to the contentions of petitioner, especially that which asserts that a necessary and lawful occupation that is not a nuisance per se cannot be made so by legislative declaration. There was a like investment in property, encouraged by the then conditions; a like reduction of value and deprivation of property was asserted against the validity of the ordinance there considered; a like assertion of an arbitrary exercise of the power of prohibition. Against all of these contentions, and causing the rejection of them all, was adduced the police power. There was a prohibition of a business, lawful in itself, there as here. It was a livery stable there; a brick yard here. They differ in particulars, but they are alike in that which cause and justify prohibition in defined localities—that is, the effect upon the health and comfort of the community.

The ordinance passed upon prohibited the conduct of the business within a certain defined area in Little Rock, Arkansas. This court said of it: granting that the business was not a nuisance per se, it was clearly within the police power of the State to regulate it, “and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law.” And the only limitation upon the power was stated to be that the power could not be exerted arbitrarily or with unjust discrimination. There was a citation of cases. We think the present case is within the ruling thus declared.

There is a distinction between *Reinman v. Little Rock* and the case at bar. There a particular business was prohibited which was not affixed to or dependent upon its locality; it could be conducted elsewhere. Here, it is contended, the latter condition does not exist, and it is alleged that the manufacture of brick must necessarily be carried on where suitable clay is found and that the clay on petitioner’s property cannot be transported to some other locality. This is not urged as a physical impossibility but only, counsel say, that such transportation and the transportation of the bricks to places where they could be used in construction work would be prohibitive “from a financial standpoint.” But upon the evidence the Supreme Court considered the case, as we understand its opinion, from the standpoint of the offensive effects of the operation of a brick yard and not from the deprivation of the deposits of clay, and distinguished *Ex parte Kelso*, 147 California, 609, wherein the court declared invalid an ordinance absolutely prohibiting the maintenance or operation of a rock or stone quarry within a certain portion of the city and county of San Francisco. The court there said that the effect of the ordinance was “to absolutely deprive the owners of real property within such limits of a valuable right incident to their ownership, viz., the right to extract therefrom such rock and stone as they might find it to their advantage to dispose of.” The court expressed the view that the removal could be regulated but that “an absolute prohibition of such removal under the circumstances,” could not be upheld.

In the present case there is no prohibition of the removal of the brick clay; only a prohibition within the designated locality of its manufacture into bricks. And to this feature of the ordinance our opinion is addressed. Whether other questions would arise if the ordinance were broader, and opinion on such questions, we reserve.

Petitioner invokes the equal protection clause of the Constitution and charges that it is violated in that the ordinance (1) “prohibits him from manufacturing brick upon his property while his competitors are permitted, without regulation of any kind, to manufacture brick upon property situated in all respects similarly to that of plaintiff in error”; and (2) that it “prohibits the conduct of his business while it permits the maintenance within the same district of any other kind of business, no matter how objectionable the same may be, either in its nature or in the manner in which it is conducted.”

If we should grant that the first specification shows a violation of classification, that is, a distinction between businesses which was not within the legislative power, petitioner’s contention encounters the objection that it depends upon an inquiry of fact which the record does

not enable us to determine. It is alleged in the return to the petition that brickmaking is prohibited in one other district and an ordinance is referred to regulating business in other districts. To this plaintiff in error replied that the ordinance attempts to prohibit the operation of certain businesses having mechanical power and does not prohibit the maintenance of any business or the operation of any machine that is operated by animal power. In other words, petitioner makes his contention depend upon disputable considerations of classification and upon a comparison of conditions of which there is no means of judicial determination and upon which nevertheless we are expected to reverse legislative action exercised upon matters of which the city has control.

To a certain extent the latter comment may be applied to other contentions, and, besides, there is no allegation or proof of other objectionable businesses being permitted within the district, and a speculation of their establishment or conduct at some future time is too remote.

In his petition and argument something is made of the ordinance as fostering a monopoly and suppressing his competition with other brickmakers. The charge and argument are too illusive. It is part of the charge that the ordinance was directed against him. The charge, we have seen, was rejected by the Supreme Court, and we find nothing to justify it.

It may be that brick yards in other localities within the city where the same conditions exist are not regulated or prohibited, but it does not follow that they will not be. That petitioner's business was first in time to be prohibited does not make its prohibition unlawful. And it may be, as said by the Supreme Court of the State, that the conditions justify a distinction. However, the inquiries thus suggested are outside of our province.

There are other and subsidiary contentions which, we think, do not require discussion. They are disposed of by what we have said. It may be that something else than prohibition would have satisfied the conditions. Of this, however, we have no means of determining, and besides we cannot declare invalid the exertion of a power which the city undoubtedly has because of a charge that it does not exactly accommodate the conditions or that some other exercise would have been better or less harsh. We must accord good faith to the city in the absence of a clear showing to the contrary and an honest exercise of judgment upon the circumstances which induced its action.

Judgment affirmed.

ADKINS v. CHILDREN'S HOSPITAL OF THE DISTRICT OF COLUMBIA
261 U.S. 525 (1923)

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The question presented for determination by these appeals is the constitutionality of the Act of September 19, 1918, providing for the fixing of minimum wages for women and children in the District of Columbia. 40 Stat. 960, c. 174.

It is declared (§23) that the purposes of the act are "to protect the women and minors of the District from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain decent standards of living; and the Act in each of its provisions and in its entirety shall be interpreted to effectuate these purposes."

The appellee in the first case is a corporation maintaining a hospital for children in the District. It employs a large number of women in various capacities, with whom it had agreed upon rates of wages and compensation satisfactory to such employees, but which in some instances were less than the minimum wage fixed by an order of the board made in pursuance of the act. The women with whom appellee had so contracted were all of full age and under no legal disability. The instant suit was brought by the appellee in the Supreme Court of the District to restrain the board from enforcing or attempting to enforce its order on the ground that the same was in contravention of the Constitution, and particularly the due process clause of the Fifth Amendment.

The judicial duty of passing upon the constitutionality of an act of Congress is one of great gravity and delicacy. The statute here in question has successfully borne the scrutiny of the legislative branch of the government, which, by enacting it, has affirmed its validity; and that determination must be given great weight. This Court, by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt. But if by clear and indubitable demonstration a statute be opposed to the Constitution we have no choice but to say so. The Constitution, by its own terms, is the supreme law of the land, emanating from the people, the repository of ultimate sovereignty under our form of government.

The statute now under consideration is attacked upon the ground that it authorizes an unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the Fifth Amendment. That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause, is settled by the decisions of this Court and is no longer open to question. *Allgeyer v. Louisiana*, 165 U.S. 578, 591; *New York Life Insurance Co. v. Dodge*, 246 U.S. 357, 373-374; *Coppage v. Kansas*, 236 U.S. 1, 10, 14; *Adair v. United States*, 208 U.S. 161; *Lochner v. New York*, 198 U.S. 45; *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746; *Muller v. Oregon*, 208 U.S. 412, 421. Within this liberty are contracts of employment of labor. In making such contracts, generally speaking, the parties have

an equal right to obtain from each other the best terms they can as the result of private bargaining.

There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception....

It has been said that legislation of the kind now under review is required in the interest of social justice, for whose ends freedom of contract may lawfully be subjected to restraint. The liberty of the individual to do as he pleases, even in innocent matters, is not absolute. It must frequently yield to the common good, and the line beyond which the power of interference may not be pressed is neither definite nor unalterable but may be made to move, within limits not well defined, with changing need and circumstance. Any attempt to fix a rigid boundary would be unwise as well as futile. But, nevertheless, there are limits to the power, and when these have been passed, it becomes the plain duty of the courts in the proper exercise of their authority to so declare. To sustain the individual freedom of action contemplated by the Constitution, is not to strike down the common good but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.

It follows from what has been said that the act in question passes the limit prescribed by the Constitution, and, accordingly, the decrees of the court below are

Affirmed.

VILLAGE OF EUCLID v. AMBLER REALTY CO. .
272 U.S. 365 (1926)

Judges: Taft, Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford, Stone

Mr. Justice Sutherland delivered the opinion of the Court.

The Village of Euclid is an Ohio municipal corporation. It adjoins and practically is a suburb of the City of Cleveland. Its estimated population is between 5,000 and 10,000, and its area from twelve to fourteen square miles, the greater part of which is farm lands or unimproved acreage. It lies, roughly, in the form of a parallelogram measuring approximately three and one-half miles each way. East and west it is traversed by three principal highways: Euclid Avenue, through the southerly border, St. Clair Avenue, through the central portion, and Lake Shore Boulevard, through the northerly border in close proximity to the shore of Lake Erie. The Nickel Plate railroad lies from 1,500 to 1,800 feet north of Euclid Avenue, and the Lake Shore railroad 1,600 feet farther to the north. The three highways and the two railroads are substantially parallel.

Appellee is the owner of a tract of land containing 68 acres, situated in the westerly end of the village, abutting on Euclid Avenue to the south and the Nickel Plate railroad to the north. Adjoining this tract, both on the east and on the west, there have been laid out restricted residential plats upon which residences have been erected.

On November 13, 1922, an ordinance was adopted by the Village Council, establishing a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, two-family houses, single family houses, etc., the lot area to be built upon, the size and height of buildings, etc.

The entire area of the village is divided by the ordinance into six classes of use districts, denominated U-1 to U-6, inclusive; three classes of height districts, denominated H-1 to H-3, inclusive; and four classes of area districts, denominated A-1 to A-4, inclusive. The use districts are classified in respect of the buildings which may be erected within their respective limits, as follows: U-1 is restricted to single family dwellings, public parks, water towers and reservoirs...; U-2 is extended to include two-family dwellings; U-3 is further extended to include apartment houses, hotels, churches, schools, public libraries, museums, private clubs, community center buildings, hospitals, sanitariums, public playgrounds and recreation buildings, and a city hall and courthouse; U-4 is further extended to include banks, offices, studios, telephone exchanges, fire and police stations, restaurants, theatres and moving picture shows, retail stores and shops, sales offices, sample rooms, wholesale stores for hardware, drugs and groceries, stations for gasoline and oil (not exceeding 1,000 gallons storage) and for ice delivery, skating rinks and dance halls, electric substations, job and newspaper printing, public garages for motor vehicles, stables and wagon sheds (not exceeding five horses, wagons or motor trucks) and distributing stations for

central store and commercial enterprises; U-5 is further extended to include billboards and advertising signs (if permitted), warehouses, ice and ice cream manufacturing and cold storage plants, bottling works, milk bottling and central distribution stations, laundries, carpet cleaning, dry cleaning and dyeing establishments, blacksmith, horseshoeing, wagon and motor vehicle repair shops, freight stations, street car barns, stables and wagon sheds (for more than five horses, wagons or motor trucks), and wholesale produce markets and salesrooms; U-6 is further extended to include plants for sewage disposal and for producing gas, garbage and refuse incineration, scrap iron, junk, scrap paper and rag storage, aviation fields, cemeteries, crematories, penal and correctional institutions, insane and feeble minded institutions, storage of oil and gasoline (not to exceed 25,000 gallons), and manufacturing and industrial operations of any kind other than, and any public utility not included in, a class U-1, U-2, U-3, U-4 or U-5 use. There is a seventh class of uses which is prohibited altogether.

Class U-1 is the only district in which buildings are restricted to those enumerated. In the other classes the uses are cumulative; that is to say, uses in class U-2 include those enumerated in the preceding class, U-1; class U-3 includes uses enumerated in the preceding classes, U-2 and U-1; and so on. In addition to the enumerated uses, the ordinance provides for accessory uses, that is, for uses customarily incident to the principal use, such as private garages. Many regulations are provided in respect of such accessory uses.

The height districts are classified as follows: In class H-1, buildings are limited to a height of two and one-half stories or thirty-five feet; in class H-2, to four stories or fifty feet; in class H-3, to eighty feet. To all of these, certain exceptions are made, as in the case of church spires, water tanks, etc.

The classification of area districts is: In A-1 districts, dwellings or apartment houses to accommodate more than one family must have at least 5,000 square feet for interior lots and at least 4,000 square feet for corner lots; in A-2 districts, the area must be at least 2,500 square feet for interior lots, and 2,000 square feet for corner lots; in A-3 districts, the limits are 1,250 and 1,000 square feet, respectively; in A-4 districts, the limits are 900 and 700 square feet, respectively. The ordinance contains, in great variety and detail, provisions in respect of width of lots, front, side and rear yards, and other matters, including restrictions and regulations as to the use of bill boards, sign boards and advertising signs.

A single family dwelling consists of a basement and not less than three rooms and a bathroom. A two-family dwelling consists of a basement and not less than four living rooms and a bathroom for each family; and is further described as a detached dwelling for the occupation of two families, one having its principal living rooms on the first floor and the other on the second floor.

Appellee's tract of land comes under U-2, U-3 and U-6. The first strip of 620 feet immediately north of Euclid Avenue falls in class U-2, the next 130 feet to the north, in U-3, and

the remainder in U-6. The uses of the first 620 feet, therefore, do not include apartment houses, hotels, churches, schools, or other public and semi-public buildings, or other uses enumerated in respect of U-3 to U-6, inclusive. The uses of the next 130 feet include all of these, but exclude industries, theatres, banks, shops, and the various other uses set forth in respect of U-4 to U-6, inclusive.

The lands lying between the two railroads for the entire length of the village area and extending some distance on either side to the north and south, having an average width of about 1,600 feet, are left open, with slight exceptions, for industrial and all other uses. This includes the larger part of appellee's tract. Approximately one-sixth of the area of the entire village is included in U-5 and U-6 use districts. That part of the village lying south of Euclid Avenue is principally in U-1 districts. The lands lying north of Euclid Avenue and bordering on the long strip just described are included in U-1, U-2, U-3 and U-4 districts, principally in U-2.

The ordinance is assailed on the grounds that it is in derogation of §1 of the Fourteenth Amendment to the Federal Constitution in that it deprives appellee of liberty and property without due process of law and denies it the equal protection of the law, and that it offends against certain provisions of the Constitution of the State of Ohio. The prayer of the bill is for an injunction restraining the enforcement of the ordinance and all attempts to impose or maintain as to appellee's property any of the restrictions, limitations or conditions. The court below held the ordinance to be unconstitutional and void, and enjoined its enforcement. 297 Fed. 307.

Before proceeding to a consideration of the case, it is necessary to determine the scope of the inquiry. The bill alleges that the tract of land in question is vacant and has been held for years for the purpose of selling and developing it for industrial uses, for which it is especially adapted, being immediately in the path of progressive industrial development; that for such uses it has a market value of about \$10,000 per acre, but if the use be limited to residential purposes the market value is not in excess of \$2,500 per acre; that the first 200 feet of the parcel back from Euclid Avenue, if unrestricted in respect of use, has a value of \$150 per front foot, but if limited to residential uses, and ordinary mercantile business be excluded therefrom, its value is not in excess of \$50 per front foot.

It is specifically averred that the ordinance attempts to restrict and control the lawful uses of appellee's land so as to confiscate and destroy a great part of its value; that it is being enforced in accordance with its terms; that prospective buyers of land for industrial, commercial and residential uses in the metropolitan district of Cleveland are deterred from buying any part of this land because of the existence of the ordinance and the necessity thereby entailed of conducting burdensome and expensive litigation in order to vindicate the right to use the land for lawful and legitimate purposes; that the ordinance constitutes a cloud upon the land, reduces and destroys its value, and has the effect of diverting the normal industrial, commercial and residential development thereof to other and less favorable locations.

The record goes no farther than to show, as the lower court found, that the normal, and reasonably to be expected, use and development of that part of appellee's land adjoining Euclid Avenue is for general trade and commercial purposes, particularly retail stores and like establishments, and that the normal, and reasonably to be expected, use and development of the residue of the land is for industrial and trade purposes. Whatever injury is inflicted by the mere existence and threatened enforcement of the ordinance is due to restrictions in respect of these and similar uses; to which perhaps should be added—if not included in the foregoing—restrictions in respect of apartment houses.

We proceed, then, to a consideration of those provisions of the ordinance to which the case as it is made relates, first disposing of a preliminary matter. A motion was made in the court below to dismiss the bill on the ground that, because complainant [appellee] had made no effort to obtain a building permit or apply to the zoning board of appeals for relief as it might have done under the terms of the ordinance, the suit was premature. The motion was properly overruled. The effect of the allegations of the bill is that the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses; and the attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety. Assuming the premises, the existence and maintenance of the ordinance, in effect, constitutes a present invasion of appellee's property rights and a threat to continue it. Under these circumstances, the equitable jurisdiction is clear.

Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of

precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim *sic utere tuo ut alienum non laedas*, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clue. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power. Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. *Sturgis v. Bridgeman*, L. R. 11 Ch. 852, 865. A nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. *Radice v. New York*, 264 U.S. 292, 294.

There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of over-crowding, and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances. See *Welch v. Swasey*, 214 U.S. 91; *Hadacheck v. Los Angeles*, 239 U.S. 394; *Reinman v. Little Rock*, 237 U.S. 171; *Cusack Co. v. City of Chicago*, 242 U.S. 526, 529-530.

Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this Court has upheld although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity.

We find no difficulty in sustaining restrictions of the kind thus far reviewed. The serious question in the case arises over the provisions of the ordinance excluding from residential districts, apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded. Upon that question, this Court has not thus far spoken. The decisions of the state courts are numerous and conflicting; but those which broadly sustain the power greatly outnumber those which deny altogether or narrowly limit it; and it is very apparent that there is a constantly increasing tendency in the direction of the broader view.

The decisions agree that the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for this conclusion are— promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires, and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community by excluding from residential areas the confusion and danger of fire, contagion and disorder which in greater or less degree attach to the location of stores, shops and factories. Another ground is that the construction and repair of streets may be rendered easier and less expensive by confining the greater part of the heavy traffic to the streets where business is carried on.

The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities,—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable,

having no substantial relation to the public health, safety, morals, or general welfare. *Cusack Co. v. City of Chicago*, supra, pp. 530-531; *Jacobson v. Massachusetts*, 197 U.S. 11, 30-31.

Decree reversed.

Mr. Justice Van Devanter, Mr. Justice McReynolds and Mr. Justice Butler, dissent.

MILLER v. SCHOENE
276 U.S. 272 (1928)

Judges: Taft, Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford, Stone

MR. JUSTICE STONE delivered the opinion of the Court.

Acting under the Cedar Rust Act of Virginia, Va. Acts 1914, c. 36, as amended by Va. Acts 1920, c. 260, now embodied in Va. Code (1924) as §§885 to 893, defendant in error, the state entomologist, ordered the plaintiffs in error to cut down a large number of ornamental red cedar trees growing on their property, as a means of preventing the communication of a rust or plant disease with which they were infected to the apple orchards in the vicinity. The plaintiffs in error appealed from the order to the Circuit Court of Shenandoah county which, after a hearing and a consideration of evidence, affirmed the order and allowed to plaintiffs in error \$100 to cover the expense of removal of the cedars. Neither the judgment of the court nor the statute as interpreted allows compensation for the value of the standing cedars or the decrease in the market value of the realty caused by their destruction whether considered as ornamental trees or otherwise. But they save to plaintiffs in error the privilege of using the trees when felled. On appeal the Supreme Court of Appeals of Virginia affirmed the judgment. *Miller v. State Entomologist*, 146 Va. 175. Both in the Circuit Court and the Supreme Court of Appeals plaintiffs in error challenged the constitutionality of the statute under the due process clause of the Fourteenth Amendment and the case is properly here on writ of error. Jud. Code §237(a).

The Virginia statute presents a comprehensive scheme for the condemnation and destruction of red cedar trees infected by cedar rust. By §1 it is declared to be unlawful for any person to “own, plant or keep alive and standing” on his premises any red cedar tree which is or may be the source or “host plant” of the communicable plant disease known as cedar rust, and any such tree growing within a certain radius of any apple orchard is declared to be a public nuisance, subject to destruction. Section 2 makes it the duty of the state entomologist, “upon the request in writing of ten or more reputable free-holders of any county or magisterial district, to make a preliminary investigation of the locality . . . to ascertain if any cedar tree or trees . . . are the source of, harbor or constitute the host plant for the said disease . . . and constitute a menace to the health of any apple orchard in said locality, and that said cedar tree or trees exist within a radius of two miles of an apple orchard in said locality.” If affirmative findings are so made, he is required to direct the owner in writing to destroy the trees and, in his notice, to furnish a statement of the “fact found to exist whereby it is deemed necessary or proper to destroy” the trees and to call attention to the law under which it is proposed to destroy them. Section 5 authorizes the state entomologist to destroy the trees if the owner, after being notified, fails to do so. Section 7 furnishes a mode of appealing from the order of the entomologist to the circuit court of the county, which is authorized to “hear the objections” and “pass upon all questions involved,” the procedure followed in the present case.

As shown by the evidence and as recognized in other cases involving the validity of this statute, *Bowman v. Virginia State Entomologist*, 128 Va. 351; *Kelleher v. Schoene*, 14 Fed. 2d 341, cedar rust is an infectious plant disease in the form of a fungoid organism which is destructive of the fruit and foliage of the apple, but without effect on the value of the cedar. Its life cycle has two phases which are passed alternately as a growth on red cedar and on apple trees. It is communicated by spores from one to the other over a radius of at least two miles. It appears not to be communicable between trees of the same species but only from one species to the other, and other plants seem not to be appreciably affected by it. The only practicable method of controlling the disease and protecting apple trees from its ravages is the destruction of all red cedar trees, subject to the infection, located within two miles of apple orchards.

The red cedar, aside from its ornamental use, has occasional use and value as lumber. It is indigenous to Virginia, is not cultivated or dealt in commercially on any substantial scale, and its value throughout the state is shown to be small as compared with that of the apple orchards of the state. Apple growing is one of the principal agricultural pursuits in Virginia. The apple is used there and exported in large quantities. Many millions of dollars are invested in the orchards, which furnish employment for a large portion of the population, and have induced the development of attendant railroad and cold storage facilities.

On the evidence we may accept the conclusion of the Supreme Court of Appeals that the state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other. And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property. *Mugler v. Kansas*, 123 U.S. 623; *Hadacheck v. Los Angeles*, 239 U.S. 394; *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365; *Fertilizing Co. v. Hyde Park*, 97 U.S. 659; *Northwestern Laundry v. Des Moines*, 239 U.S. 486; *Lawton v. Steele*, 152 U.S. 133; *Sligh v. Kirkwood*, 237 U.S. 52; *Reinman v. Little Rock*, 237 U.S. 171.

We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law; or whether they may be so declared by statute. See *Hadacheck v. Los Angeles*, *supra*, 411. For where, as here, the choice is unavoidable, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable,

involves any denial of due process. The injury to property here is no more serious, nor the public interest less, than in *Hadacheck v. Los Angeles*, supra; *Northwestern Laundry v. Des Moines*, supra; *Reinman v. Little Rock*, supra, or *Sligh v. Kirkwood*, supra.

The statute is not, as plaintiffs in error argue, subject to the vice which invalidated the ordinance considered by this Court in *Eubank v. Richmond*, 226 U.S. 137. That ordinance directed the committee on streets of the city of Richmond to establish a building line, not less than five nor more than thirty feet from the street line whenever requested to do so by the owners of two-thirds of the property abutting on the street in question. No property owner might build beyond the line so established. Of this the Court said (p. 143), "It [the ordinance] leaves no discretion in the committee on streets as to whether the street [building, semple] line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent."

The function of the property owners there is in no way comparable to that of the "ten or more reputable freeholders" in the Cedar Rust Act. They do not determine the action of the state entomologist. They merely request him to conduct an investigation. In him is vested the discretion to decide, after investigation, whether or not conditions are such that the other provisions of the statute shall be brought into action; and his determination is subject to judicial review. The property of plaintiffs in error is not subjected to the possibly arbitrary and irresponsible action of a group of private citizens.

The objection of plaintiffs in error to the vagueness of the statute is without weight. The state court has held it to be applicable and that is enough when, by the statute, no penalty can be incurred or disadvantage suffered in advance of the judicial ascertainment of its applicability. Compare *Connally v. General Construction Co.*, 269 U.S. 385.

Affirmed.

NECTOW v. CITY OF CAMBRIDGE
277 U.S. 183 (1928)

Mr. Justice Sutherland delivered the opinion of the Court.

A zoning ordinance of the City of Cambridge divides the city into three kinds of districts: residential, business and unrestricted. Each of these districts is sub-classified in respect of the kind of buildings which may be erected. The ordinance is an elaborate one, and of the same general character as that considered by this Court in *Euclid v. Ambler Co.*, 272 U.S. 365. In its general scope it is conceded to be constitutional within that decision. The land of plaintiff was put in district R-3, in which are permitted only dwellings, hotels, clubs, churches, schools, philanthropic institutions, greenhouses and gardening, with customary incidental accessories. The attack upon the ordinance is that, as specifically applied to plaintiff in error, it deprived him of his property without due process of law in contravention of the Fourteenth Amendment.

The suit was for a mandatory injunction directing the city and its inspector of buildings to pass upon an application of the plaintiff for a permit to erect any lawful buildings upon a tract of land without regard to the provisions of the ordinance including such tract within a residential district. The case was referred to a master to make and report findings of fact. After a view of the premises and the surrounding territory, and a hearing, the master made and reported his findings. The case came on to be heard by a justice of the court, who, after confirming the master's report, reported the case for the determination of the full court. Upon consideration, that court sustained the ordinance as applied to plaintiff in error, and dismissed the bill. 260 Mass. 441.

A condensed statement of facts, taken from the master's report, is all that is necessary. When the zoning ordinance was enacted, plaintiff was and still is the owner of a tract of land containing 140,000 square feet, of which the locus here in question is a part. The locus contains about 29,000 square feet with a frontage on Brookline street The lands beyond Brookline street to the west are within a restricted residential district. The effect of the zoning is to separate from the west end of plaintiff's tract a strip 100 feet in width. The Ford Motor Company has a large auto assembling factory south of the locus; and a soap factory and the tracks of the Boston & Albany Railroad lie near. Opposite the locus, on Brookline street, there are some residences; and in the same district, are other residences. The locus is now vacant, although it was once occupied by a mansion house. Before the passage of the ordinance in question, plaintiff had outstanding a contract for the sale of the greater part of his entire tract of land for the sum of \$63,000. Because of the zoning restrictions, the purchaser refused to comply with the contract. Under the ordinance, business and industry of all sorts are excluded from the locus, while the remainder of the tract is unrestricted. It further appears that provision has been made for widening Brookline street, the effect of which, if carried out, will be to reduce the depth of the locus to 65 feet. After a statement at length of further facts, the master finds "that no practical use can be made of the land in question for residential purposes, because among other reasons

herein related, there would not be adequate return on the amount of any investment for the development of the property.” The last finding of the master is:

“I am satisfied that the districting of the plaintiff’s land in a residence district would not promote the health, safety, convenience and general welfare of the inhabitants of that part of the defendant City, taking into account the natural development thereof and the character of the district and the resulting benefit to accrue to the whole City and I so find.”

It is made pretty clear that because of the industrial and railroad purposes to which the immediately adjoining lands to the south and east have been devoted and for which they are zoned, the locus is of comparatively little value for the limited uses permitted by the ordinance.

We quite agree with the opinion expressed below that a court should not set aside the determination of public officers in such a matter unless it is clear that their action “has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.” *Euclid v. Ambler Co.*, supra, p. 395.

An inspection of a plat of the city upon which the zoning districts are outlined, taken in connection with the master’s findings, shows with reasonable certainty that the inclusion of the locus in question is not indispensable to the general plan. The boundary line of the residential district before reaching the locus runs for some distance along the streets, and to exclude the locus from the residential district requires only that such line shall be continued 100 feet further along Henry street and thence south along Brookline street. There does not appear to be any reason why this should not be done. Nevertheless, if that were all, we should not be warranted in substituting our judgment for that of the zoning authorities primarily charged with the duty and responsibility of determining the question. *Zahn v. Bd. of Public Works*, 274 U.S. 325, 328, and cases cited. But that is not all. The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. *Euclid v. Ambler Co.*, supra, p. 395. Here, the express finding of the master, already quoted, confirmed by the court below, is that the health, safety, convenience and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question. This finding of the master, after a hearing and an inspection of the entire area affected, supported, as we think it is, by other findings of fact, is determinative of the case. That the invasion of the property of plaintiff in error was serious and highly injurious is clearly established; and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained.

Judgment reversed.

GOLDBLATT v. TOWN OF HEMPSTEAD
369 U.S. 590 (1962)

Mr. Justice Clark delivered the opinion of the Court.

The Town of Hempstead has enacted an ordinance regulating dredging and pit excavating on property within its limits. Appellants, who engaged in such operations prior to the enactment of the ordinance, claim that it in effect prevents them from continuing their business and therefore takes their property without due process of law in violation of the Fourteenth Amendment. The trial court held that the ordinance was a valid exercise of the town's police power, 19 Misc. 2d 176, 189 N. Y. S. 2d 577, and the Appellate Division affirmed, 9 App. Div. 2d 941, 196 N. Y. S. 2d 573. The New York Court of Appeals in a divided opinion affirmed. 9 N. Y. 2d 101, 172 N. E. 2d 562. We noted probable jurisdiction, 366 U.S. 942, and having heard argument we now affirm the judgment.

Appellant Goldblatt owns a 38-acre tract within the Town of Hempstead. At the time of the present litigation appellant Builders Sand and Gravel Corporation was mining sand and gravel on this lot, a use to which the lot had been put continuously since 1927. Before the end of the first year the excavation had reached the water table leaving a water-filled crater which has been widened and deepened to the point that it is now a 20-acre lake with an average depth of 25 feet. The town has expanded around this excavation, and today within a radius of 3,500 feet there are more than 2,200 homes and four public schools with a combined enrollment of 4,500 pupils.

In 1958 the town amended Ordinance No. 16 to prohibit any excavating below the water table and to impose an affirmative duty to refill any excavation presently below that level. The new amendment also made the berm, slope, and fence requirements more onerous.

In 1959 the town brought the present action to enjoin further mining by the appellants on the grounds that they had not complied with the ordinance, as amended, nor acquired a mining permit as required by it. Appellants contended, *inter alia*, that the ordinance was unconstitutional because (1) it was not regulatory of their business but completely prohibitory and confiscated their property without compensation, (2) it deprived them of the benefit of the favorable judgment arising from the previous zoning litigation, and (3) it constituted *ex post facto* legislation. However, the trial court did not agree, and the appellants were enjoined from conducting further operations on the lot until they had obtained a permit and had complied with the new provisions of Ordinance No. 16.

Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it

unconstitutional. *Walls v. Midland Carbon Co.*, 254 U.S. 300 (1920); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Reinman v. Little Rock*, 237 U.S. 171 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887); see *Laurel Hill Cemetery v. San Francisco*, 216 U.S. 358 (1910). As pointed out in *Mugler v. Kansas*, *supra*, at 668-669:

“The present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property 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 their property, to inflict injury upon the community.”

Nor is it of controlling significance that the “use” prohibited here is of the soil itself as opposed to a “use” upon the soil, cf. *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958), or that the use prohibited is arguably not a common-law nuisance, e. g., *Reinman v. Little Rock*, *supra*.

This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); see *United States v. Central Eureka Mining Co.*, *supra*. There is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant, see *Pennsylvania Coal Co. v. Mahon*, *supra*, it is by no means conclusive, see *Hadacheck v. Sebastian*, *supra*, where a diminution in value from \$800,000 to \$60,000 was upheld. How far regulation may go before it becomes a taking we need not now decide, for there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question. Indulging in the usual presumption of constitutionality, *infra*, p. 596, we find no indication that the prohibitory effect of Ordinance No. 16 is sufficient to render it an unconstitutional taking if it is otherwise a valid police regulation.

The question, therefore, narrows to whether the prohibition of further excavation below the water table is a valid exercise of the town’s police power. The term “police power” connotes

the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of “reasonableness,” this Court has generally refrained from announcing any specific criteria. The classic statement of the rule in *Lawton v. Steele*, 152 U.S. 133, 137 (1894), is still valid today:

“To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.”

The ordinance in question was passed as a safety measure, and the town is attempting to uphold it on that basis. To evaluate its reasonableness we therefore need to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance.

A careful examination of the record reveals a dearth of relevant evidence on these points. One fair inference arising from the evidence is that since a few holes had been burrowed under the fence surrounding the lake it might be attractive and dangerous to children. But there was no indication whether the lake as it stood was an actual danger to the public or whether deepening the lake would increase the danger. In terms of dollars or some other objective standard, there was no showing how much, if anything, the imposition of the ordinance would cost the appellants. In short, the evidence produced is clearly indecisive on the reasonableness of prohibiting further excavation below the water table.

Although one could imagine that preventing further deepening of a pond already 25 feet deep would have a de minimis effect on public safety, we cannot say that such a conclusion is compelled by facts of which we can take notice. Even if we could draw such a conclusion, we would be unable to say the ordinance is unreasonable; for all we know, the ordinance may have a de minimis effect on appellants. Our past cases leave no doubt that appellants had the burden on “reasonableness.” E.g., *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 529 (1959) (exercise of police power is presumed to be constitutionally valid); *Salsburg v. Maryland*, 346 U.S. 545, 553 (1954) (the presumption of reasonableness is with the State); *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938) (exercise of police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it). This burden not having been met, the prohibition of excavation on the 20-acre-lake tract must stand as a valid police regulation.

We now turn our attention to the remainder of the lot, the 18 acres surrounding the present pit which have not yet been mined or excavated. Appellants themselves contend that this area cannot be mined. They say that this surface space is necessary for the processing operations incident to mining and that no other space is obtainable. This was urged as an important factor

in their contention that upholding the depth limitation of the ordinance would confiscate the entire mining utility of their property. However, we have upheld the validity of the prohibition even on that supposition. If the depth limitation in relation to deepening the existing pit is valid, it follows a fortiori that the limitation is constitutionally permissible as applied to prevent the creation of new pits. We also note that even if appellants were able to obtain suitable processing space the geology of the 18-acre tract would prevent any excavation. The water table, appellants admit, is too close to the ground surface to permit commercial mining in the face of the depth restrictions of the ordinance. The impossibility of further mining makes it unnecessary for us to decide to what extent the berm and slope of such excavation could be limited by the ordinance.

Appellants' other contentions warrant only a passing word. The claim that rights acquired in previous litigation are being undermined is completely unfounded. A successful defense to the imposition of one regulation does not erect a constitutional barrier to all other regulation. The first suit was brought to enforce a zoning ordinance, while the present one is to enforce a safety ordinance. In fact no relevant issues presented here were decided in the first suit. We therefore do not need to consider to what extent such issues would have come under the protective wing of due process.

Appellants also contend that the ordinance is unconstitutional because it imposes under penalty of fine and imprisonment such affirmative duties as refilling the existing excavation and the construction of a new fence. This claim is founded principally on the constitutional prohibitions against bills of attainder and ex post facto legislation. These provisions are severable, both in nature and by express declaration, from the prohibition against further excavation. Since enforcement of these provisions was not sought in the present litigation, this Court under well-established principles will not at this time undertake to decide their constitutionality. E.g., *Ohio Tax Cases*, 232 U.S. 576, 594 (1914); cf. *United States v. Raines*, 362 U.S. 17 (1960). That determination must await another day. We pass only on the provisions of the ordinance here invoked, not on probabilities not now before us, and to that extent the judgment is

Affirmed.

Session 10. State Ownership of Resources

A special question arises as to the perquisites of public ownership. The answer requires consideration of both the Privileges and Immunities Clause and the Commerce Clause of the U.S. Constitution.

McCREADY v. VIRGINIA **94 U.S. 391 (1877)**

Mr. Chief Justice Waite delivered the opinion of the court.

The precise question to be determined in this case is, whether the State of Virginia can prohibit the citizens of other States from planting oysters in Ware River, a stream in that State where the tide ebbs and flows, when its own citizens have that privilege.

The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and inter-state commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship.

By art. 4, sect. 2, of the Constitution, the citizens of each State are “entitled to all privileges and immunities of citizens in the several States.” We think we may safely hold that the citizens of one State are not invested by this clause of the Constitution with any interest in the common property of the citizens of another State. If Virginia had by law provided for the sale of its once vast public domain, and a division of the proceeds among its own people, no one, we venture to say, would contend that the citizens of other States had a constitutional right to the enjoyment of this privilege of Virginia citizenship. Neither if, instead of selling, the State had appropriated the same property to be used as a common by its people for the purposes of agriculture, could the citizens of other States avail themselves of such a privilege. And the reason is obvious: the right thus granted is not a privilege or immunity of general but of special citizenship. It does not “belong of right to the citizens of all free governments,” but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed. They, and they alone, owned the property to be sold or used, and they alone had the power to dispose

of it as they saw fit. They owned it, not by virtue of citizenship merely, but of citizenship and domicile united; that is to say, by virtue of a citizenship confined to that particular locality.

The planting of oysters in the soil covered by water owned in common by the people of the State is not different in principle from that of planting corn upon dry land held in the same way. Both are for the purposes of cultivation and profit; and if the State, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry lands, we see no reason why it may not do the same thing in respect to such as are covered by water. And as all concede that a State may grant to one of its citizens the exclusive use of a part of the common property, the conclusion would seem to follow, that it might by appropriate legislation confine the use of the whole to its own people alone.

We are unable to agree with the counsel for the plaintiff in error in his argument, that the right of planting may be enforced as a privilege of inter-state citizenship, even though that of taking cannot. Planting means, in "oysterman's phraseology," as counsel say, "depositing with the intent that the oysters shall remain until they are fattened." The object is, therefore, to make use of the soil and the water above it for the improvement and growth of that which is planted. It is this use, as has already been seen, that the State has the right, by reason of its ownership, to prohibit.

Judgment affirmed.

GEER v. CONNECTICUT
161 U.S. 519 1896

MR. JUSTICE WHITE, after stating the case, delivered the opinion of the court.

By the statutes of the State of Connecticut, referred to in the statement of facts, the open season for the game birds mentioned therein was from the first day of October to the first day of January. The birds which the defendant was charged with unlawfully having in his possession on the 19th of October, for the purpose of unlawful transportation beyond the State, were alleged to have been killed within the State after the first day of October. They were, therefore, killed during the open season. There was no charge that they had been unlawfully killed for the purpose of being transported outside of the State. The offence, therefore, charged was the possession of game birds, for the purpose of transporting them beyond the State, which birds had been lawfully killed within the State. The court of last resort of the State held, in interpreting the statute already cited, by the light afforded by previous enactments, that one of its objects was to forbid the killing of birds within the State during the open season for the purpose of transporting them beyond the State, and also additionally as a distinct offence to punish the having in possession, for the purpose of transportation beyond the State, birds lawfully killed within the State. The court found that the information did not charge the first of these offences, and therefore that the sole offence which it covered was the latter. It then decided that the State had power to make it an offence to have in possession, for the purpose of transportation beyond the State, birds which had been lawfully killed within the State during the open season, and that the statute in creating this offence did not violate the interstate commerce clause of the Constitution of the United States. The correctness of this latter ruling is the question for review. In other words, the sole issue which the case presents is, was it lawful under the Constitution of the United States (section 8, Article I) for the State of Connecticut to allow the killing of birds within the State during a designated open season, to allow such birds, when so killed, to be used, to be sold and to be bought for use within the State, and yet to forbid their transportation beyond the State? Or, to state it otherwise, had the State of Connecticut the power to regulate the killing of game within her borders so as to confine its use to the limits of the State and forbid its transmission outside of the State?

In considering this inquiry we of course accept the interpretation affixed to the state statute by the court of last resort of the State. The solution of the question involves a consideration of the nature of the property in game and the authority which the State had a right lawfully to exercise in relation thereto.

From the earliest traditions the right to reduce animals *feroe naturae* to possession has been subject to the control of the law-giving power.

Among other subdivisions, things were classified by the Roman law into public and common. The latter embraced animals *feroe naturae*, which, having no owner, were considered

as belonging in common to all the citizens of the State. After pointing out the foregoing subdivision, the Digest says:

"There are things which we acquire the dominion of, as by the law of nature, which the light of natural reason causes every man to see, and others we acquire by the civil law, that is to say, by methods which belong to the government. As the law of nature is more ancient, because it took birth with the human race, it is proper to speak first of the latter. 1. Thus, all the animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them. . . . Because that which belongs to nobody is acquired by the natural law by the person who first possesses it. We do not distinguish the acquisition of these wild beasts and birds by whether one has captured them on his own property or on the property of another; but he who wishes to enter into the property of another to hunt can be readily prevented if the owner knows his purpose to do so." Digest, Book 41, Tit. 1, De Acquir. Rer. Dom.

No restriction, it would hence seem, was placed by the Roman law upon the power of the individual to reduce game, of which he was the owner in common with other citizens, to possession, although the Institutes of Justinian recognized the right of an owner of land to forbid another from killing game on his property, as indeed this right was impliedly admitted by the Digest in the passage just cited. Institutes, Book 2, Tit. 1, s. 12.

This inhibition was, however, rather a recognition of the right of ownership in land than an exercise by the State of its undoubted authority to control the taking and use of that which belonged to no one in particular, but was common to all. In the feudal as well as the ancient law of the continent of Europe, in all countries, the right to acquire animals *feroe naturee* by possession was recognized as being subject to the governmental authority and under its power, not only as a matter of regulation, but also of absolute control.

The common law of England also based property in game upon the principle of common ownership, and therefore treated it as subject to governmental authority. The practice of the government of England from the earliest time to the present has put into execution the authority to control and regulate the taking of game.

Undoubtedly this attribute of government to control the taking of animals *feroe naturee*, which was thus recognized and enforced by the common law of England, was vested in the colonial governments, where not denied by their charters, or in conflict with grants of the royal prerogative. It is also certain that the power which the colonies thus possessed passed to the States with the separation from the mother country, and remains in them at the present day, in so far as its exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution. Kent, in his Commentaries, states the ownership of animals *feroe naturee* to be only that of a qualified property. 2 Kent Com. 347. In most of the States laws have been passed for the protection and preservation of game. We have been referred

to no case where the power to so legislate has been questioned, although the books contain cases involving controversies as to the meaning of some of the statutes. *Commonwealth v. Hall*, 128 Mass. 410; *Commonwealth v. Wilkinson*, 139 Penn. St. 304; *People v. O'Neil*, 71 Michigan, 325. There are also cases where the validity of some particular method of enforcement provided in some of the statutes has been drawn in question. *Kansas v. Saunders*, 19 Kansas, 127; *Territory v. Evans*, 2 Idaho, 634.

The adjudicated cases recognizing the right of the States to control and regulate the common property in game are numerous. In *McCrary v. Virginia*, 94 U.S. 395, the power of the State of Virginia to prohibit citizens of other States from planting oysters within the tide waters of that State was upheld by this court. In *Manchester v. Massachusetts*, 139 U.S. 24, the authority of the State of Massachusetts to control and regulate the catching of fish within the bays of that State was also maintained.

Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control pledged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the State, as held by this court in *Martin v. Waddell*, 16 Pet. 410, represents its people, and the ownership is that of the people in their united sovereignty. The common ownership, and its resulting responsibility in the State, is thus stated in a well considered opinion of the Supreme Court of California:

"The wild game within a State belongs to the people in their collective sovereign capacity. It is not the subject of private ownership except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good." *Ex parte Maier*, 103 California, 476.

The foregoing analysis of the principles upon which alone rests the right of an individual to acquire a qualified ownership in game, and the power of the State, deduced therefrom, to control such ownership for the common benefit, clearly demonstrates the validity of the statute of the State of Connecticut here in controversy. The sole consequence of the provision forbidding the transportation of game, killed within the State, beyond the State, is to confine the use of such game to those who own it, the people of that State. The proposition that the State may not forbid carrying it beyond her limits involves, therefore, the contention that a State cannot allow its own people the enjoyment of the benefits of the property belonging to them in common, without at the same time permitting the citizens of other States to participate in that which they do not own. It was said in the discussion at bar, although it be conceded that the

State has an absolute right to control and regulate the killing of game as its judgment deems best in the interest of its people, inasmuch as the State has here chosen to allow the people within her borders to take game, to dispose of it, and thus cause it to become an object of State commerce, as a resulting necessity such property has become the subject of interstate commerce, and is hence controlled by the provisions of article 1, section 8, of the Constitution of the United States. But the errors which this argument involves are manifest. It presupposes that where the killing of game and its sale within the State is allowed, that it thereby becomes commerce in the legal meaning of that word. In view of the authority of the State to affix conditions to the killing and sale of game, predicated as is this power on the peculiar nature of such property and its common ownership by all the citizens of the State, it may well be doubted whether commerce is created by an authority given by a State to reduce game within its borders to possession, provided such game be not taken, when killed, without the jurisdiction of the State. The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose. The qualification which forbids its removal from the State necessarily entered into and formed part of every transaction on the subject, and deprived the mere sale or exchange of these articles of that element of freedom of contract and of full ownership which is an essential attribute of commerce. Passing, however, as we do, the decision of this question, and granting that the dealing in game killed within the State, under the provision in question, created internal State commerce, it does not follow that such internal commerce became necessarily the subject-matter of interstate commerce, and therefore under the control of the Constitution of the United States.

The fact that internal commerce may be distinct from interstate commerce, destroys the whole theory upon which the argument of the plaintiff in error proceeds. The power of the State to control the killing of and ownership in game being admitted, the commerce in game, which the state law permitted, was necessarily only internal commerce, since the restriction that it should not become the subject of external commerce went along with the grant and was a part of it. All ownership in game killed within the State came under this condition, which the State had the lawful authority to impose, and no contracts made in relation to such property were exempt from the law of the State consenting that such contracts be made, provided only they were confined to internal and did not extend to external commerce.

So ... in *Magner v. The People*, 97 Illinois, 320, 333, the Supreme Court of Illinois said:

"So far as we are aware, it has never been judicially denied that the government under its police powers may make regulations for the preservation of game and fish, restricting their taking and molestation to certain seasons of the year, although laws to this effect, it is believed, have been in force in many of the older States since the organization of the Federal Government. . . . The ownership being in the people of the State, the repository of the sovereign authority, and no individual having any property rights to be affected, it necessarily results that the legislature, as the representative of the people of the State, may withhold or grant

to individuals the right to hunt and kill game or qualify or restrict, as in the opinions of its members will best subserve the public welfare. Stated in other language, to hunt and kill game is a boon or privilege, granted either expressly or impliedly by the sovereign authority -- not a right inherent in each individual, and consequently nothing is taken away from the individual when [*534] he is denied the privilege at stated seasons of hunting and killing game. It is, perhaps, accurate to say that the ownership of the sovereign authority is in trust for all the people of the State, and hence by implication it is the duty of the legislature to enact such laws as will best preserve the subject of the trust and secure its beneficial use in the future to the people of the State. But in any view, the question of individual enjoyment is one of public policy and not of private right."

Aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of its people which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the State of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected. Indeed, the source of the police power as to game birds (like those covered by the statute here called in question) flows from the duty of the State to preserve for its people a valuable food supply. The power of a State to protect by adequate police regulation its people against the adulteration of articles of food, (which was in that case maintained,) although in doing so commerce might be remotely affected, necessarily carries with it the existence of a like power to preserve a food supply which belongs in common to all the people of the State, which can only become the subject of ownership in a qualified way, and which can never be the object of commerce except with the consent of the State and subject to the conditions which it may deem best to impose for the public good.

Judgment affirmed.

MR. JUSTICE FIELD dissenting.

I am unable to agree with the majority of my associates in the affirmance of the judgment of the Supreme Court of Errors of Connecticut in this case, and I will state, briefly, the grounds of my disagreement.

When any animal, whether living in the waters of the State or in the air above, is lawfully killed for the purposes of food or other uses of man, it becomes an article of commerce, and its use cannot be limited to the citizens of one State to the exclusion of citizens of another State. Although there are declarations of some courts that the State possesses a property in its wild game, and when it authorizes the game to be killed and sold as an article of food it may limit the sale only for domestic consumption, and the Supreme Court of Errors of Connecticut in deciding the present case appears to have held that doctrine, I am unable to assent to its soundness, where the State has never had the game in its possession or under its control or use. I do not admit that

in such case there is any specific property held by the State by which, in the exercise of its rightful authority, it can lawfully limit the control and use of the animals killed to particular classes of persons, or citizens, or to citizens of particular places or States. But on the contrary, I hold that where animals within a State, whether living in its waters or in the air above, are, at the time, beyond the reach or control of man, so that they cannot be subjected to his use or that of the State in any respect, they are not the property of the State or of any one in a proper sense. I hold that until they are brought into subjection or use by the labor or skill of man, they are not the property of any one, and that they only become the property of man according to the extent to which they are subjected by his labor or skill to his use and benefit. When man by his labor or skill brings any such animals under his control and subject to his use, he acquires to that extent a right of property in them, and the ownership of others in the animals is limited by the extent and right thus acquired. This is a generally recognized doctrine, acknowledged by all States of Christendom. It is the doctrine of law, both natural and positive.

I do not doubt the right of the State, by its legislation, to provide for the protection of wild game, so far as such protection is necessary for their preservation or for the comfort, health or security of its citizens, and does not contravene the power of Congress in the regulation of interstate commerce. But I do deny the authority of the State, in its legislation for the protection and preservation of game, to interfere in any respect with the paramount control of Congress in prescribing the terms by which its transportation to another State, when killed, shall be restricted to such conditions as the State may impose. The absolute control of Congress in the regulation of interstate commerce, unimpeded by any state authority, is of much greater consequence than any regulation the State may prescribe with reference to the place where its wild game, when killed, may be consumed.

When property, like the game birds in this case, is reduced to possession it becomes an article of commerce and may be the subject of sale to the citizens of one State or community, or to the citizens of several. The decision of the court, however, would limit the right of sale of such property, however valuable it may become, and whether living or killed, to the directions of the State or community in which the property is found, and would convert it from the freedom of use which belongs to property in general to the limited use of the persons or communities where found, or to a particular class to which only property possessed of special ingredients or qualities is limited. I do not think that it lies within the province of any State to confine the excellencies of any articles of food within its borders to its own fortunate inhabitants to the exclusion of others, and that it may lawfully require that game killed within its borders shall only be eaten in such parts of the country as it may prescribe.

By the Constitution of the United States it has been adjudged that commerce between the States is under the absolute regulation of Congress, and that whenever an article of property begins to move from one State to another, commerce between the States has commenced, and that with its control or regulation no State can interfere. *Welton v. Missouri*, 91 U.S. 275; *Henderson v. New York*, 92 U.S. 259; *Chy Lung v. Freeman*, 92 U.S. 275; *Ward v. Maryland*,

12 Wall. 418; State Tax on Railway Gross Receipts, 15 Wall. 284; *Sherlock v. Alling*, 93 U.S. 99.

I therefore dissent from the conclusion of the majority of my associates in affirming the judgment of the Supreme Court of Errors of Connecticut.

MR. JUSTICE HARLAN dissenting.

I do not question the power of the State to prescribe a period during which wild game within its limits may not be lawfully killed. The State, as we have seen, does not prohibit the killing of game altogether, but permits hunting and killing of woodcock, quail, ruffed grouse and gray squirrels between the first day of October and the first day of January. The game in question having been lawfully killed, the person who killed it and took it into his possession became the rightful owner thereof. This, I take it, will not be questioned. As such owner he could dispose of it, by gift or sale, at his discretion. So long as it was fit for use as food, the State could not interfere with his disposition of it, any more than it could interfere with the disposition by the owner of other personal property that was not noxious in its character. To hold that the person receiving personal property from the owner may not receive it with the intent to send it out of the State is to recognize an arbitrary power in the government which is inconsistent with the liberty belonging to every man, as well as with the rights which inhere in the ownership of property. Such a holding would also be inconsistent with the freedom of interstate commerce which has been established by the Constitution of the United States. If the majority had not held differently in the present case, I should have said that discussion was unnecessary to show the soundness of the propositions just stated. But it seems that if the citizen, whether residing in Connecticut or elsewhere, finds in the markets of one of the cities or towns of that State game, fit for food, that has been lawfully killed, and is lawfully in the possession of the keeper of such market, he may, without becoming a criminal, buy such game and take it into his possession, provided his intention be to eat it, or to have it eaten, in Connecticut. But he will subject himself to a fine, as well as to imprisonment upon his failing to pay such fine, if he buys and take possession of such lawfully killed game, with intent to send it to a friend in an adjoining State.

The Court cites *McCready v. Virginia*, 94 U.S. 391, 395, in which it was held that Virginia could restrict to its own citizens the privilege of planting oysters in the streams of that State, the soil under which was owned by it. But I cannot believe that it would hold that oysters, which had been lawfully taken out of such streams, and which had been lawfully planted, could not be purchased in Virginia, with the intent to ship them to another State.

Believing that the statute of Connecticut, in its application to the present case, is not consistent with the liberty of the citizen or with the freedom of interstate commerce, I dissent from the opinion and judgment of the court.

TOOMER v. WITSELL
334 U.S. 385 (1948)

Mr. Chief Justice Vinson delivered the opinion of the Court.

This is a suit to enjoin as unconstitutional the enforcement of several South Carolina statutes governing commercial shrimp fishing in the three-mile maritime belt off the coast of that State. Appellants, who initiated the action, are five individual fishermen, all citizens and residents of Georgia, and a non-profit fish dealers' organization incorporated in Florida. Appellees are South Carolina officials charged with enforcement of the statutes.

The three-judge Federal District Court which was convened to hear the case upheld the statutes, denied an injunction and dismissed the suit. On direct appeal from that judgment we noted probable jurisdiction.

The fishery which South Carolina attempts to regulate by the statutes in question is part of a larger shrimp fishery extending from North Carolina to Florida. Most of the shrimp in this area are of a migratory type, swimming south in the late summer and fall and returning northward in the spring. Since there is no federal regulation of the fishery, the four States most intimately concerned have gone their separate ways in devising conservation and other regulatory measures. While action by the States has followed somewhat parallel lines, efforts to secure uniformity throughout the fishery have by and large been fruitless. Because of the integral nature of the fishery, many commercial shrimpers, including the appellants, would like to start trawling off the Carolinas in the summer and then follow the shrimp down the coast to Florida. Each State has been desirous of securing for its residents the opportunity to shrimp in this way, but some have apparently been more concerned with channeling to their own residents the business derived from local waters. Restrictions on non-resident fishing in the marginal sea, and even prohibitions against it, have now invited retaliation to the point that the fishery is effectively partitioned at the state lines; bilateral bargaining on an official level has come to be the only method whereby any one of the States can obtain for its citizens the right to shrimp in waters adjacent to the other States.

South Carolina forbids trawling for shrimp in the State's inland waters, which are the habitat of the young shrimp for the first few months of their life. It also provides for a closed season in the three-mile maritime belt during the spawning season, from March 1 to July 1. The validity of these regulations is not questioned.

The statutes appellants challenge relate to shrimping during the open season in the three-mile belt: Section 3300 of the South Carolina Code provides that the waters in that area shall be "a common for the people of the State for the taking of fish." Section 3374 imposes a tax of 1/8 cent a pound on green, or raw, shrimp taken in those waters. Section 3379, as amended in 1947, requires payment of a license fee of \$25 for each shrimp boat owned by a resident, and of \$2,500 for each one owned by a non-resident. Another statute, not integrated in the Code, conditions the

issuance of non-resident licenses for 1948 and the years thereafter on submission of proof that the applicants have paid South Carolina income taxes on all profits from operations in that State during the preceding year. And §3414 requires that all boats licensed to trawl for shrimp in the State's waters dock at a South Carolina port and unload, pack, and stamp their catch "before shipping or transporting it to another State or the waters thereof." Violation of the fishing laws entails suspension of the violator's license as well as a maximum of a \$1,000 fine, imprisonment for a year, or a combination of a \$500 fine and a year's imprisonment.

Appellants' most vigorous attack is directed at §3379 which, as amended in 1947, requires non-residents of South Carolina to pay license fees one hundred times as great as those which residents must pay. The purpose and effect of this statute, they contend, is not to conserve shrimp, but to exclude non-residents and thereby create a commercial monopoly for South Carolina residents. As such, the statute is said to violate the privileges and immunities clause of Art. IV, §2, of the Constitution and the equal protection clause of the Fourteenth Amendment.

Article IV, §2, so far as relevant, reads as follows:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation. "Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists." *Paul v. Virginia*, 8 Wall. 168, 180 (1868).

In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.

Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.

With these factors in mind, we turn to a consideration of the constitutionality of §3379. By that statute South Carolina plainly and frankly discriminates against non-residents, and the record leaves little doubt but what the discrimination is so great that its practical effect is virtually exclusionary. This the appellees do not seriously dispute. Nor do they argue that since the statute is couched in terms of residence it is outside the scope of the privileges and immunities clause, which speaks of citizens. Such an argument, we agree, would be without force in this case.

As justification for the statute, appellees urge that the State's obvious purpose was to conserve its shrimp supply, and they suggest that it was designed to head off an impending threat of excessive trawling. The record casts some doubt on these statements. But in any event, appellees' argument assumes that any means adopted to attain valid objectives necessarily squares with the privileges and immunities clause. It overlooks the purpose of that clause, which, as indicated above, is to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed.

The reports of the State Board of Fisheries for several years back, while expressing solicitude as to the need for conservation measures, reveal equal concern with methods for increasing the market for shrimp—by advertising, air shipments, etc.—and contain frequent references to the economic importance of the shrimp industry to the State. The 1945 report, for example, said that “The shrimp business in our State is quite an industry, it employs numbers of men and boat crews spend large sums of money on repairs, gasoline, oil and food besides the money that is spent by the individuals personally.” In connection with the possibility of air shipments to large consuming centers such as New York, the same report said that air transportation “should increase the consumption of same [i.e., seafoods] in large quantities; it will also create a much greater demand for shrimp and seafoods all over the universe, and it will place them in sections where they are very seldom consumed with the result that many more people will get sold on the idea of eating same.” And the 1946 report's section on shrimp concluded with the statement that “To be able to make this report is certainly a pleasure to the State Board of Fisheries as we are able to show that the catch of shrimp this season was nearly twice as large as in the previous year.”

In this connection appellees mention, without further elucidation, the fishing methods used by non-residents, the size of their boats, and the allegedly greater cost of enforcing the laws against them. One statement in the appellees' brief might also be construed to mean that the State's conservation program for shrimp requires expenditure of funds beyond those collected in license fees—funds to which residents and not non-residents contribute. Nothing in the record indicates that non-residents use larger boats or different fishing methods than residents, that the cost of enforcing the laws against them is appreciably greater, or that any substantial amount of the State's general funds is devoted to shrimp conservation. But assuming such were the facts, they would not necessarily support a remedy so drastic as to be a near equivalent of total

exclusion. The State is not without power, for example, to restrict the type of equipment used in its fisheries, to graduate license fees according to the size of the boats, or even to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay. We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced upon them. Thus, §3379 must be held unconstitutional unless commercial shrimp fishing in the maritime belt falls within some unexpressed exception to the privileges and immunities clause.

Appellees strenuously urge that there is such an exception. Their argument runs as follows: Ever since Roman times, animals *ferae naturae*, not having been reduced to individual possession and ownership, have been considered as *res nullius* or part of the “negative community of interests” and hence subject to control by the sovereign or other governmental authority. More recently this thought has been expressed by saying that fish and game are the common property of all citizens of the governmental unit and that the government, as a sort of trustee, exercises this “ownership” for the benefit of its citizens. In the case of fish, it has also been considered that each government “owned” both the beds of its lakes, streams, and tidewaters and the waters themselves; hence it must also “own” the fish within those waters. Each government may, the argument continues, regulate the corpus of the trust in the way best suited to the interests of the beneficial owners, its citizens, and may discriminate as it sees fit against persons lacking any beneficial interest. Finally, it is said that this special property interest, which nations and similar governmental bodies have traditionally had, in this country vested in the colonial governments and passed to the individual States.

Language frequently repeated by this Court appears to lend some support to this analysis. But in only one case, *McCready v. Virginia*, 94 U.S. 391 (1876), has the Court actually upheld State action discriminating against commercial fishing or hunting by citizens of other States where there were advanced no persuasive independent reasons justifying the discrimination. In that case the Court sanctioned a Virginia statute applied so as to prohibit citizens of other States, but not Virginia citizens, from planting oysters in the tidal waters of the Ware River. The right of Virginians in Virginia waters, the Court said, was “a property right, and not a mere privilege or immunity of citizenship.” And an analogy was drawn between planting oysters in a river bed and planting corn in state-owned land.

It will be noted that there are at least two factual distinctions between the present case and the *McCready* case. First, the *McCready* case related to fish which would remain in Virginia until removed by man. The present case, on the other hand, deals with free-swimming fish which migrate through the waters of several States and are off the coast of South Carolina only temporarily. Secondly, the *McCready* case involved regulation of fishing in inland waters, whereas the statute now questioned is directed at regulation of shrimping in the marginal sea.

Thus we have, on the one hand, a single precedent which might be taken as reading an exception into the privileges and immunities clause and, on the other, a case which does not fall directly within that exception. Viewed in this light, the question before us comes down to whether the reasons which evoked the exception call for its extension to a case involving the factual distinctions here presented.

However satisfactorily the ownership theory explains the McCready case, the very factors which make the present case distinguishable render that theory but a weak prop for the South Carolina statute. That the shrimp are migratory makes apposite Mr. Justice Holmes' statement in *Missouri v. Holland*, 252 U.S. 416, 434 (1920), that "To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership." The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State has power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States.

These considerations lead us to the conclusion that the McCready exception to the privileges and immunities clause, if such it be, should not be expanded to cover this case.

Thus we hold that commercial shrimping in the marginal sea, like other common callings, is within the purview of the privileges and immunities clause. And since we have previously concluded that the reasons advanced in support of the statute do not bear a reasonable relationship to the high degree of discrimination practiced upon citizens of other States, it follows that §3379 violates Art. IV, §2, of the Constitution.

Appellants maintain that by a parity of reasoning the statute also contravenes the equal protection clause of the Fourteenth Amendment. That may well be true, but we do not pass on this argument since it is unnecessary to disposition of the present case.

Appellants contend that §3414 which requires that owners of shrimp boats fishing in the maritime belt off South Carolina dock at a South Carolina port and unload, pack, and stamp their catch (with a tax stamp) before "shipping or transporting it to another state," burdens interstate commerce in shrimp in violation of Art. I, §8, of the Constitution.

The record shows that a high proportion of the shrimp caught in the waters along the South Carolina coast, both by appellants and by others, is shipped in interstate commerce. There was also uncontradicted evidence that appellants' costs would be materially increased by the necessity of having their shrimp unloaded and packed in South Carolina ports rather than at their home bases in Georgia where they maintain their own docking, warehousing, refrigeration and packing facilities. In addition, an inevitable concomitant of a statute requiring that work be done in South Carolina, even though that is economically disadvantageous to the fishermen, is to

divert to South Carolina employment and business which might otherwise go to Georgia; the necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry.

Thus we hold that §3414 violates the commerce clause of Art. I, §8 of the Constitution.

Mr. Justice Frankfurter, whom Mr. Justice Jackson joins, concurring:

I join the Court's opinion. While I agree that South Carolina has exceeded her power to control fisheries within her waters, I rest the invalidity of her attempt to do so on the Commerce Clause. The Court reaches this result by what I deem to be a misapplication of the Privileges-and-Immunities Clause of Art. IV, §2, of the Constitution.

Like other provisions of the Constitution, the Clause whereby "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States" must be read in conjunction with the Tenth Amendment to the Constitution. This clause presupposes the continued retention by the States of powers that historically belonged to the States, and were not explicitly given to the central government or withdrawn from the States. I think it is fair to summarize the decisions which have applied Art. IV, §2, by saying that they bar a State from penalizing the citizens of other States by subjecting them to heavier taxation merely because they are such citizens or by discriminating against citizens of other States in the pursuit of ordinary livelihoods in competition with local citizens. It is not conceivable that the framers of the Constitution meant to obliterate all special relations between a State and its citizens. This Clause does not touch the right of a State to conserve or utilize its resources on behalf of its own citizens, provided it uses these resources within the State and does not attempt a control of the resources as part of a regulation of commerce between the States. A State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers.

When the Constitution was adopted, such, no doubt, was the common understanding regarding the power of States over their fisheries, and it is this common understanding that was reflected in *McCready v. Virginia*, 94 U.S. 391. The *McCready* case is not an isolated decision to be looked at askance. It is the symbol of one of the weightiest doctrines in our law. It expressed the momentum of legal history that preceded it, and around it in turn has clustered a voluminous body of rulings. Not only has a host of State cases applied the *McCready* doctrine as to the power of States to control their game and fisheries for the benefit of their own citizens, but in our own day this Court formulated the amplitude of the *McCready* doctrine by referring to "the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States." *Truax v. Raich*, 239 U.S. 33, 39-40.

HICKLIN v. ORBECK
437 U.S. 518 (1978)

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

In 1972, professedly for the purpose of reducing unemployment in the State, the Alaska Legislature passed an Act entitled “Local Hire Under State Leases.” Alaska Stat. Ann. §§38.40.010 to 38.40.090 (1977). The key provision of “Alaska Hire,” as the Act has come to be known, is the requirement that “all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes, unitization agreements, or any renegotiation of any of the preceding to which the state is a party” contain a provision “requiring the employment of qualified Alaska residents” in preference to nonresidents. Alaska Stat. Ann. §38.40.030 (a) (1977). This employment preference is administered by providing persons meeting the statutory requirements for Alaskan residency with certificates of residence—“resident cards”—that can be presented to an employer covered by the Act as proof of residency. 8 Alaska Admin. Code 35.015 (1977). Appellants, individuals desirous of securing jobs covered by the Act but unable to qualify for the necessary resident cards, challenge Alaska Hire as violative of both the Privileges and Immunities Clause of Art. IV, §2, and the Equal Protection Clause of the Fourteenth Amendment.

I

Although enacted in 1972, Alaska Hire was not seriously enforced until 1975, when construction on the Trans-Alaska Pipeline was reaching its peak. At that time, the State Department of Labor began issuing residency cards and limiting to resident cardholders the dispatchment to oil pipeline jobs. On March 1, 1976, in response to “numerous complaints alleging that persons who are not Alaska residents have been dispatched on pipeline jobs when qualified Alaska residents were available to fill the jobs,” Executive Order #76-1, Alaska Dept. of Labor (Mar. 1, 1976), Edmund Orbeck, the Commissioner of Labor and one of the appellees here, issued a cease-and-desist order to all unions supplying pipeline workers enjoining them “to respond to all open job calls by dispatching all qualified Alaska residents before any non-residents are dispatched.” *Ibid.* As a result, the appellants, all but one of whom had previously worked on the pipeline, were prevented from obtaining pipeline-related work. Consequently, on April 28, 1976, appellants filed a complaint in the Superior Court in Anchorage seeking declaratory and injunctive relief against enforcement of Alaska Hire.

On July 21, 1976, the Superior Court upheld Alaska Hire in its entirety and denied appellants all relief. On appeal, the Alaska Supreme Court . . . held that the Act’s general preference for Alaska residents was constitutionally permissible. Appellants appealed the State Supreme Court’s judgment . . . and we noted probable jurisdiction. 434 U.S. 919 (1977). We reverse.

II

Appellants' principal challenge to Alaska Hire is made under the Privileges and Immunities Clause of Art. IV, §2: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." That provision, which "appears in the so-called States' Relations Article, the same Article that embraces the Full Faith and Credit Clause, the Extradition Clause . . . , the provisions for the admission of new States, the Territory and Property Clause, and the Guarantee Clause," *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371, 379 (1978), "establishes a norm of comity," *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975), that is to prevail among the States with respect to their treatment of each other's residents. The purpose of the Clause, as described in *Paul v. Virginia*, 8 Wall. 168, 180 (1869), is

"to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this."

Appellants' appeal to the protection of the Clause is strongly supported by this Court's decisions . . . *Toomer v. Witsell*, 334 U.S. 385 (1948), the leading modern exposition of the limitations the Clause places on a State's power to bias employment opportunities in favor of its own residents, invalidated a South Carolina statute that required nonresidents to pay a fee 100 times greater than that paid by residents for a license to shrimp commercially in the three-mile maritime belt off the coast of that State. The Court reasoned that although the Privileges and Immunities Clause "does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it," *id.*, at 396, "[it] does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Ibid.*

[A]lthough the statute may not violate the Clause if the State shows "something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed," *Toomer v. Witsell*, *supra*, at 398, . . . certainly no showing was made on this record that nonresidents were "a peculiar source of the evil" Alaska Hire was enacted to remedy, namely, Alaska's "uniquely high unemployment." Alaska Stat. Ann. §38.40.020 (1977). What evidence the record does contain indicates that the major cause of Alaska's high unemployment was not the influx of nonresidents seeking employment, but rather the fact that a substantial number of Alaska's jobless residents- especially the unemployed Eskimo and Indian residents -were unable

to secure employment either because of their lack of education and job training or because of their geographical remoteness from job opportunities. . . .

Relying on *McCready v. Virginia*, 94 U.S. 391 (1877), however, Alaska contends that because the oil and gas that are the subject of Alaska Hire are owned by the State,²¹ this ownership, of itself, is sufficient justification for the Act's discrimination against nonresidents, and takes the Act totally without the scope of the Privileges and Immunities Clause. As the State sees it "the privileges and immunities clause [does] not apply, and was never meant to apply, to decisions by the states as to how they would permit, if at all, the use and distribution of the natural resources which they own" Brief for Appellees 20 n.14. We do not agree that the fact that a State owns a resource, of itself, completely removes a law concerning that resource from the prohibitions of the Clause. Although some courts, including the court below, have read *McCready* as creating an "exception" to the Privileges and Immunities Clause, we have just recently confirmed that "[in] more recent years . . . the Court has recognized that the States' interest in regulating and controlling those things they claim to 'own' . . . is by no means absolute." *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S., at 385. Rather than placing a statute completely beyond the Clause, a State's ownership of the property with which the statute is concerned is a factor- although often the crucial factor -to be considered in evaluating whether the statute's discrimination against noncitizens violates the Clause. Dispositive though this factor may be in many cases in which a State discriminates against nonresidents, it is not dispositive here.

The reason is that Alaska has little or no proprietary interest in much of the activity swept within the ambit of Alaska Hire; and the connection of the State's oil and gas with much of the covered activity is sufficiently attenuated so that it cannot justifiably be the basis for requiring private employers to discriminate against nonresidents. Alaska Hire extends to employers who have no connection whatsoever with the State's oil and gas, perform no work on state land, have no contractual relationship with the State, and receive no payment from the State.

In sum, the Act is an attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the State's residents. We believe that Alaska's ownership of the oil and gas that is the subject matter of Alaska Hire simply constitutes insufficient justification for the pervasive discrimination against nonresidents that the Act mandates.

²¹ At the time Alaska was admitted into the Union on January 3, 1959, 99% of all land within Alaska's borders was owned by the Federal Government. In becoming a State, Alaska was granted and became entitled to select approximately 103 million acres of those federal lands. Alaska Statehood Law, 72 Stat. 340, §6, note preceding 48 U. S. C. §21. The selection process is not yet complete, but since 1959 large portions of land have been conveyed to the State, in fee, by the Federal Government. Full title to those lands and to the minerals on and below them is vested in the State. 72 Stat. 342, §6 (i), note preceding 48 U. S. C. §21.

Although appellants raise no Commerce Clause challenge to the Act, the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, §2, and the Commerce Clause—a relationship that stems from their . . . shared vision of federalism—renders several Commerce Clause decisions appropriate support for our conclusion. *West v. Kansas Natural Gas*, 221 U.S. 229 (1911), struck down an Oklahoma statutory scheme that completely prohibited the out-of-state shipment of natural gas found within the State. The Court reasoned that if a State could so prefer its own economic well-being to that of the Nation as a whole, “Pennsylvania might keep its coal, the Northwest its timber, [and] the mining States their minerals,” so that “embargo may be retaliated by embargo” with the result that “commerce [would] be halted at state lines.” *Id.*, at 255. *West* was held to be controlling in *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), where a West Virginia statute that effectively required natural gas companies within the State to satisfy all fuel needs of West Virginia residents before transporting any natural gas out of the State was held to violate the Commerce Clause. *West and Pennsylvania v. West Virginia* thus established that the location in a given State of a resource bound for interstate commerce is an insufficient basis for preserving the benefits of the resource exclusively or even principally for that State’s residents. *Foster Packing Co. v. Haydel*, 278 U.S. 1 (1928), went one step further; it limited the extent to which a State’s purported ownership of certain resources could serve as a justification for the State’s economic discrimination in favor of residents. There, in the face of Louisiana’s claim that the State owned all shrimp within state waters, the Court invalidated a Louisiana law that required the local processing of shrimp taken from Louisiana marshes as a prerequisite to their out-of-state shipment. The Court observed that “by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the State necessarily releases its hold and, as to the shrimp so taken, definitely terminates its control.” *Id.*, at 13.

West, *Pennsylvania v. West Virginia*, and *Foster Packing* thus establish that the Commerce Clause circumscribes a State’s ability to prefer its own citizens in the utilization of natural resources found within its borders, but destined for interstate commerce. Like Louisiana’s shrimp in *Foster Packing*, Alaska’s oil and gas here are bound for out-of-state consumption. Indeed, the construction of the Trans-Alaska Pipeline, on which project appellants’ nonresidency has prevented them from working, was undertaken expressly to accomplish this end.

Alaska Hire cannot withstand constitutional scrutiny. As Mr. Justice Cardozo observed in *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 523 (1935), the Constitution “was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”

Reversed.

OREGON WASTE SYSTEMS v. OREGON
511 U.S. 93 (1994)

JUSTICE THOMAS delivered the opinion of the Court.

Two Terms ago, in *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. (1992), we held that the negative Commerce Clause prohibited Alabama from imposing a higher fee on the disposal in Alabama landfills of hazardous waste from other States than on the disposal of identical waste from Alabama. In reaching that conclusion, however, we left open the possibility that such a differential surcharge might be valid if based on the costs of disposing of waste from other States. Today, we must decide whether Oregon’s purportedly cost-based surcharge on the in-state disposal of solid waste generated in other States violates the Commerce Clause.

I

Like other States, Oregon comprehensively regulates the disposal of solid wastes within its borders. Respondent Oregon Department of Environmental Quality oversees the State’s regulatory scheme by developing and executing plans for the management, reduction, and recycling of solid wastes. To fund these and related activities, Oregon levies a wide range of fees on landfill operators. See, e. g., Ore. Rev. Stat. §§459.235(3), 459.310 (1991). In 1989, the Oregon Legislature imposed an additional fee, called a “surcharge,” on “every person who disposes of solid waste generated out-of-state in a disposal site or regional disposal site.” §459.297(1) (effective Jan. 1, 1991). The amount of that surcharge was left to respondent Environmental Quality Commission (Commission) to determine through rulemaking, but the legislature did require that the resulting surcharge “be based on the costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state which are not otherwise paid for” under specified statutes. §459.298. At the conclusion of the rulemaking process, the Commission set the surcharge on out-of-state waste at \$2.25 per ton. Ore. Admin. Rule 340-97-120(7) (Sept. 1993).

In conjunction with the out-of-state surcharge, the legislature imposed a fee on the in-state disposal of waste generated within Oregon. See Ore. Rev. Stat. §§459A.110(1), (5) (1991). The in-state fee, capped by statute at \$0.85 per ton (originally \$0.50 per ton), is considerably lower than the fee imposed on waste from other States. §§459A.110(5) and 459A.115.

The anticipated court challenge was not long in coming. Petitioners, Oregon Waste Systems, Inc. (Oregon Waste) and Columbia Resource Company (CRC), joined by Gilliam County, Oregon, sought expedited review of the out-of-state surcharge in the Oregon Court of Appeals. Oregon Waste owns and operates a solid waste landfill in Gilliam County, at which it accepts for final disposal solid waste generated in Oregon and in other States. CRC, pursuant to a 20-year contract with Clark County, in neighboring Washington State, transports solid waste via barge from Clark County to a landfill in Morrow County, Oregon. Petitioners challenged the

administrative rule establishing the out-of-state surcharge and its enabling statutes under both state law and the Commerce Clause of the United States Constitution. The Oregon Court of Appeals upheld the statutes and rule. *Gilliam County v. Department of Environmental Quality*, 114 Ore. App. 369, 837 P.2d 965 (1992).

The State Supreme Court affirmed. *Gilliam County v. Department of Environmental Quality of Oregon*, 316 Ore. 99, 849 P.2d 500 (1993). As to the Commerce Clause, the court recognized that the Oregon surcharge resembled the Alabama fee invalidated in *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. (1992), in that both prescribed higher fees for the disposal of waste from other States. Nevertheless, the court viewed the similarity as superficial only. Despite the explicit reference in §459.297(1) to out-of-state waste's geographic origin, the court reasoned, the Oregon surcharge is not facially discriminatory "because of [its] express nexus to actual costs incurred [by state and local government]." 316 Ore., at 112, 849 P.2d, at 508. That nexus distinguished *Chemical Waste*, supra, by rendering the surcharge a "compensatory fee," which the court viewed as "prima facie reasonable," that is to say, facially constitutional. *Ibid.* The court read our case law as invalidating compensatory fees only if they are "manifestly disproportionate to the services rendered. We granted certiorari, 509 U.S. (1993).

II

The Commerce Clause provides that "the Congress shall have Power . . . to regulate Commerce . . . among the several States." Art. I, §8, cl. 3. Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a "negative" aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce. The Framers granted Congress plenary authority over interstate commerce in "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-326 (1979). See generally, *The Federalist*, No. 42 (J. Madison). "This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, . . . has as its corollary that the states are not separable economic units." *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-538 (1949).

Consistent with these principles, we have held that the first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce." *Hughes*, supra, at 336. As we use the term here, "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually per se invalid. By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

We deem it obvious here that Oregon’s \$2.25 per ton surcharge is discriminatory on its face. The surcharge subjects waste from other States to a fee almost three times greater than the \$0.85 per ton charge imposed on solid in-state waste. The statutory determinant for which fee applies to any particular shipment of solid waste to an Oregon landfill is whether or not the waste was “generated out-of-state.” Ore. Rev. Stat. §459.297(1) (1991).

Respondents argue, and the Oregon Supreme Court held, that the statutory nexus between the surcharge and “the [otherwise uncompensated] costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state,” Ore. Rev. Stat. §459.298 (1991), necessarily precludes a finding that the surcharge is discriminatory. We find respondents’ narrow focus on Oregon’s compensatory aim to be foreclosed by our precedents. Even if the surcharge merely recoups the costs of disposing of out-of-state waste in Oregon, the fact remains that the differential charge favors shippers of Oregon waste over their counterparts handling waste generated in other States. In making that geographic distinction, the surcharge patently discriminates against interstate commerce.

Respondents must come forward with other legitimate reasons to subject waste from other States to a higher charge than is levied against waste from Oregon. Respondents offer two such reasons, each of which we address below.

A

Respondents’ principal defense of the higher surcharge on out-of-state waste is that it is a “compensatory tax” necessary to make shippers of such waste pay their “fair share” of the costs imposed on Oregon by the disposal of their waste in the State. To justify a charge on interstate commerce as a compensatory tax, a State must, as a threshold matter, “identify . . . the [intrastate tax] burden for which the State is attempting to compensate.” Once that burden has been identified, the tax on interstate commerce must be shown roughly to approximate—but not exceed—the amount of the tax on intrastate commerce. Finally, the events on which the interstate and intrastate taxes are imposed must be “substantially equivalent”; that is, they must be sufficiently similar in substance to serve as mutually exclusive “proxies” for each other.²²

Although it is often no mean feat to determine whether a challenged tax is a compensatory tax, we have little difficulty concluding that the Oregon surcharge is not such a

²² The Oregon Supreme Court, though terming the out-of-state surcharge a “compensatory fee,” relied for its legal standard on our “user fee” cases. See 316 Ore. 99, 112, 849 P.2d 500, 508 (1993). The compensatory tax cases cited in the text, rather than the user fee cases, are controlling here, as the latter apply only to “charges imposed by the State for the use of state-owned or state-provided transportation or other facilities and services.” *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621 (1981). Because it is undisputed that the landfills in question are owned by private entities the out-of-state surcharge is plainly not a user fee. Nevertheless, even if the surcharge could somehow be viewed as a user fee, it could not be sustained as such, given that it discriminates against interstate commerce. See *Guy v. Baltimore*, 100 U.S. 434 (1880).

tax. Oregon does not impose a specific charge of at least \$2.25 per ton on shippers of waste generated in Oregon, for which the out-of-state surcharge might be considered compensatory. In fact, the only analogous charge on the disposal of Oregon waste is \$0.85 per ton, approximately one-third of the amount imposed on waste from other States. See Ore. Rev. Stat. §§459A.110(5), 459A.115 (1991). Respondents' failure to identify a specific charge on intrastate commerce equal to or exceeding the surcharge is fatal to their claim.

Respondents argue that, despite the absence of a specific \$2.25 per ton charge on in-state waste, intrastate commerce does pay its share of the costs underlying the surcharge through general taxation. Whether or not that is true is difficult to determine, as “[general] tax payments are received for the general purposes of the [government], and are, upon proper receipt, lost in the general revenues.” *Flast v. Cohen*, 392 U.S. 83, 128 (1968) (Harlan, J., dissenting). Even assuming, however, that various other means of general taxation, such as income taxes, could serve as an identifiable intrastate burden roughly equivalent to the out-of-state surcharge, respondents' compensatory tax argument fails because the in-state and out-of-state levies are not imposed on substantially equivalent events.

The prototypical example of substantially equivalent taxable events is the sale and use of articles of trade. In fact, use taxes on products purchased out of state are the only taxes we have upheld in recent memory under the compensatory tax doctrine. In our view, earning income and disposing of waste at Oregon landfills are even less equivalent than manufacturing and wholesaling. Indeed, the very fact that in-state shippers of out-of-state waste, such as Oregon Waste, are charged the out-of-state surcharge even though they pay Oregon income taxes refutes respondents' argument that the respective taxable events are substantially equivalent. We conclude that, far from being substantially equivalent, taxes on earning income and utilizing Oregon landfills are “entirely different kinds of taxes.”

B

Respondents' final argument is that Oregon has an interest in spreading the costs of the in-state disposal of Oregon waste to all Oregonians. That is, because all citizens of Oregon benefit from the proper in-state disposal of waste from Oregon, respondents claim it is only proper for Oregon to require them to bear more of the costs of disposing of such waste in the State through a higher general tax burden. At the same time, however, Oregon citizens should not be required to bear the costs of disposing of out-of-state waste, respondents claim. The necessary result of that limited cost-shifting is to require shippers of out-of-state waste to bear the full costs of in-state disposal, but to permit shippers of Oregon waste to bear less than the full cost.

Respondents counter that if Oregon is engaged in any form of protectionism, it is “resource protectionism,” not economic protectionism. It is true that by discouraging the flow of out-of-state waste into Oregon landfills, the higher surcharge on waste from other States conserves more space in those landfills for waste generated in Oregon. Recharacterizing the

surcharge as resource protectionism hardly advances respondents' cause, however. Even assuming that landfill space is a "natural resource," "a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." *Philadelphia*, 437 U.S., at 627. As we held more than a century ago, "if the State, under the guise of exerting its police powers, should [impose a burden] . . . applicable solely to articles [of commerce] . . . produced or manufactured in other States, the courts would find no difficulty in holding such legislation to be in conflict with the Constitution of the United States." *Guy v. Baltimore*, 100 U.S. 434, 443 (1880).

IV

We recognize that the States have broad discretion to configure their systems of taxation as they deem appropriate. See, e. g., *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622-623 (1981); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 336-337 (1977). All we intimate here is that their discretion in this regard, as in all others, is bounded by any relevant limitations of the Federal Constitution, in this case the negative Commerce Clause. Because respondents have offered no legitimate reason to subject waste generated in other States to a discriminatory surcharge approximately three times as high as that imposed on waste generated in Oregon, the surcharge is facially invalid under the negative Commerce Clause. Accordingly, the judgment of the Oregon Supreme Court is reversed, and the cases are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE BLACKMUN joins, dissenting.

Landfill space evaporates as solid waste accumulates. State and local governments expend financial and political capital to develop trash control systems that are efficient, lawful, and protective of the environment. The State of Oregon responsibly attempted to address its solid waste disposal problem through enactment of a comprehensive regulatory scheme for the management, disposal, reduction, and recycling of solid waste. For this Oregon should be applauded. The regulatory scheme included a fee charged on out-of-state solid waste. The Oregon Legislature directed the Commission to determine the appropriate surcharge "based on the costs . . . of disposing of solid waste generated out-of-state." Ore. Rev. Stat. §459.298 (1991). The Commission arrived at a surcharge of \$2.25 per ton, compared to the \$0.85 per ton charged on in-state solid waste. Ore. Admin. Rule 340-97-110(3) (1993).

Nearly 20 years ago, we held that a State cannot ban all out-of-state waste disposal in protecting themselves from hazardous or noxious materials brought across the State's borders.

Philadelphia v. New Jersey, 437 U.S. 617 (1978). Two Terms ago in *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. (1992), in striking down the State of Alabama's \$72 per ton fee on the disposal of out-of-state hazardous waste, the Court left open the possibility that

such a fee could be valid if based on the costs of disposing of waste from other States. *Id.*, at, n. 9 (slip op., at 10, n. 9). Once again, however, as in *Philadelphia and Chemical Waste Management*, the Court further cranks the dormant Commerce Clause ratchet against the States by striking down such cost-based fees, and by so doing ties the hands of the States in addressing the vexing national problem of solid waste disposal. I dissent.

Americans generated nearly 196 million tons of municipal solid waste in 1990, an increase from 128 million tons in 1975. See U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1992 Update*, p. ES-3. Under current projections, Americans will produce 222 million tons of garbage in the year 2000. *Ibid.* Generating solid waste has never been a problem. Finding environmentally safe disposal sites has. By 1991, it was estimated that 45 percent of all solid waste landfills in the Nation had reached capacity. 56 Fed. Reg. 50980 (1991). Nevertheless, the Court stubbornly refuses to acknowledge that a clean and healthy environment, unthreatened by the improper disposal of solid waste, is the commodity really at issue in cases such as this.

Notwithstanding the identified shortage of landfill space in the Nation, the Court notes that it has “little difficulty,” concluding that the Oregon surcharge does not operate as a compensatory tax, designed to offset the loss of available landfill space in the State caused by the influx of out-of-state waste. The Court reaches this nonchalant conclusion because the State has failed “to identify a specific charge on intrastate commerce equal to or exceeding the surcharge.” The Court’s myopic focus on “differential fees” ignores the fact that in-state producers of solid waste support the Oregon regulatory program through state income taxes and by paying, indirectly, the numerous fees imposed on landfill operators and the dumping fee on in-state waste. Ore. Rev. Stat. §459.005 et seq. (1991).

A State may enact a comprehensive regulatory system to address an environmental problem or a threat to natural resources within the confines of the Commerce Clause. Where a State imposes restrictions on the ability of its own citizens to dispose of solid waste in an effort to promote a “clean and safe environment,” it is not discriminating against interstate commerce by preventing the uncontrolled transfer of out-of-state solid waste into the State.

The availability of safe landfill disposal sites in Oregon did not occur by chance. Through its regulatory scheme, the State of Oregon inspects landfill sites, monitors waste streams, promotes recycling, and imposes an \$0.85 per ton disposal fee on in-state waste, Ore. Rev. Stat. 459.005 et seq. (1991), all in an effort to curb the threat that its residents will harm the environment and create health and safety problems through excessive and unmonitored solid waste disposal. Depletion of a clean and safe environment will follow if Oregon must accept out-of-state waste at its landfills without a sharing of the disposal costs. The Commerce Clause does not require a State to abide this outcome where the “natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage.” A shortage of available landfill space is upon us, 56 Fed. Reg. 50980 (1991), and

with it comes the accompanying health and safety hazards flowing from the improper disposal of solid wastes. We have long acknowledged a distinction between economic protectionism and health and safety regulation promulgated by Oregon. See *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949).

Far from neutralizing the economic situation for Oregon producers and out-of-state producers, the Court's analysis turns the Commerce Clause on its head. Oregon's neighbors will operate under a competitive advantage against their Oregon counterparts as they can now produce solid waste with reckless abandon and avoid paying concomitant state taxes to develop new landfills and clean up retired landfill sites. While I understand that solid waste is an article of commerce, it is not a commodity sold in the marketplace; rather it is disposed of at a cost to the State. Petitioners do not buy garbage to put in their landfills; solid waste producers pay petitioners to take their waste. Oregon solid waste producers do not compete with out-of-state businesses in the sale of solid waste. Thus, the fees do not alter the price of a product that is competing with other products for common purchasers. If anything, striking down the fees works to the disadvantage of Oregon businesses. They alone will have to pay the "nondisposal" fees associated with solid waste: landfill siting, landfill clean-up, insurance to cover environmental accidents, and transportation improvement costs associated with out-of-state waste being shipped into the State. While we once recognized that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies," *id.*, at 621, n. 4, quoting 42 U.S.C. §6901 (a) (4) (1976 ed.), the Court today leaves States with only two options: become a dumper and ship as much waste as possible to a less populated State, or become a dumpee, and stoically accept waste from more densely populated States.

In its sweeping ruling, the Court makes no distinction between publicly and privately owned landfills. It rejects the argument that our "user fee" cases apply in this context since the landfills owned by the petitioners are private and our user fee analysis applies only to "charges imposed by the State for the use of a state-owned or state-provided transportation or other facilities and services." Rather than stopping there, however, the majority goes on to note that even if the Oregon surcharge could be viewed as a user fee, "it could not be sustained as such, given that it discriminates against interstate commerce." There is no need to make this dubious assertion. We specifically left unanswered the question whether a state or local government could regulate disposal of out-of-state solid waste at landfills owned by the government.

We will undoubtedly be faced with this question directly in the future as roughly 80 percent of landfills receiving municipal solid waste in the United States are state or locally owned. We noted in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984), "if a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities." See also *Wyoming v. Oklahoma*, 502 U.S. Similarly, if the State owned and operated a park or recreational facility, it would be allowed to charge differential fees for in-state and out-of-state users of the resource. See, e.g., *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371 (1978) (upholding Montana's

higher nonresident elk hunting license fees to compensate the State for conservation expenditures from taxes which only residents pay).

I think that the \$2.25 per ton fee that Oregon imposes on out-of-state waste works out to a similar “fair approximation” of the privilege to use its landfills. Even the Court concedes that our precedents do not demand anything beyond “substantial equivalency” between the fees charged on in-state and out-of-state waste.

The State of Oregon is not prohibiting the export of solid waste from neighboring States; it is only asking that those neighbors pay their fair share for the use of Oregon landfill sites. I see nothing in the Commerce Clause that compels less densely populated States to serve as the low-cost dumping grounds for their neighbors, suffering the attendant risks that solid waste landfills present. The Court, deciding otherwise, further limits the dwindling options available to States as they contend with the environmental, health, safety, and political challenges posed by the problem of solid waste disposal in modern society.

For the foregoing reasons, I respectfully dissent.

DISCUSSION QUESTIONS:

Why are most dumping grounds located in close proximity to poor communities? Is this “environmental injustice” the result of market forces or racial prejudice?

How can West Virginia cheaply dispose of solid waste from home-grown industries while discouraging the importation of solid waste from out of state?

PART IV. EMINENT DOMAIN

"The right to take private property for public use, or eminent domain, is reserved right attached to every man's land, and paramount to his right of ownership."
Todd v. Austin, 34 Connecticut 78 (1867).

Session 11. Public Use

MISSOURI PACIFIC RAILWAY CO. v. NEBRASKA 164 U.S. 403 (1896)

Mr. Justice Gray, after stating the case, delivered the opinion of the court.

The arguments in this case have taken a wider range than is required for its decision. The material facts, as assumed by the court below, are as follows:

The Missouri Pacific Railway Company, a corporation of the State of Nebraska, was the owner of the right of way and depot grounds, within which were its main and side tracks, its station-houses, and other shipping facilities, at Elmwood in that State; and had permitted two elevators to be erected and operated by private firms on the side track at that station.

John W. Hollenbeck and others, apparently not a corporation, but a voluntary association of persons owning farms and leaseholds in the neighborhood of Elmwood, upon which they raised corn, wheat, oats and other cereals, large quantities of which were ready for market, made an application in writing to the railway company to grant them "a location on the right of way at Elmwood station aforesaid, for the erection of an elevator of sufficient capacity to store from time to time the cereal products of the farms and leaseholds of" the applicants, "as well as the products of other neighboring farms." That application was refused by the railway company.

The applicants then made a complaint to the Board of Transportation of the State of Nebraska, alleging that the two elevators already built on the right of way of the railway company at Elmwood station were "during certain seasons of the year wholly insufficient in affording a market for the cereals of the complainants and others desirous of marketing their grain"; and that the refusal of the railway company to grant to the complainants a location for an elevator was in violation of the Nebraska statute of 1887, c. 60, in that such refusal was an unjust discrimination, and that the railway company, by such refusal, was subjecting the complainants to an undue and unreasonable prejudice and disadvantage, in respect to traffic facilities, over other localities, and was giving an undue and unreasonable preference and advantage to the owners and operators of the two elevators already built at that station.

The board of transportation, after notice to the railway company, and hearing evidence and arguments, found that the two existing elevators were insufficient to handle the grain shipped at Elmwood station, and the owners and operators of those elevators had entered into a combination to fix the prices of grain and to prevent competition in the price thereof, and there

were not sufficient facilities for the handling and shipping of grain at that station; that it was necessary for the convenience of the public that another elevator should be erected and operated there; that, by reason of the side track being placed within the right of way and depot grounds, the complainants could not ship grain without building their elevator upon the grounds of the railway company; that there was room upon those grounds for another elevator without materially interfering with the operation of the railroad, and the building of an elevator thereon by the complainants would not materially affect the railway company in the use of its grounds, or be an unreasonable burden to it; and that the granting by the railway company of the right and privilege to the owners of the two elevators now standing, and refusing to grant the like right and privilege to the complainants, was an unjust and unreasonable discrimination against the complainants, and unlawfully gave a preference and advantage to the owners of the two existing elevators.

The board of transportation thereupon ordered that the railway company, within ten days, grant to the complainants, on like terms and conditions as granted to the owners of the two existing elevators, the right and privilege of erecting an elevator upon its grounds, and adjacent to its track, at a point specified in the order, or at some other suitable and convenient place if the parties could agree; and grant to the complainants all and equal facilities for the handling and shipping of grain at that station, which it granted to other shippers of grain there, and cease from all discrimination or preference to and of shippers and operators of elevators at that station.

The railway company not having complied with the order, the Supreme Court of the State, upon a petition in the name of the State, at the relation of the board of transportation, for a mandamus, and an answer thereto and hearing thereon, found the issues in favor of the realtors, and adjudged that, unless the railway company, within forty days, complied with order of the board of transportation, a writ of mandamus should issue to compel compliance with that order according to its terms.

The Supreme Court of Nebraska has construed this statute as authorizing the board of transportation to make the order questioned in this case, which required the railroad company to grant to the realtors the right to erect an elevator upon its right of way at Elmwood station, on the same terms and conditions on which it had already granted to other persons rights to erect two elevators thereon. The construction so given to the statute by the highest court of the State must be accepted by this court in judging whether the statute conforms to the Constitution of the United States. *Chicago, Milwaukee & St. Paul Railway v. Minnesota*, 134 U.S. 418, 456.

A railroad corporation doubtless holds its station grounds, tracks and right of way as its private property, but for the public use for which it was incorporated; and may, in its discretion, permit them to be occupied by other parties with structures convenient for the receipt and delivery of freight upon its railroad, so long as a free and safe passage is left for the carriage of freight and passengers. *Grand Trunk Railroad v. Richardson*, 91 U.S. 454. But how far the railroad company can be compelled to do so, against its will, is a wholly different question.

Upon the admitted facts of the case at bar, the railroad company had granted to two private firms the privilege of erecting elevators upon its right of way at Elmwood station; and had refused an application of other private persons, farmers in the neighborhood, for the privilege of erecting on that right of way a third elevator of sufficient capacity to store from time to time the grain produced upon their farms and upon those of their neighbors; and has been ordered by the board of transportation, and by the Supreme Court of the State, to grant to the applicants a location upon its right of way for the purpose of erecting thereon such an elevator, upon the like terms and conditions as in its grants to the owners of the two existing elevators.

The only particular alleged in the complaint, and the only one, therefore, presented for our consideration in this case, in which the railroad company is supposed to have made an unjust discrimination against the complainants, or to have subjected them to an undue and unreasonable prejudice and disadvantage, in respect to traffic facilities, over other locations, or to have given an undue and unreasonable preference to other persons, is the refusal of the railroad company to grant to the complainants a location upon its right of way for the purpose of erecting an elevator thereon, upon the terms and conditions upon which it had previously granted to other persons similar privileges to erect two other elevators.

The record does not show what were the terms and conditions of the contracts between the railroad company and the owners of those elevators; nor present any question as to the validity of those contracts.

Nor does it present any question as to the power of the legislature to compel the railroad company itself to erect and maintain an elevator for the use of the public; or to compel it to permit to all persons equal facilities of access from their own lands to its tracks, and of the use, from time to time, of those tracks, for the purpose of shipping or receiving grain or other freight, as in *Rhodes v. Northern Pacific Railroad*, 34 Minnesota, 87, in *Chicago & Northwestern Railway v. People*, 56 Illinois, 365, and in *Hoyt v. Chicago, Burlington & Quincy Railroad*, 93 Illinois, 601.

Nor does this case show any such exercise of the legislative power to regulate the conduct of the business, or the rate of tolls, fees or charges, either of railroad corporations or of the proprietors of elevators, as has been upheld by this court in previous cases. *Munn v. Illinois*, 94 U.S. 113; *Chicago, Burlington & Quincy Railroad v. Illinois*, 94 U.S. 155; *Dow v. Beidelman*, 125 U.S. 680; *Budd v. New York*, 143 U.S. 517; *Brass v. Stoeser*, 153 U.S. 391; *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U.S. 204, 213, 214; *Louisville & Nashville Railroad v. Kentucky*, 161 U.S. 677, 696.

The order in question was not limited to temporary use of tracks, nor to the conduct of the business of the railway company. But it required the railway company to grant to the petitioners the right to build and maintain a permanent structure upon its right of way.

The order in question was not, and was not claimed to be, either in the opinion of the court below or in the argument for the defendant in error in this court, a taking of private property for a public use under the right of eminent domain. The petitioners were merely private individuals, voluntarily associated together for their own benefit. They do not appear to have been incorporated by the State for any public purpose whatever; or to have themselves intended to establish an elevator for the use of the public. On the contrary, their own application to the railroad company, as recited in their complaint to the board of transportation, was only "for a location, on the right of way at Elmwood station aforesaid, for the erection of an elevator of sufficient capacity to store from time to time the cereal products of the farms and leaseholds of complainants aforesaid, as well as the products of other neighboring farms."

To require the railroad company to grant to the petitioners a location on its right of way, for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railroad company, against its will, to transfer an estate in part of the land which it owns and holds, under its charter, as its private property and for a public use, to an association of private individuals, for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit, without reserving any control of the use of such land, or of the building to be erected thereon, to the railroad company for the accommodation of its own business, or for the convenience of the public.

This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion, that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States. *Wilkinson v. Leland*, 2. Pet. 627, 658; *Murray v. Hoboken Co.*, 18 How. 272, 276; *Loan Association v. Topeka*, 20 Wall. 655; *Davidson v. New Orleans*, 96 U.S. 97, 102; *Cole v. La Grange*, 113 U.S. 1; *Fallbrook District v. Bradley*, ante, 112, 158, 161; *State v. Chicago, Milwaukee & St. Paul Railway*, 36 Minnesota, 402.

Judgment reversed, and case remanded to the Supreme Court of the State of Nebraska, for further proceedings not inconsistent with this opinion.

BERMAN v. PARKER
348 U.S. 26 (1954)

Mr. Justice Douglas delivered the opinion of the Court.

This is an appeal (28 U.S.C. §1253) from the judgment of a three-judge District Court which dismissed a complaint seeking to enjoin the condemnation of appellants' property under the District of Columbia Redevelopment Act of 1945, 60 Stat. 790, D. C. Code, 1951, §§5-701--719. The challenge was to the constitutionality of the Act, particularly as applied to the taking of appellants' property. The District Court sustained the constitutionality of the Act. 117 F.Supp. 705.

By §2 of the Act, Congress made a "legislative determination" that "owing to technological and sociological changes, obsolete layout, and other factors, conditions existing in the District of Columbia with respect to substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation, are injurious to the public health, safety, morals, and welfare; and it is hereby declared to be the policy of the United States to protect and promote the welfare of the inhabitants of the seat of the Government by eliminating all such injurious conditions by employing all means necessary and appropriate for the purpose."²³

Section 2 goes on to declare that acquisition of property is necessary to eliminate these housing conditions.

Congress further finds in §2 that these ends cannot be attained "by the ordinary operations of private enterprise alone without public participation"; that "the sound replanning and redevelopment of an obsolescent or obsolescing portion" of the District "cannot be accomplished unless it be done in the light of comprehensive and coordinated planning of the whole of the territory of the District of Columbia and its environs"; and that "the acquisition and the assembly of real property and the leasing or sale thereof for redevelopment pursuant to a project area redevelopment plan . . . is hereby declared to be a public use."

Section 4 creates the District of Columbia Redevelopment Land Agency (hereinafter called the Agency), composed of five members, which is granted power by §5 (a) to acquire and assemble, by eminent domain and otherwise, real property for "the redevelopment of blighted

²³ The Act does not define either "slums" or "blighted areas." Section 3 (r), however, states: "Substandard housing conditions' means the conditions obtaining in connection with the existence of any dwelling, or dwellings, or housing accommodations for human beings, which because of lack of sanitary facilities, ventilation, or light, or because of dilapidation, overcrowding, faulty interior arrangement, or any combination of these factors, is in the opinion of the Commissioners detrimental to the safety, health, morals, or welfare of the inhabitants of the District of Columbia."

territory in the District of Columbia and the prevention, reduction, or elimination of blighting factors or causes of blight."

Section 6 (a) of the Act directs the National Capital Planning Commission (hereinafter called the Planning Commission) to make and develop "a comprehensive or general plan" of the District, including "a land-use plan" which designates land for use for "housing, business, industry, recreation, education, public buildings, public reservations, and other general categories of public and private uses of the land." Section 6 (b) authorizes the Planning Commission to adopt redevelopment plans for specific project areas. These plans are subject to the approval of the District Commissioners after a public hearing; and they prescribe the various public and private land uses for the respective areas, the "standards of population density and building intensity," and "the amount or character or class of any low-rent housing." §6 (b).

Once the Planning Commission adopts a plan and that plan is approved by the Commissioners, the Planning Commission certifies it to the Agency. §6 (d). At that point, the Agency is authorized to acquire and assemble the real property in the area. *Id.*

After the real estate has been assembled, the Agency is authorized to transfer to public agencies the land to be devoted to such public purposes as streets, utilities, recreational facilities, and schools, §7 (a), and to lease or sell the remainder as an entirety or in parts to a redevelopment company, individual, or partnership. §7 (b), (f). The leases or sales must provide that the lessees or purchasers will carry out the redevelopment plan and that "no use shall be made of any land or real property included in the lease or sale nor any building or structure erected thereon" which does not conform to the plan, §§7 (d), 11. Preference is to be given to private enterprise over public agencies in executing the redevelopment plan. §7 (g).

The first project undertaken under the Act relates to Project Area B in Southwest Washington, D. C. In 1950 the Planning Commission prepared and published a comprehensive plan for the District. Surveys revealed that in Area B, 64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, 83.8% lacked central heating. In the judgment of the District's Director of Health it was necessary to redevelop Area B in the interests of public health. The population of Area B amounted to 5,012 persons, of whom 97.5% were Negroes.

The plan for Area B specifies the boundaries and allocates the use of the land for various purposes. It makes detailed provisions for types of dwelling units and provides that at least one-third of them are to be low-rent housing with a maximum rental of \$17 per room per month.

After a public hearing, the Commissioners approved the plan and the Planning Commission certified it to the Agency for execution. The Agency undertook the preliminary steps for redevelopment of the area when this suit was brought.

Appellants own property in Area B at 712 Fourth Street, S.W. It is not used as a dwelling or place of habitation. A department store is located on it. Appellants object to the appropriation of this property for the purposes of the project. They claim that their property may not be taken constitutionally for this project. It is commercial, not residential property; it is not slum housing; it will be put into the project under the management of a private, not a public, agency and redeveloped for private, not public, use. That is the argument; and the contention is that appellants' private property is being taken contrary to two mandates of the Fifth Amendment--(1) "No person shall . . . be deprived of . . . property, without due process of law"; (2) "nor shall private property be taken for public use, without just compensation." To take for the purpose of ridding the area of slums is one thing; it is quite another, the argument goes, to take a man's property merely to develop a better balanced, more attractive community. The District Court, while agreeing in general with that argument, saved the Act by construing it to mean that the Agency could condemn property only for the reasonable necessities of slum clearance and prevention, its concept of "slum" being the existence of conditions "injurious to the public health, safety, morals and welfare." 117 F.Supp. 705, 724-725.

The power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs. See *District of Columbia v. Thompson Co.*, 346 U.S. 100, 108. We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia (see *Block v. Hirsh*, 256 U.S. 135) or the States legislating concerning local affairs. See *Olsen v. Nebraska*, 313 U.S. 236; *Lincoln Union v. Northwestern Co.*, 335 U.S. 525; *California State Association v. Maloney*, 341 U.S. 105. This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one. See *Old Dominion Co. v. United States*, 269 U.S. 55, 66; *United States ex rel. T. V. A. v. Welch*, 327 U.S. 546, 552.

Public safety, public health, morality, peace and quiet, law and order— these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. See *Noble State Bank v. Haskell*, 219 U.S. 104, 111. Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of

charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. See *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. See *Luxton v. North River Bridge Co.*, 153 U.S. 525, 529-530; *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 679. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. See *Luxton v. North River Bridge Co.*, *supra*; cf. *Highland v. Russell Car Co.*, 279 U.S. 253. The public end may be as well or better served through an agency of private enterprise than through a department of government- or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects. What we have said also disposes of any contention concerning the fact that certain property owners in the area may be permitted to repurchase their properties for redevelopment in harmony with the over-all plan. That, too, is a legitimate means which Congress and its agencies may adopt, if they choose.

In the present case, Congress and its authorized agencies attack the problem of the blighted parts of the community on an area rather than on a structure-by-structure basis. That, too, is opposed by appellants. They maintain that since their building does not imperil health or safety nor contribute to the making of a slum or a blighted area, it cannot be swept into a redevelopment plan by the mere dictum of the Planning Commission or the Commissioners. The particular uses to be made of the land in the project were determined with regard to the needs of the particular community. The experts concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole. It was not enough, they believed, to remove existing buildings that were unsanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums—the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the

presence of outmoded street patterns. It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative. The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented. Cf. *Gohld Realty Co. v. Hartford*, 141 Conn. 135, 141-144, 104 A. 2d 365, 368-370; *Hunter v. Redevelopment Authority*, 195 Va. 326, 338-339, 78 S. E. 2d 893, 900-901. Such diversification in future use is plainly relevant to the maintenance of the desired housing standards and therefore within congressional power.

The District Court below suggested that, if such a broad scope were intended for the statute, the standards contained in the Act would not be sufficiently definite to sustain the delegation of authority. 117 F.Supp. 705, 721. We do not agree. We think the standards prescribed were adequate for executing the plan to eliminate not only slums as narrowly defined by the District Court but also the blighted areas that tend to produce slums. Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. But we have said enough to indicate that it is the need of the area as a whole which Congress and its agencies are evaluating. If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. But as we have already stated, community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.

It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch. See *Shoemaker v. United States*, 147 U.S. 282, 298; *United States ex rel. T. V. A. v. Welch*, *supra*, 554; *United States v. Carmack*, 329 U.S. 230, 247.

The District Court indicated grave doubts concerning the Agency's right to take full title to the land as distinguished from the objectionable buildings located on it. 117 F.Supp. 705, 715-719. We do not share those doubts. If the Agency considers it necessary in carrying out the redevelopment project to take full title to the real property involved, it may do so. It is not for the courts to determine whether it is necessary for successful consummation of the project that unsafe, unsightly, or unsanitary buildings alone be taken or whether title to the land be included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation.

The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking.

The judgment of the District Court, as modified by this opinion, is Affirmed.

HAWAII HOUSING AUTHORITY v. MIDKIFF
467 U.S. 229 (1984)

O'Connor, J., delivered the opinion of the Court.

The Fifth Amendment of the United States Constitution provides, in pertinent part, that "private property [shall not] be taken for public use, without just compensation." These cases present the question whether the Public Use Clause of that Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the State of Hawaii from taking, with just compensation, title in real property from lessors and transferring it to lessees in order to reduce the concentration of ownership of fees simple in the State. We conclude that it does not.

I

A

The Hawaiian Islands were originally settled by Polynesian immigrants from the western Pacific. These settlers developed an economy around a feudal land tenure system in which one island high chief, the ali'i nui, controlled the land and assigned it for development to certain subchiefs. The subchiefs would then reassign the land to other lower ranking chiefs, who would administer the land and govern the farmers and other tenants working it. All land was held at the will of the ali'i nui and eventually had to be returned to his trust. There was no private ownership of land. See generally Brief for Office of Hawaiian Affairs as Amicus Curiae 3-5.

Beginning in the early 1800's, Hawaiian leaders and American settlers repeatedly attempted to divide the lands of the kingdom among the crown, the chiefs, and the common people. These efforts proved largely unsuccessful, however, and the land remained in the hands of a few. In the mid-1960's, after extensive hearings, the Hawaii Legislature discovered that, while the State and Federal Governments owned almost 49% of the State's land, another 47% was in the hands of only 72 private landowners. See Brief for the Hou Hawaiians and Maui Loa, Chief of the Hou Hawaiians, as Amici Curiae 32. The legislature further found that 18 landholders, with tracts of 21,000 acres or more, owned more than 40% of this land and that on Oahu, the most urbanized of the islands, 22 landowners owned 72.5% of the fee simple titles. *Id.*, at 32-33. The legislature concluded that concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare.

To redress these problems, the legislature decided to compel the large landowners to break up their estates. The legislature considered requiring large landowners to sell lands which they were leasing to homeowners. However, the landowners strongly resisted this scheme, pointing out the significant federal tax liabilities they would incur. Indeed, the landowners claimed that the federal tax laws were the primary reason they previously had chosen to lease, and not sell, their lands. Therefore, to accommodate the needs of both lessors and lessees, the

Hawaii Legislature enacted the Land Reform Act of 1967 (Act), Haw. Rev. Stat., ch. 516, which created a mechanism for condemning residential tracts and for transferring ownership of the condemned fees simple to existing lessees. By condemning the land in question, the Hawaii Legislature intended to make the land sales involuntary, thereby making the federal tax consequences less severe while still facilitating the redistribution of fees simple.

Under the Act's condemnation scheme, tenants living on single-family residential lots within developmental tracts at least five acres in size are entitled to ask the Hawaii Housing Authority (HHA) to condemn the property on which they live. Haw. Rev. Stat. §§516-1(2), (11), 516-22 (1977). When 25 eligible tenants, or tenants on half the lots in the tract, whichever is less, file appropriate applications, the Act authorizes HHA to hold a public hearing to determine whether acquisition by the State of all or part of the tract will "effectuate the public purposes" of the Act. §516-22. If HHA finds that these public purposes will be served, it is authorized to designate some or all of the lots in the tract for acquisition. It then acquires, at prices set either by condemnation trial or by negotiation between lessors and lessees, the former fee owners' full "right, title, and interest" in the land.

After compensation has been set, HHA may sell the land titles to tenants who have applied for fee simple ownership. HHA is authorized to lend these tenants up to 90% of the purchase price, and it may condition final transfer on a right of first refusal for the first 10 years following sale. §§516-30, 516-34, 516-35. If HHA does not sell the lot to the tenant residing there, it may lease the lot or sell it to someone else, provided that public notice has been given. §516-28. However, HHA may not sell to any one purchaser, or lease to any one tenant, more than one lot, and it may not operate for profit. §§516-28, 516-32. In practice, funds to satisfy the condemnation awards have been supplied entirely by lessees. See App. 164. While the Act authorizes HHA to issue bonds and appropriate funds for acquisition, no bonds have issued and HHA has not supplied any funds for condemned lots.

B

In April 1977, HHA held a public hearing concerning the proposed acquisition of some of appellees' lands. HHA made the statutorily required finding that acquisition of appellees' lands would effectuate the public purposes of the Act. Then, in October 1978, it directed appellees to negotiate with certain lessees concerning the sale of the designated properties. Those negotiations failed, and HHA subsequently ordered appellees to submit to compulsory arbitration.

Rather than comply with the compulsory arbitration order, appellees filed suit, in February 1979, in United States District Court, asking that the Act be declared unconstitutional and that its enforcement be enjoined. The District Court temporarily restrained the State from proceeding against appellees' estates. Three months later, while declaring the compulsory arbitration and compensation formulae provisions of the Act unconstitutional, the District Court

refused preliminarily to enjoin appellants from conducting the statutory designation and condemnation proceedings. Finally, in December 1979, it granted partial summary judgment to appellants, holding the remaining portion of the Act constitutional under the Public Use Clause. See 483 F.Supp. 62 (Haw. 1979). The District Court found that the Act's goals were within the bounds of the State's police powers and that the means the legislature had chosen to serve those goals were not arbitrary, capricious, or selected in bad faith.

The Court of Appeals for the Ninth Circuit reversed. 702 F.2d 788 (1983). The court further determined that the public purposes offered by the Hawaii Legislature were not deserving of judicial deference. The court concluded that the Act was simply "a naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B's private use and benefit." *Id.*, at 798. One judge dissented.

On applications of HHA and certain private appellants who had intervened below, this Court noted probable jurisdiction. We now reverse.

III

The majority of the Court of Appeals . . . determined that the Act violates the "public use" requirement of the Fifth and Fourteenth Amendments. On this argument, however, we find ourselves in agreement with the dissenting judge in the Court of Appeals.

A

The starting point for our analysis of the Act's constitutionality is the Court's decision in *Berman v. Parker*, 348 U.S. 26 (1954). In *Berman*, the Court held constitutional the District of Columbia Redevelopment Act of 1945. That Act provided both for the comprehensive use of the eminent domain power to redevelop slum areas and for the possible sale or lease of the condemned lands to private interests. In discussing whether the takings authorized by that Act were for a "public use," *id.*, at 31, the Court stated:

"We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the States legislating concerning local affairs. . . . This principle admits of no exception merely because the power of eminent domain is involved. . . ." *Id.*, at 32 (citations omitted).

The Court explicitly recognized the breadth of the principle it was announcing, noting:

"Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. . . . Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established." *Id.*, at 33.

The "public use" requirement is thus coterminous with the scope of a sovereign's police powers.

There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* made clear that it is "an extremely narrow" one. *Id.*, at 32. The Court in *Berman* cited with approval the Court's decision in *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925), which held that deference to the legislature's "public use" determination is required "until it is shown to involve an impossibility." The *Berman* Court also cited to *United States ex rel. TVA v. Welch*, 327 U.S. 546, 552 (1946), which emphasized that "[any] departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields." In short, the Court has made clear that it 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." *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896).

To be sure, the Court's cases have repeatedly stated that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937). Thus, in *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896), where the "order in question was not, and was not claimed to be, . . . a taking of private property for a public use under the right of eminent domain," *id.*, at 416 (emphasis added), the Court invalidated a compensated taking of property for lack of a justifying public purpose. But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause. See *Berman v. Parker*, *supra*; *Rindge Co. v. Los Angeles*, 262 U.S. 700 (1923); *Block v. Hirsh*, 256 U.S. 135 (1921); cf. *Thompson v. Consolidated Gas Corp.*, *supra* (invalidating an uncompensated taking).

On this basis, we have no trouble concluding that the Hawaii Act is constitutional. The people of Hawaii have attempted, much as the settlers of the original 13 Colonies did,²⁴ to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs. The land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes. Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers. We cannot disapprove of Hawaii's exercise of this power.

Nor can we condemn as irrational the Act's approach to correcting the land oligopoly problem. The Act presumes that when a sufficiently large number of persons declare that they are willing but unable to buy lots at fair prices the land market is malfunctioning. When such a malfunction is signaled, the Act authorizes HHA to condemn lots in the relevant tract. The Act limits the number of lots any one tenant can purchase and authorizes HHA to use public funds to ensure that the market dilution goals will be achieved. This is a comprehensive and rational approach to identifying and correcting market failure.

Of course, this Act, like any other, may not be successful in achieving its intended goals. But "whether in fact the provision will accomplish its 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." *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-672 (1981); see also *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981); *Vance v. Bradley*, 440 U.S. 93, 112 (1979). When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts. Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power. Therefore, the Hawaii statute must pass the scrutiny of the Public Use Clause.²⁵

²⁴ After the American Revolution, the colonists in several States took steps to eradicate the feudal incidents with which large proprietors had encumbered land in the Colonies. See, e. g., Act of May 1779, 10 Henning's Statutes At Large 64, ch. 13, §6 (1822) (Virginia statute); Divesting Act of 1779, 1775-1781 Pa. Acts 258, ch. 139 (1782) (Pennsylvania statute). Courts have never doubted that such statutes served a public purpose. See, e. g., *Wilson*, 67 U.S. 229, 242 (1902); *Stewart v. Gorter*, 70 Md., 244-245, 16 A. 644, 645 (1889).

²⁵ It is worth noting that the Fourteenth Amendment does not itself contain an independent "public use" requirement. Rather, that requirement is made binding on the States only by incorporation of the Fifth Amendment's Eminent Domain Clause through the Fourteenth Amendment's Due Process Clause. See *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).

IV

The State of Hawaii has never denied that the Constitution forbids even a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party. A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void. But no purely private taking is involved in these cases. The Hawaii Legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii—a legitimate public purpose. Use of the condemnation power to achieve this purpose is not irrational. Since we assume for purposes of these appeals that the weighty demand of just compensation has been met, the requirements of the Fifth and Fourteenth Amendments have been satisfied. Accordingly, we reverse the judgment of the Court of Appeals, and remand these cases for further proceedings in conformity with this opinion.

It is so ordered.

KELO v. CITY OF NEW LONDON
545 U.S. 469 (2005)

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined.

JUSTICE STEVENS delivered the opinion of the Court.

In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." 268 Conn. 1, 5, 843 A.2d 500, 507 (2004). In assembling the land needed for this project, the city's development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. The question presented is whether the city's proposed disposition of this property qualifies as a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.²⁶

I

The city of New London (hereinafter City) sits at the junction of the Thames River and the Long Island Sound in southeastern Connecticut. Decades of economic decline led a state agency in 1990 to designate the City a "distressed municipality." In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500 people. In 1998, the City's unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920.

These conditions prompted state and local officials to target New London, and particularly its Fort Trumbull area, for economic revitalization. To this end, respondent New London Development Corporation (NLDC), a private nonprofit entity established some years earlier to assist the City in planning economic development, was reactivated. In January 1998, the State authorized a \$5.35 million bond issue to support the NLDC's planning activities and a \$10 million bond issue toward the creation of a Fort Trumbull State Park. In February, the pharmaceutical company Pfizer Inc. announced that it would build a \$300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation. After receiving initial approval from the city council, the NLDC continued its planning activities and

²⁶ "Nor shall private property be taken for public use, without just compensation." U.S. Const., Amdt. 5. That Clause is made applicable to the States by the Fourteenth Amendment. See *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).

held a series of neighborhood meetings to educate the public] about the process. In May, the city council authorized the NLDC to formally submit its plans to the relevant state agencies for review. Upon obtaining state-level approval, the NLDC finalized an integrated development plan focused on 90 acres of the Fort Trumbull area.

The Fort Trumbull area is situated on a peninsula that juts into the Thames River. The area comprises approximately 115 privately owned properties, as well as the 32 acres of land formerly occupied by the naval facility (Trumbull State Park now occupies 18 of those 32 acres). The development plan encompasses seven parcels. Parcel 1 is designated for a waterfront conference hotel at the center of a "small urban village" that will include restaurants and shopping. This parcel will also have marinas for both recreational and commercial uses. A pedestrian "riverwalk" will originate here and continue down the coast, connecting the waterfront areas of the development. Parcel 2 will be the site of approximately 80 new residences organized into an urban neighborhood and linked by public walkway to the remainder of the development, including the state park. This parcel also includes space reserved for a new U.S. Coast Guard Museum. Parcel 3, which is located immediately north of the Pfizer facility, will contain at least 90,000 square feet of research and development office space. Parcel 4A is a 2.4-acre site that will be used either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina. Parcel 4B will include a renovated marina, as well as the final stretch of the riverwalk. Parcels 5, 6, and 7 will provide land for office and retail space, parking, and water-dependent commercial uses. 1 App. 109-113.

The NLDC intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract. In addition to creating jobs, generating tax revenue, and helping to "build momentum for the revitalization of downtown New London," *id.*, at 92, the plan was also designed to make the City more attractive and to create leisure and recreational opportunities on the waterfront and in the park.

The city council approved the plan in January 2000, and designated the NLDC as its development agent in charge of implementation. See Conn. Gen. Stat. §8-188 (2005). The city council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City's name. §8-193. The NLDC successfully negotiated the purchase of most of the real estate in the 90-acre area, but its negotiations with petitioners failed. As a consequence, in November 2000, the NLDC initiated the condemnation proceedings that gave rise to this case.

II

Petitioner Susette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago.

In all, the nine petitioners own 15 properties in Fort Trumbull -- 4 in parcel 3 of the development plan and 11 in parcel 4A. Ten of the parcels are occupied by the owner or a family member; the other five are held as investment properties. There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area.

In December 2000, petitioners brought this action in the New London Superior Court. They claimed, among other things, that the taking of their properties would violate the "public use" restriction in the Fifth Amendment. After a 7-day bench trial, the Superior Court granted a permanent restraining order prohibiting the taking of the properties located in parcel 4A (park or marina support). It, however, denied petitioners relief as to the properties located in parcel 3 (office space).

After the Superior Court ruled, both sides took appeals to the Supreme Court of Connecticut. That court held, over a dissent, that all of the City's proposed takings were valid. It began by upholding the lower court's determination that the takings were authorized by chapter 132, the State's municipal development statute. See Conn. Gen. Stat. §8-186 et seq. (2005). That statute expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is a "public use" and in the "public interest." 268 Conn., at 18-28, 843 A. 2d, at 515-521. Next, relying on cases such as *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), and *Berman v. Parker*, 348 U.S. 26 (1954), the court held that such economic development qualified as a valid public use under both the Federal and State Constitutions. 268 Conn., at 40, 843 A. 2d, at 527.

Finally, adhering to its precedents, the court went on to determine, first, whether the takings of the particular properties at issue were "reasonably necessary" to achieving the City's intended public use, *id.*, at 82, 843 A. 2d, at 552-553, and, second, whether the takings were for "reasonably foreseeable needs," *id.*, at 93, 843 A. 2d, at 558-559. The court upheld the trial court's factual findings as to parcel 3, but reversed the trial court as to parcel 4A, agreeing with the City that the intended use of this land was sufficiently definite and had been given "reasonable attention" during the planning process. *Id.*, at 120-121, 843 A. 2d, at 574.

The three dissenting justices would have imposed a "heightened" standard of judicial review for takings justified by economic development. Although they agreed that the plan was intended to serve a valid public use, they would have found all the takings unconstitutional because the City had failed to adduce "clear and convincing evidence" that the economic benefits of the plan would in fact come to pass. *Id.*, at 144, 146, 843 A. 2d, at 587, 588 (Zarella, J., joined by Sullivan, C. J., and Katz, J., concurring in part and dissenting in part).

We granted certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Fifth Amendment.

III

Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example. Neither of these propositions, however, determines the disposition of this case.

As for the first proposition, the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. See *Midkiff*, 467 U.S., at 245 ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void"); *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896).²⁷ Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. The takings before us, however, would be executed pursuant to a "carefully considered" development plan. 268 Conn., at 54, 843 A. 2d, at 536. The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case. Therefore, as was true of the statute challenged in *Midkiff*, 467 U.S., at 245, the City's development plan was not adopted "to benefit a particular class of identifiable individuals."

On the other hand, this is not a case in which the City is planning to open the condemned land – at least not in its entirety – to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers. But although such a projected use would be sufficient to satisfy the public use requirement, this "Court long ago rejected any literal requirement that condemned property be put into use for the general public." Indeed, while many state courts in the mid-19th century endorsed "use by the public" as the proper definition of public use, that narrow view steadily eroded over time. Not only was the "use by the public" test difficult to administer (e.g., what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society. We have repeatedly and consistently rejected that narrow test ever since.

²⁷ See also *Calder v. Bull*, 3 Dall. 386, 388 (1798) ("An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority A few instances will suffice to explain what I mean . . . [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them" (emphasis deleted)).

The disposition of this case therefore turns on the question whether the City's development plan serves a "public purpose." Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.

In *Berman v. Parker*, 348 U.S. 26 (1954), this Court upheld a redevelopment plan targeting a blighted area of Washington, D. C., in which most of the housing for the area's 5,000 inhabitants was beyond repair. Under the plan, the area would be condemned and part of it utilized for the construction of streets, schools, and other public facilities. The remainder of the land would be leased or sold to private parties for the purpose of redevelopment, including the construction of low-cost housing.

The owner of a department store located in the area challenged the condemnation, pointing out that his store was not itself blighted and arguing that the creation of a "better balanced, more attractive community" was not a valid public use. Writing for a unanimous Court, Justice Douglas refused to evaluate this claim in isolation, deferring instead to the legislative and agency judgment that the area "must be planned as a whole" for the plan to be successful. The Court explained that "community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis -- lot by lot, building by building." The public use underlying the taking was unequivocally affirmed

In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the Court considered a Hawaii statute whereby fee title was taken from lessors and transferred to lessees (for just compensation) in order to reduce the concentration of land ownership. We unanimously upheld the statute and rejected the Ninth Circuit's view that it was "a naked attempt on the part of the state of Hawaii to take the property of A and transfer it to B solely for B's private use and benefit." *Id.*, at 235 (internal quotation marks omitted). Reaffirming *Berman's* deferential approach to legislative judgments in this field, we concluded that the State's purpose of eliminating the "social and economic evils of a land oligopoly" qualified as a valid public use. 467 U.S., at 241-242. Our opinion also rejected the contention that the mere fact that the State immediately transferred the properties to private individuals upon condemnation somehow diminished the public character of the taking. "It is only the taking's purpose, and not its mechanics," we explained, that matters in determining public use. *Id.*, at 244.

Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.

IV

Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including -- but by no means limited to -- new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.

To avoid this result, petitioners urge us to adopt a new bright-line rule that economic development does not qualify as a public use. Putting aside the unpersuasive suggestion that the City's plan will provide only purely economic benefits, neither precedent nor logic supports petitioners' proposal. Promoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized. In our cases upholding takings that facilitated agriculture and mining, for example, we emphasized the importance of those industries to the welfare of the States in question, see, e.g., *Strickley*, 200 U.S. 527; in *Berman*, we endorsed the purpose of transforming a blighted area into a "well-balanced" community through redevelopment, 348 U.S., at 33; in *Midkiff*, we upheld the interest in breaking up a land oligopoly that "created artificial deterrents to the normal functioning of the State's residential land market," 467 U.S. It would be incongruous to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests. Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose.

Petitioners contend that using eminent domain for economic development impermissibly blurs the boundary between public and private takings. Again, our cases foreclose this objection. Quite simply, the government's pursuit of a public purpose will often benefit individual private parties. For example, in *Midkiff*, the forced transfer of property conferred a direct and significant benefit on those lessees who were previously unable to purchase their homes. The owner of the department store in *Berman* objected to "taking from one businessman for the benefit of another businessman," 348 U.S., at 33, referring to the fact that under the redevelopment plan land would be leased or sold to private developers for redevelopment. Our rejection of that contention has particular relevance to the instant case: "The public end may be as well or better served through

an agency of private enterprise than through a department of government – or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects."²⁸

It is further argued that without a bright-line rule nothing would stop a city from transferring citizen A's property to citizen B for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes. Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise. They do not warrant the crafting of an artificial restriction on the concept of public use.

Alternatively, petitioners maintain that for takings of this kind we should require a "reasonable certainty" that the expected public benefits will actually accrue. Such a rule, however, would represent an even greater departure from our precedent. "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings – no less than debates over the wisdom of other kinds of socioeconomic legislation – are not to be carried out in the federal courts." *Midkiff*, 467 U.S., at 242.

Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project. "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." *Berman*, 348 U.S., at 35-36.

In affirming the City's authority to take petitioners' properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a

²⁸ Nor do our cases support JUSTICE O'CONNOR'S novel theory that the government may only take property and transfer it to private parties when the initial taking eliminates some "harmful property use." There was nothing "harmful" about the nonblighted department store at issue in *Berman*, 348 U.S. 26; see also n. 13, *supra*. The public purpose we upheld depended on a private party's future use of the concededly nonharmful property that was taken. By focusing on a property's future use, as opposed to its past use, our cases are faithful to the text of the Takings Clause. See U.S. Const., Amdt. 5. ("Nor shall private property be taken for public use, without just compensation").

matter of state constitutional law,²⁹ while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. As the submissions of the parties and their amici make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek.

JUSTICE KENNEDY, concurring.[omitted]

I join the opinion for the Court and add these further observations.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

Over two centuries ago, just after the Bill of Rights was ratified, Justice Chase wrote:

"An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority A few instances will suffice to explain what I mean [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it." *Calder v. Bull*, 3 Dall. 386, 388 (1798) (emphasis deleted).

Today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded -- i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public -- in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property -- and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment. Accordingly I respectfully dissent.

I

Petitioners are nine resident or investment owners of 15 homes in the Fort Trumbull neighborhood of New London, Connecticut. Petitioner Wilhelmina Dery, for example, lives in a house on Walbach Street that has been in her family for over 100 years. She was born in the

²⁹ See, e.g., *County of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004).

house in 1918; her husband, petitioner Charles Dery, moved into the house when they married in 1946. Their son lives next door with his family in the house he received as a wedding gift, and joins his parents in this suit. Two petitioners keep rental properties in the neighborhood.

In February 1998, Pfizer Inc., the pharmaceuticals manufacturer, announced that it would build a global research facility near the Fort Trumbull neighborhood. Two months later, New London's city council gave initial approval for the New London Development Corporation (NLDC) to prepare the development plan at issue here. The NLDC is a private, nonprofit corporation whose mission is to assist the city council in economic development planning. It is not elected by popular vote, and its directors and employees are privately appointed. Consistent with its mandate, the NLDC generated an ambitious plan for redeveloping 90 acres of Fort Trumbull in order to "complement the facility that Pfizer was planning to build, create jobs, increase tax and other revenues, encourage public access to and use of the city's waterfront, and eventually 'build momentum' for the revitalization of the rest of the city."

To save their homes, petitioners sued New London and the NLDC, to whom New London has delegated eminent domain power. Petitioners maintain that the Fifth Amendment prohibits the NLDC from condemning their properties for the sake of an economic development plan. Petitioners are not hold-outs; they do not seek increased compensation, and none is opposed to new development in the area. Theirs is an objection in principle: They claim that the NLDC's proposed use for their confiscated property is not a "public" one for purposes of the Fifth Amendment. While the government may take their homes to build a road or a railroad or to eliminate a property use that harms the public, say petitioners, it cannot take their property for the private use of other owners simply because the new owners may make more productive use of the property.

II

The Fifth Amendment to the Constitution, made applicable to the States by the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." When interpreting the Constitution, we begin with the unremarkable presumption that every word in the document has independent meaning, "that no word was unnecessarily used, or needlessly added." *Wright v. United States*, 302 U.S. 583, 588 (1938). In keeping with that presumption, we have read the Fifth Amendment's language to impose two distinct conditions on the exercise of eminent domain: "the taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 231-232 (2003).

Where is the line between "public" and "private" property use? We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check

on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning. See *Cincinnati v. Vester*, 281 U.S. 439, 446 (1930) ("It is well established that . . . the question [of] what is a public use is a judicial one").

Our cases have generally identified three categories of takings that comply with the public use requirement, though it is in the nature of things that the boundaries between these categories are not always firm. Two are relatively straightforward and uncontroversial. First, the sovereign may transfer private property to public ownership -- such as for a road, a hospital, or a military base. Second, the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use -- such as with a railroad, a public utility, or a stadium. But "public ownership" and "use-by-the-public" are sometimes too constricting and impractical ways to define the scope of the Public Use Clause. Thus we have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use. See, e.g., *Berman v. Parker*, 348 U.S. 26 (1954); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

This case returns us for the first time in over 20 years to the hard question of when a purportedly "public purpose" taking meets the public use requirement. It presents an issue of first impression: Are economic development takings constitutional? I would hold that they are not. We are guided by two precedents about the taking of real property by eminent domain. In *Berman*, we upheld takings within a blighted neighborhood of Washington, D. C. Mr. Berman's department store was not itself blighted. Having approved of Congress' decision to eliminate the harm to the public emanating from the blighted neighborhood, however, we did not second-guess its decision to treat the neighborhood as a whole rather than lot-by-lot.

In *Midkiff*, we upheld a land condemnation scheme in Hawaii whereby title in real property was taken from lessors and transferred to lessees. At that time, the State and Federal Governments owned nearly 49% of the State's land, and another 47% was in the hands of only 72 private landowners. Concentration of land ownership was so dramatic that on the State's most urbanized island, Oahu, 22 landowners owned 72.5% of the fee simple titles. *Id.*, at 232. The Hawaii Legislature had concluded that the oligopoly in land ownership was "skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare," and therefore enacted a condemnation scheme for redistributing title. *Ibid.*

In those decisions, we emphasized the importance of deferring to legislative judgments about public purpose. Yet for all the emphasis on deference, *Berman* and *Midkiff* hewed to a bedrock principle without which our public use jurisprudence would collapse: "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." *Midkiff*, 467 U.S., at 245. To protect that principle, those decisions reserved "a role for courts to play in reviewing a legislature's

judgment of what constitutes a public use . . . [though] the Court in *Berman* made clear that it is 'an extremely narrow' one." *Midkiff*, *supra*, at 240 (quoting *Berman*, *supra*, at 32).

The Court's holdings in *Berman* and *Midkiff* were true to the principle underlying the Public Use Clause. In both those cases, the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society – in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth. And in both cases, the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm. *Berman*, *supra*, at 28-29; *Midkiff*, *supra*, at 232. Thus a public purpose was realized when the harmful use was eliminated. Because each taking directly achieved a public benefit, it did not matter that the property was turned over to private use. Here, in contrast, *New London* does not claim that *Susette Kelo's* and *Wilhelmina Dery's* well-maintained homes are the source of any social harm. Indeed, it could not so claim without adopting the absurd argument that any single-family home that might be razed to make way for an apartment building, or any church that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society and thus within the government's power to condemn.

In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public – such as increased tax revenue, more jobs, maybe even aesthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words "for public use" do not realistically exclude any takings, and thus do not exert any constraint on the eminent domain power.

There is a sense in which this troubling result follows from errant language in *Berman* and *Midkiff*. In discussing whether takings within a blighted neighborhood were for a public use, *Berman* began by observing: "We deal, in other words, with what traditionally has been known as the police power." 348 U.S., at 32. From there it declared that "once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." *Id.*, at 33. Following up, we said in *Midkiff* that "the 'public use' requirement is coterminous with the scope of a sovereign's police powers." 467 U.S., at 240. This language was unnecessary to the specific holdings of those decisions. *Berman* and *Midkiff* simply did not put such language to the constitutional test, because the takings in those cases were within the police power but also for "public use" for the reasons I have described. The case before us now demonstrates why, when deciding if a taking's purpose is constitutional, the police power and "public use" cannot always be equated.

Even if there were a practical way to isolate the motives behind a given taking, the gesture toward a purpose test is theoretically flawed. If it is true that incidental public benefits from new private use are enough to ensure the "public purpose" in a taking, why should it matter, as far as the Fifth Amendment is concerned, what inspired the taking in the first place? How much the government does or does not desire to benefit a favored private party has no bearing on whether an economic development taking will or will not generate secondary benefit for the public. And whatever the reason for a given condemnation, the effect is the same from the constitutional perspective -- private property is forcibly relinquished to new private ownership.

A second proposed limitation is implicit in the Court's opinion. The logic of today's decision is that eminent domain may only be used to upgrade -- not downgrade -- property. The Court rightfully admits, however, that the judiciary cannot get bogged down in predictive judgments about whether the public will actually be better off after a property transfer. In any event, this constraint has no realistic import. For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory. Cf. *99 Cents Only Stores v. Lancaster Redevelopment Authority*, 237 F. Supp. 2d 1123 (CD Cal. 2001) (attempted taking of 99 Cents store to replace with a Costco); *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981) (taking a working-class, immigrant community in Detroit and giving it to a General Motors assembly plant), overruled by *County of Wayne v. Hathcock*, 471 Mich. 415, 684 N.W.2d 765 (2004).

It was possible after *Berman* and *Midkiff* to imagine unconstitutional transfers from A to B. Those decisions endorsed government intervention when private property use had veered to such an extreme that the public was suffering as a consequence. Today nearly all real property is susceptible to condemnation on the Court's theory.

Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. "That alone is a just government," wrote James Madison, "which impartially secures to every man, whatever is his own." *For the National Gazette, Property*, (Mar. 29, 1792), reprinted in *14 Papers of James Madison* 266 (R. Rutland et al. eds. 1983).

I would hold that the takings are unconstitutional, reverse the judgment of the Supreme Court of Connecticut, and remand for further proceedings.

JUSTICE THOMAS, dissenting.

I would revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property.

The consequences of today's decision are not difficult to predict, and promise to be harmful. So-called "urban renewal" programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. If ever there were justification for intrusive judicial review of constitutional provisions that protect "discrete and insular minorities," *United States v. Carolene Products Co.*, 304 U.S. 144, 152, (1938), surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects. The deferential standard this Court has adopted for the Public Use Clause is therefore deeply perverse. It encourages "those citizens with disproportionate influence and power in the political process, including large corporations and development firms" to victimize the weak.

Those incentives have made the legacy of this Court's "public purpose" test an unhappy one. In the 1950's, no doubt emboldened in part by the expansive understanding of "public use" this Court adopted in *Berman*, cities "rushed to draw plans" for downtown development. B. Frieden & L. Sagalyn, *Downtown, Inc. How America Rebuilds Cities* 17 (1989). "Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite, and of these families, 56 percent of nonwhites and 38 percent of whites had incomes low enough to qualify for public housing, which, however, was seldom available to them." *Id.*, at 28. Public works projects in the 1950's and 1960's destroyed predominantly minority communities in St. Paul, Minnesota, and Baltimore, Maryland. *Id.*, at 28-29. In 1981, urban planners in Detroit, Michigan, uprooted the largely "lower-income and elderly" Poletown neighborhood for the benefit of the General Motors Corporation. J. Wylie, *Poletown: Community Betrayed* 58 (1989). Urban renewal projects have long been associated with the displacement of blacks; "in cities across the country, urban renewal came to be known as 'Negro removal.'" Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *Yale L. & Pol'y Rev.* 1, 47 (2003). Over 97 percent of the individuals forcibly removed from their homes by the "slum-clearance" project upheld by this Court in *Berman* were black. 348 U.S., at 30. Regrettably, the predictable consequence of the Court's decision will be to exacerbate these effects.

* * *

The Court relies almost exclusively on this Court's prior cases to derive today's far-reaching, and dangerous, result. But the principles this Court should employ to dispose of this case are found in the Public Use Clause itself. When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning. For the reasons I have given, and for the reasons given in JUSTICE O'CONNOR'S dissent, the conflict of principle raised by this boundless use of the eminent domain power should be resolved in petitioners' favor. I would reverse the judgment of the Connecticut Supreme Court.

Session 12. Just Compensation

MARYLAND CONSTITUTION Art. 3, §40 [Eminent Domain] (1867)

The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation.

CHICAGO, B. & Q. R. CO. v. CITY OF CHICAGO 166 U.S. 226 (1897)

Mr. Justice Harlan delivered the opinion of the court.

The questions presented on this writ of error relate to certain rulings of the state court which, it is alleged, were in disregard of that part of the Fourteenth Amendment declaring that no State shall deprive any person of his property without due process of law, or deny the equal protection of the laws to any person within its jurisdiction.

The constitution of Illinois provides that "no person shall be deprived of life, liberty or property, without due process of law." Art. 2, §2. It also provides: "Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners, subject to the use for which it is taken." Art. 2, §13.

By the fifth article of the general statute of Illinois, approved April 10, 1872, and relating to the incorporation of cities and villages, it was provided that "the city council shall have power, by condemnation or otherwise, to extend any street, alley or highway over or across, or to construct any sewer under or through any railroad track, right of way or land of any railroad company."

The ninth article of the same statute declared that the corporate authorities of a city should file in its name a petition in some court of record of the county praying "that the just compensation to be made for private property to be taken or damaged" for the improvement or purpose specified in the ordinance be ascertained by a jury.

By an ordinance of the city council of Chicago approved October 9, 1880, it was ordained that Rockwell Street in that city be opened and widened from West 18th Street to West 19th Street by condemning therefore, in accordance with the above act of April 10, 1872, certain parcels of land owned by individuals, and also certain parts of the right of way in that city of the Chicago, Burlington and Quincy Railroad Company, a corporation of Illinois.

In execution of that ordinance a petition was filed by the city, November 12, 1890, in the Circuit Court of Cook County, Illinois, for the condemnation of the lots, pieces or parcels of land and property proposed to be taken or damaged for the proposed improvement, and praying that the just compensation required for private property taken or damaged be ascertained by a jury.

In their verdict the jury fixed the just compensation to be paid to the respective individual owners of the lots, pieces and parcels of land and property sought to be taken or damaged by the proposed improvements, and fixed one dollar as just compensation to the railroad company in respect of those parts of its right of way described in the city's petition as necessary to be used for the purposes of the proposed street.

Thereupon the railroad company moved for a new trial. The motion was overruled, and a final judgment was rendered in execution of the award by the jury. That judgment was affirmed by the Supreme Court of the State. 149 Illinois, 457.

The general contentions of the railroad company are—

That the judgment of the state court whereby a public street is opened across its land used for railroad purposes, and whereby compensation to the extent of one dollar only is awarded, deprives it of its property without due process of law contrary to the prohibitions of the Fourteenth Amendment; and,

That the railroad company was entitled by reason of the opening of the street to recover as compensation a sum equal to the difference between the value of the fee of the land sought to be crossed, without any restrictions on its right to use the land for any lawful purpose, and the value of the land burdened with a perpetual right in the public to use it for the purpose of a street subject to the right of the company, or those acquiring title under it, to use it only for railroad tracks or any purpose for which the same could be used without interfering with its use by the public.

It is . . . necessary to inquire at the outset whether "due process of law" requires compensation to be made or secured to the owner of private property taken for public use In determining what is due process of law regard must be had to substance, not to form. This court, referring to the Fourteenth Amendment, has said: "Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation." If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the State within the meaning of that amendment.

It is proper now to inquire whether the due process of law enjoined by the Fourteenth Amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a State.

The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation. Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.

In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument.

It remains to inquire whether the necessary effect of the proceedings in the court below was to appropriate to the public use any property right of the railroad company without compensation being made or secured to the owner.

The contention of the railroad company is that the verdict and judgment for one dollar as the amount to be paid to it was, in effect, an appropriation of its property rights without any compensation whatever; that the judgment should be read as if in form as well as in fact it made no provision whatever for compensation for the property so appropriated.

Undoubtedly the verdict may not unreasonably be taken as meaning that, in the judgment of the jury, the company's property, proposed to be taken, was not materially damaged; that is, looking at the nature of the property and the purposes for which it was obtained and was being used, that which was taken from the company was not, in the judgment of the jury, of any substantial value in money. The owner of private property taken under the right of eminent domain obtains just compensation if he is awarded such sum as, under all the circumstances, is a fair and full equivalent for the thing taken from him by the public. If the opening of the street across the railroad tracks did not unduly interfere with the company's use of the right of way for legitimate railroad purposes, then its compensation would be nominal.

The principal point of dispute between the parties was whether the railroad company, by reason of the opening of the street, was entitled to recover a sum equal to the difference between

the value of the land in question as land, without any restriction on its right to use it for any lawful purpose, and the value of the land when burdened with the right of the public to use it for the purposes of a street crossing.

The plaintiff in error took its charter subject to the power of the State to provide for the safety of the public, in so far as the safety of the lives and persons of the people were involved in the operation of the railroad. The company laid its tracks subject to the condition necessarily implied that their use could be so regulated by competent authority as to insure the public safety. And as all property, whether owned by private persons or by corporations, is held subject to the authority of the State to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people, it is not a condition of the exercise of that authority that the State shall indemnify the owners of property for the damage or injury resulting from its exercise. Property thus damaged or injured is not, within the meaning of the Constitution, taken for public use, nor is the owner deprived of it without due process of law. The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the State by reasonable regulations to protect the lives and secure the safety of the people.

The expenses that will be incurred by the railroad company in erecting gates, planking the crossing, and maintaining flagmen, in order that its road may be safely operated -if all that should be required- necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken by the company into account when it accepted the privileges and franchises granted by the State. Such expenses must be regarded as incidental to the exercise of the police powers of the State.

What was obtained, and all that was obtained, by the condemnation proceedings for the public was the right to open a street across land within the crossing that was used, and was always likely to be used, for railroad tracks. While the city was bound to make compensation for that which was actually taken, it cannot be required to compensate the defendant for obeying lawful regulations enacted for the safety of the lives and property of the people. And the value to the railroad company of that which was taken from it is, as we have said, the difference between the value of the right to the exclusive use of the land in question for the purposes for which it was being used, and for which it was always likely to be used, and that value after the city acquired the privilege of participating in such use by the opening of a street across it, leaving the railroad tracks untouched. Upon that theory the case was considered by the jury, and the court did not err in placing it before them upon that basis as to compensation.

We have examined all the questions of law arising on the record of which this court may take cognizance, and which, in our opinion, are of sufficient importance to require notice at our hands, and finding no error, the judgment is

Affirmed.

UNITED STATES v. GENERAL MOTORS CORP. .
323 U.S. 373 (1945)

Mr. Justice Roberts delivered the opinion of the Court.

This case is one of first impression in this court. It presents a question on which the decisions of federal courts are in conflict. The problem involved is the ascertainment of the just compensation required by the Fifth Amendment of the Constitution, where, in the exercise of the power of eminent domain, temporary occupancy of a portion of a leased building is taken from a tenant who holds under a long-term lease.

Section 201 of Title II of the Second War Powers Act of March 27, 1942, provides, in part, that the Secretary of War may cause proceedings to be instituted, in any court having jurisdiction, to acquire, by condemnation, any real property, temporary use thereof, or other interest therein which shall be deemed necessary for military or other war purposes. The Act provides further that, on or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, or improved.

In 1928 the respondent leased a one-story warehouse building in Chicago for a term of twenty years, for the storage and distribution of automobile parts, and fitted the premises for this use. In 1942 the United States became subtenants of a portion of the floor space in the building. There remained in the possession of the respondent some 93,000 square feet. In the spring of 1942 the Secretary of War requested the Attorney General to institute proceedings for condemnation of the occupancy of the remaining space for a term ending June 30, 1943. Pursuant to the request, the United States, on June 8, 1942, filed a petition in the District Court for an order condemning such temporary use and granting the Government the right of immediate possession, use, and improvement for military purposes. On the same day the court entered an order declaring the property condemned for a term ending June 30, 1943, and granting the United States the right of immediate possession. The order was served on the respondent and shortly thereafter it began removing its personal property from the area and dismantling and demolishing bins and fixtures, so that the space was available for government use by June 19.

At the trial for the ascertainment of the compensation due the respondent, the attorney for the Government, after proving the authority for the taking, called a real estate expert who gave his opinion that the fair rental value of the space was 35 cents per year per square foot. The Government then rested.

The respondent called expert witnesses who testified that, in their opinion, the fair rental value was 43 cents per square foot, and a witness was permitted to testify that the rent paid by the respondent to its landlord had varied during the years 1940 to 1942, inclusive, from 41.9 to 43.24 cents.

The respondent then offered to prove various items of cost caused by removal of the contents. These consisted, inter alia, of salaries of employees engaged in the work, compensation due employees put out of work by the removal, wages of janitors and watchmen for the protection of the building during the moving, the cost of shipping the contents of the building to other points, compensation to executives and employees whose time was required in connection with the moving of the property, freight and haulage charges, rental of storage space for articles moved out, the value of the bin equipment destroyed and the estimated original cost of the installation of fixed equipment completely lost as a result of the dismantling of the area. The court sustained an objection to the offer. The jury awarded compensation in a lump sum at a rate of approximately 40 cents per square foot for the term of one year.

The respondent appealed to the Circuit Court of Appeals, assigning as error the refusal of its offer of proof. That court might have sustained the District Court's ruling on the ground that respondent was not entitled to prove certain of the expenditures and losses in question as independent items of damages additional to the value of the interest taken by condemnation. The court, however, considering substance rather than form, by a vote of 2 to 1, reversed the judgment, holding that items of actual loss which were the direct and necessary result of the respondent's exclusion from the leased area might be proved, not as independent items but as elements to be considered in arriving at the sum which would be just compensation for the interest which the Government condemned. The cause was remanded for trial in accordance with the ruling of the Circuit Court of Appeals. We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case. The correctness of the decision of the court below depends upon the scope and meaning of the constitutional provision: "nor shall private property be taken for public use, without just compensation," which conditions the otherwise unrestrained power of the sovereign to expropriate, without compensation, whatever it needs.

The critical terms are "property," "taken" and "just compensation." It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter. When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers term the individual's "interest" in the thing in question. That interest may comprise the group of rights for which the shorthand term is "a fee simple" or it may be the interest known as an "estate or tenancy for years," as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess.

In its primary meaning, the term "taken" would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But 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. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.

But it is to be observed that whether the sovereign substitutes itself as occupant in place of the former owner, or destroys all his existing rights in the subject matter, the Fifth Amendment concerns itself solely with the "property," i.e., with the owner's relation as such to the physical thing and not with other collateral interests which may be incident to his ownership.

In the light of these principles it has been held that the compensation to be paid is the value of the interest taken. Only in the sense that he is to receive such value is it true that the owner must be put in as good position pecuniarily as if his property had not been taken. In the ordinary case, for want of a better standard, market value, so called, is the criterion of that value. In some cases this criterion cannot be used either because the interest condemned has no market value or because, in the circumstances, market value furnishes an inappropriate measure of actual value.

In the trial of this case the parties presented evidence of the market value of the occupancy of bare floor space for the term taken. The respondent's offer to prove additional items for which it claimed compensation was overruled. The award was therefore limited to the market value of the occupancy of a vacant building. The question is whether any other element of value inhered in the interest taken.

The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. No doubt all these elements would be considered by an owner in determining whether, and at what price, to sell. No doubt, therefore, if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered. But the courts have generally held that they are not to be reckoned as part of the compensation for the fee taken by the Government. We are not to be taken as departing from the rule they have laid down, which we think sound. Even where state constitutions command that compensation be made for property "taken or damaged" for public use, as many do, it has generally been held that that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and that damage to those rights of ownership does not include losses to his business or other consequential damage.

The question posed in this case then is, shall a different measure of compensation apply where that which is taken is a right of temporary occupancy of a building equipped for the

condemnee's business, filled with his commodities, and presumably to be reoccupied and used, as before, to the end of the lease term on the termination of the Government's use? The right to occupy, for a day, a month, a year, or a series of years, in and of itself and without reference to the actual use, needs, or collateral arrangements of the occupier, has a value. The value of that interest is affected, of course, by the kind of building to be occupied, by its location, by its susceptibility to various uses, by its conveniences, or the reverse, and by many other factors which go to set the value of the occupancy. These were taken into consideration in fixing the market value of the floor space taken, as if that space were bare and in the market for rent.

While, as has been said, the Government's power to take for a short period, and to demand possession of the space taken freed of all equipment or personal property therein, cannot be denied, three questions emerge which are not presented when what is taken is a fee interest in land. They are: 1. Is the long-term rental value the sole measure of the value of such short-term occupancy carved out of the long term? 2. If the taking necessitates the removal of personal property stored in the building in conformity to the normal use of such a building, is the necessary expense of the removal to be considered in computing compensation? 3. If a tenant's equipment and fixtures are taken or destroyed, or reduced in value, by the Government's action, must it compensate for the value thus taken or destroyed in addition to paying the rental value of the occupancy?

1. If the Government need only pay the long-term rental of an empty building for a temporary taking from the long-term tenant a way will have been found to defeat the Fifth Amendment's mandate for just compensation in all condemnations except those in which the contemplated public use requires the taking of the fee simple title. In any case where the Government may need private property, it can devise its condemnation so as to specify a term of a day, a month, or a year, with optional contingent renewal for indefinite periods, and with the certainty that it need pay the owner only the long-term rental rate of an unoccupied building for the short term period, if the premises are already under lease or, if not, then a market rental for whatever minimum term it may choose to select, fixed according to the usual modes of arriving at rental rates. And this, though the owner may be damaged by the ouster ten, a score, or perhaps a hundred times the amount found due him as "fair rental value." In the present case the respondent offered to prove that the actual expense of moving its property exceeded \$46,000, and the loss due to destruction and removal of fixtures and fixed equipment exceeded \$31,000, in addition to its continuing liability to pay rent for the year of approximately \$40,000; whereas the award was \$38,597.86. If such a result be sustained we can see no limit to utilization of such a device; and, if there is none, the Amendment's guaranty becomes, not one of just compensation for what is taken, but an instrument of confiscation fictionalizing "just compensation" into some such concept as the common law idea of a

peppercorn in the law of seizing or the later one of "value received" in that of contractual consideration. If the value to be paid in a case like the present is confined, as matter of law, to the long-term rental of bare space, the owner will not be secure, either in his rights of property, or in his right to just compensation as a substitute for it, when the Government takes it for the use and benefit of all. Here the use of a warehouse for a short time was taken. The property might have been the General Motors factory. Or several plants. Or a modest store or home. Whatever of property the citizen has the Government may take. When it takes the property, that is, the fee, the lease, whatever he may own, terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of "consequential damage" as that conception has been defined in such cases. Even so the consequences often are harsh. For these whatever remedy may exist lies with Congress.

It is altogether another matter when the Government does not take his entire interest, but by the form of its proceeding chops it into bits, of which it takes only what it wants, however few or minute, and leaves him holding the remainder, which may then be altogether useless to him, refusing to pay more than the "market rental value" for the use of the chips so cut off. This is neither the "taking" nor the "just compensation" the Fifth Amendment contemplates. The value of such an occupancy is to be ascertained, not by treating what is taken as an empty warehouse to be leased for a long term, but what would be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier. The case should be retried on this principle. In so ruling we do not suggest that the long-term rental value may not be shown as bearing on the market rental value of the temporary occupancy taken. It may be evidence of the value of what is taken but it is not the criterion of value in such a case as this.

2. Some of the elements which would certainly and directly affect the market price agreed upon by a tenant and a sublessee in such an extraordinary and unusual transaction would be the reasonable cost of moving out the property stored and preparing the space for occupancy by the subtenant. That cost would include labor, materials, and transportation. And it might also include the storage of goods against their sale or the cost of their return to the leased premises. Such items may be proved, not as independent items of damage but to aid in the determination of what would be the usual—the market—price which would be asked and paid for such temporary occupancy of the building then in use under a long-term lease. The respondent offered detailed proof of amounts actually and necessarily paid for these purposes. We think that the proof should have been received for the purpose and with the limitation indicated. Proof of such costs as

affecting market value is to be distinguished from proof of value peculiar to the respondent, or the value of good-will or of injury to the business of the respondent which, in this case, as in the case of the condemnation of a fee, must be excluded from the reckoning.

3. For fixtures and permanent equipment destroyed or depreciated in value by the taking, the respondent is entitled to compensation. An owner's rights in these are no less property within the meaning of the Fifth Amendment than his rights in land and the structures thereon erected. And it matters not whether they were taken over by the Government or destroyed, since, as has been said, destruction is tantamount to taking. This is true whether the fixtures and equipment would be considered such as between vendor and vendee, or as a tenant's trade fixtures. In respect of them, the tenant whose occupancy is taken is entitled to compensation for destruction, damage or depreciation in value. And since they are property distinct from the right of occupancy such compensation should be awarded not as part of but in addition to the value of the occupancy as such.

The judgment of the Circuit Court of Appeals, as modified by this opinion, is Affirmed.

KIRBY FOREST INDUSTRIES, INC. v. UNITED STATES
467 U.S. 1 (1984)

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

Title 40 U. S. C. §257, in conjunction with Rule 71A of the Federal Rules of Civil Procedure, prescribes a procedure pursuant to which the United States may appropriate privately owned land by eminent domain. The central issue in this case is whether the manner in which the value of the land is determined and paid to its owner under that procedure comports with the requirement, embodied in the Fifth Amendment, that private property not be taken for public use without just compensation.

A

The United States customarily employs one of three methods when it appropriates private land for a public purpose. The most frequently used is the so-called "straight-condemnation" procedure prescribed in 40 U. S. C. §257. Under that statute, an "officer of the Government" who is "authorized to procure real estate for the erection of a public building or for other public uses".³⁰ makes an application to the Attorney General who, within 30 days, must initiate condemnation proceedings. The form of those proceedings is governed by Federal Rule of Civil Procedure 71A.³¹ In brief, Rule 71A requires the filing in federal district court of a "complaint in condemnation," identifying the property and the interest therein that the United States wishes to take, followed by a trial—before a jury, judge, or specially appointed commission—of the question of how much compensation is due the owner of the land. The practical effect of final judgment on the issue of just compensation is to give the Government an option to buy the property at the adjudicated price. *Danforth v. United States*, 308 U.S. 271, 284 (1939). If the Government wishes to exercise that option, it tenders payment to the private owner, whereupon title and right to possession vest in the United States. If the Government decides not to exercise its option, it can move for dismissal of the condemnation action. *Ibid.*; see Fed. Rule Civ. Proc. 71A(i)(3).

A more expeditious procedure is prescribed by 40 U. S. C. §258a.³² That statute empowers the Government, "at any time before judgment" in a condemnation suit, to file "a

³⁰ Such authorization generally is derived from some independent statute that vests the officer with the power of eminent domain but does not prescribe the manner in which that power should be exercised. See, e. g., 16 U. S. C. §404c-11.

³¹ Suits under §257 originally were required to "conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State" in which the suits were instituted. Act of Aug. 1, 1888, ch. 728, §2, 25 Stat. 357. The adoption in 1951 of Rule 71A capped an effort to establish a uniform set of procedures governing all federal condemnation actions. See Advisory Committee's Notes on Rule 71A, Original Report, 28 U. S. C. App., p. 644.

³² Section 258a was enacted in 1931, for the principal purpose of enabling the United States, when it wished, peremptorily to appropriate property on which public buildings were to be constructed, making it possible for the Government to begin improving the land, thereby stimulating employment during the Great Depression. See

declaration of taking signed by the authority empowered by law to acquire the lands [in question], declaring that said lands are thereby taken for the use of the United States." The Government is obliged, at the time of the filing, to deposit in the court, "to the use of the persons entitled thereto," an amount of money equal to the estimated value of the land. Title and right to possession thereupon vest immediately in the United States. In subsequent judicial proceedings, the exact value of the land (on the date the declaration of taking was filed) is determined, and the owner is awarded the difference (if any) between the adjudicated value of the land and the amount already received by the owner, plus interest on that difference.

Finally, Congress occasionally exercises the power of eminent domain directly. For example, when Congress thinks that a tract of land that it wishes to preserve inviolate is threatened with imminent alteration, it sometimes enacts a statute appropriating the property immediately by "legislative taking" and setting up a special procedure for ascertaining, after the appropriation, the compensation due to the owners.³³

In addition to these three statutory methods, the United States is capable of acquiring privately owned land summarily, by physically entering into possession and ousting the owner. E. g., *United States v. Dickinson*, 331 U.S. 745, 747-749 (1947). In such a case, the owner has a right to bring an "inverse condemnation" suit to recover the value of the land on the date of the intrusion by the Government. *United States v. Dow*, 357 U.S. 17, 21-22 (1958).³⁴

The Government's selection amongst and implementation of these various methods of acquiring property is governed, to some extent, by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U. S. C. §4601 et seq. That statute enjoins federal agencies, inter alia, to attempt to acquire property by negotiation rather than condemnation, and whenever possible not to take land by physical appropriation. §§4651(1), (4), (8). In addition, the statute requires a court with jurisdiction over a condemnation action that is dismissed or abandoned by the Government to award the landowner an amount that will reimburse him for "his reasonable costs, disbursements, and expenses" incurred in contesting the suit. §4654(a).³⁵ The statute does not, however, regulate decisions by the Government whether to employ the "straight-condemnation" procedure prescribed in §257 or the "declaration of taking" procedure embodied in §258a.

H. R. Rep. No. 2086, 71st Cong., 3d Sess. (1930).

³³ See, e. g., 16 U. S. C. §79c(b) (vesting in the United States "all right, title, and interest" in the land encompassed by the Redwood National Park as of the date of the enactment of the statute).

³⁴ Such a suit is "inverse" because it is brought by the affected owner, not by the condemnor. *United States v. Clarke*, 445 U.S. 253, 257 (1980). The owner's right to bring such a suit derives from "the self-executing character of the constitutional provision with respect to condemnation. . . ." *Ibid.* (quoting 6 P. Nichols, *Eminent Domain* §25.41 (3d rev. ed. 1972)).

³⁵ We have held that the last-mentioned provision for the reimbursement of costs is a matter of legislative grace, not constitutional entitlement. *United States v. Bodcaw Co.*, 440 U.S. 202, 204 (1979) (per curiam).

B

Petitioner, a manufacturer of forest products, owns substantial tracts of timberland in Texas. This case arises out of a protracted effort by the United States to appropriate 2,175.86 acres of that land.

In the mid-1960's, several studies were made of the desirability of establishing a national park or preserve to protect an area of relatively untrammelled wilderness in eastern Texas. One of those studies, conducted in 1967 by the National Park Service, recommended the creation of a 35,500-acre Big Thicket National Park. The Texas Forestry Association, of which petitioner is a member, endorsed that proposal and declared a voluntary moratorium on logging in the designated area. Since 1967, petitioner has observed that moratorium and has not cut any trees on its property lying within the area demarked by the Park Service.³⁶ After seven years of desultory consideration of the matter, Congress rejected the Park Service proposal and enacted legislation creating a much larger Big Thicket National Preserve. Act of Oct. 11, 1974, Pub. L. 93-439, 88 Stat. 1254, 16 U. S. C. §698 et seq. The statute directed the Secretary of the Interior to acquire the land within the boundaries of the Preserve. 16 U. S. C. §698(c). The Senate Report made clear that, though the Secretary had the authority to acquire individual tracts by declaration of taking, pursuant to 40 U. S. C. §258a, such a peremptory procedure should be employed only when necessary to protect a parcel from destruction. S. Rep. No. 93-875, p. 5 (1974). It was understood that, in the absence of such an emergency, the Secretary would purchase the land using the straight-condemnation method prescribed in 40 U. S. C. §257.

The Government initially attempted to acquire the acreage owned by petitioner through a negotiated purchase. On August 21, 1978, after those negotiations had broken down, the United States filed a complaint in condemnation in the District Court for the Eastern District of Texas. Shortly thereafter, the Government filed a notice of *lis pendens*, notifying the public of the institution of the condemnation proceeding. The District Court referred the matter to a special commission to ascertain the compensation due petitioner. Trial before the commission began on March 6, 1979. On that day, the parties stipulated that "today is the date of taking." After hearing competing testimony pertaining to the fair market value of petitioner's land, the commission entered a report recommending compensation in the amount of \$2,331,202.

Both parties filed objections to the report in the District Court. On August 13, 1981, after holding a hearing to consider those objections, the District Court entered judgment awarding petitioner compensation in the amount recommended by the commission, plus interest at a rate of six percent for the period from August 21, 1978 (the date the complaint had been filed), to the

³⁶ Testimony at trial by one of petitioner's officers suggested that, regardless of the existence of the moratorium, petitioner would not have cut any trees on that land, which it had held as a "reserve logging area" since the 1950's. For the purpose of our decision, we place no weight on that testimony; we assume that petitioner voluntarily forwent an opportunity to make profitable use of its land.

date the Government deposited the adjudicated value of the land with the court. *United States v. 2,175.86 Acres of Land*, 520 F.Supp. 75, 81 (1981). The court justified its award of interest on the ground that the institution of condemnation proceedings had "effectively denied [petitioner] economically viable use and enjoyment of its property" and therefore had constituted a taking. *Id.*, at 80. On March 26, 1982, the United States deposited the total amount of the judgment in the registry of the District Court. On the same date, the Government acquired title to the land.

Both parties appealed. A panel of the Court of Appeals for the Fifth Circuit unanimously ruled that the commission's report failed to meet the standards enunciated in *United States v. Merz*, 376 U.S. 192 (1964), and remanded the case for further findings regarding the value of petitioner's land. *United States v. 2,175.86 Acres of Land*, 696 F.2d 351, 358 (1983). More importantly for present purposes, the Court of Appeals, by a vote of two to one, reversed the District Court's award of interest to petitioner. Reasoning that "the mere commencement of straight condemnation proceedings, where the government does not enter into possession . . . , does not constitute a taking," *id.*, at 355, the court held that, in this case, the date of the taking should be deemed the date on which the compensation award was paid. Consequently, no interest was due on that award.³⁷

We granted certiorari to resolve a conflict in the Circuits regarding the date on which the taking, in a "straight-condemnation" proceeding, should be deemed to occur and the constitutional obligation of the United States to pay interest on the adjudicated value of the property.³⁸ 464 U.S. 913 (1983). We now affirm.

II

The United States has the authority to take private property for public use by eminent domain, *Kohl v. United States*, 91 U.S. 367, 371 (1876), but is obliged by the Fifth Amendment to provide "just compensation" to the owner thereof. "Just compensation," we have held, means in most cases the fair market value of the property on the date it is appropriated. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511-513 (1979). "Under this standard, the owner is entitled

³⁷ Judge Jolly dissented on this issue, arguing that the owner of unimproved land subject to condemnation proceedings under 40 U. S. C. §257 is entitled to interest on the award at least for the period beginning with entry of judgment by the district court, because during that period the owner is "shackled from making economically viable use of his property." 696 F.2d, at 358-359.

³⁸ In two cases, panels of the Court of Appeals for the Ninth Circuit have rejected the position taken by the Fifth Circuit in this case, holding that, when the United States condemns unimproved property using the method prescribed in 40 U. S. C. §257, it must award interest to the owner for some period prior to the date the award is paid and title passes. *United States v. 15.65 Acres of Land*, 689 F.2d 1329 (1982), cert. denied sub nom. *Marin Ridgeland Co. v. United States*, 460 U.S. 1041 (1983); *United States v. 156.81 Acres of Land*, 671 F.2d 336, cert. denied, 459 U.S. 1086 (1982). Similar confusion exists in the District Courts. See, e. g., *United States v. 59.29 Acres of Land*, 495 F.Supp. 212 (ED Tex. 1980) (date of taking is date of announcement of the award by the commission).

to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking." *Id.*, at 511 (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943)).³⁹

If the Government pays the owner before or at the time the property is taken, no interest is due on the award. See *Danforth v. United States*, 308 U.S., at 284. Such a mode of compensation is not constitutionally mandated; the Fifth Amendment does not forbid the Government to take land and pay for it later. *Sweet v. Rechel*, 159 U.S. 380, 400-403 (1895). But if disbursement of the award is delayed, the owner is entitled to interest thereon sufficient to ensure that he is placed in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation. *Phelps v. United States*, 274 U.S. 341, 344 (1927); *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 306 (1923).⁴⁰

From the foregoing it should be apparent that identification of the time a taking of a tract of land occurs is crucial to determination of the amount of compensation to which the owner is constitutionally entitled. The Government contends that, in straight-condemnation proceedings like that at issue here, the date of taking must be deemed the date the United States tenders payment to the owner of the land. The Government's position is amply supported by prior decisions by this Court and by indications of congressional intent derivable from the structure of the pertinent statutory scheme and the governing procedural rule.

In *Danforth v. United States*, *supra*, we were called upon to determine the date on which the Government, in an exercise of its eminent domain power under the Flood Control Act of 1928, ch. 569, 45 Stat. 534, as amended, 33 U. S. C. §702a et seq., appropriated the petitioner's property. We held that, "[unless] a taking has occurred previously in actuality or by a statutory provision . . . , we are of the view that the taking in a condemnation suit under this statute takes place upon the payment of the money award by the condemnor." 308 U.S., at 284. In response to the contention that such a procedure was unfair, we observed, "[the] owner is protected by the rule that title does not pass until compensation has been ascertained and paid. . . ." *Id.*, at 284-285 (quoting *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 587 (1923)).

That all straight-condemnation proceedings under §257 should operate in the fashion described in *Danforth* is strongly suggested by the structure of Rule 71A, which now governs the

³⁹ We have acknowledged that, in some cases, this standard fails fully to indemnify the owner for his loss. Particularly when property has some special value to its owner because of its adaptability to his particular use, the fair-market-value measure does not make the owner whole. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511-512 (1979). We are willing to tolerate such occasional inequity because of the difficulty of assessing the value an individual places upon a particular piece of property and because of the need for a clear, easily administrable rule governing the measure of "just compensation." *Ibid.*

⁴⁰ The last-mentioned principle underlies the provision in 40 U. S. C. §258a for the payment of interest on any difference between the estimated value of land appropriated through a declaration of taking and its subsequently adjudicated actual value as of that date. See *supra*, at 5. The principle also underlies several decisions by Courts of Appeals, holding that the six percent rate of interest prescribed by §258a is not a ceiling on the amount that can and must be paid by the Government. See, e. g., *United States v. 329.73 Acres of Land*, 704 F.2d 800, 812, and n. 18 (CA5 1983) (en banc). The United States has acquiesced in those decisions. Brief for United States 14, n. 13.

administration of the statute. Rule 71A(i) permits the United States to dismiss a condemnation suit at any time before "compensation has been determined and paid," unless the Government previously has "acquired the title or a lesser interest . . . or taken possession." The Government's capacity to withdraw from the proceeding in this fashion would be difficult to explain if a taking were effectuated prior to tendering of payment.

Finally, Congress' understanding that a taking does not occur until the termination of condemnation proceedings brought under §257 is reflected in its adoption of §258a for the purpose of affording the Government the option of peremptorily appropriating land prior to final judgment, thereby permitting immediate occupancy and improvement of the property. Such an option would have been superfluous if, as petitioner contends, a taking occurred upon the filing of the complaint in a §257 suit.

Petitioner's principal objection to the position advocated by the Government is that such a reading of §257 and Rule 71A is precluded by the Fifth Amendment. Petitioner contends that, at least when the subject of a straight-condemnation proceeding is unimproved land, the owner is effectively deprived of all of the significant interests associated with ownership long before the Government tenders payment. The filing of a complaint in condemnation and a notice of lis pendens, petitioner contends, has the effect of preventing the owner of unimproved land thereafter from making any profitable use of it, or of selling it to another private party. At the same time, the owner remains liable for property taxes.⁴¹ Such a thoroughgoing abrogation of the owner's rights, petitioner submits, surely constitutes a taking as soon as the abrogation is effective, regardless of when the land is officially appropriated under the terms of the statute.

If petitioner's depiction of the impairment of its beneficial interests during the pendency of the condemnation suit were accurate, we would find its constitutional argument compelling. We have frequently recognized that a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property. The principle that underlies this doctrine is that, while most burdens consequent upon government action undertaken in the public interest must be borne by individual landowners as concomitants of "the advantage of living and doing business in a civilized community,"⁴² some are so substantial and unforeseeable, and can so easily be identified and redistributed, that "justice and fairness" require that they be borne by the public as a whole.⁴³ These considerations are as applicable to the problem of determining when in a

⁴¹ Cf. *United States v. 15.65 Acres of Land*, 689 F.2d, at 1334 (arguing that the initiation of a condemnation action leaves "[the] owner of unimproved land . . . with the liabilities which follow title but none of the benefits, save the right ultimately to be paid for the taking").

⁴² *Andrus v. Allard*, 444 U.S. 51, 67 (1979) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting)).

⁴³ See *Agins v. Tiburon*, 447 U.S. 255, 260-262 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-128 (1978); *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *Pennsylvania Coal Co. v.*

condemnation proceeding the taking occurs as they are to the problem of ascertaining whether a taking has been effected by a putative exercise of the police power.

However, we do not find, prior to the payment of the condemnation award in this case, an interference with petitioner's property interests severe enough to give rise to a taking under the foregoing theory. Until title passed to the United States, petitioner was free to make whatever use it pleased of its property. The Government never forbade petitioner to cut the trees on the land or to develop the tract in some other way. Indeed, petitioner is unable to point to any statutory provision that would have authorized the Government to restrict petitioner's usage of the property prior to payment of the award.

Nor did the Government abridge petitioner's right to sell the land if it wished. It is certainly possible, as petitioner contends, that the initiation of condemnation proceedings, publicized by the filing of a notice of *lis pendens*, reduced the price that the land would have fetched, but impairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking. At least in the absence of an interference with an owner's legal right to dispose of his land, even a substantial reduction of the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment.

It is true that any effort by petitioner to develop the land probably would have prompted the Government to exercise its authority, under 40 U. S. C. §258a, to file a declaration of taking and thereby peremptorily to appropriate the tract in order to protect it from alteration. But the likelihood that the United States would have responded in that fashion to an attempt by petitioner to make productive use of the land weakens rather than strengthens petitioner's position, because it suggests that petitioner had the option, at any time, to precipitate an immediate taking of the land and to obtain compensation therefore as of that date, merely by informing the Government of its intention to cut down the trees.

We conclude, in sum, that petitioner has failed to demonstrate that its interests were impaired in any constitutionally significant way before the Government tendered payment and acquired title in the usual course. Accordingly, we approve the finding of the Court of Appeals that the taking of petitioner's land occurred on March 26, 1982. Because the award was paid on that date, no interest was due thereon.

III

The foregoing conclusion does not dispose of this case. We still must determine whether the award itself satisfied the strictures of the Fifth Amendment. As indicated above, petitioner is constitutionally entitled to the fair market value of its property on the date of the taking.

Mahon, *supra*, at 413, 415-416; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1214-1224 (1967).

Petitioner points out that \$2,331,202 represents the commission's best estimate of the value of the land on March 6, 1979. To the extent that that figure is less than the value of the land on March 26, 1982, the date of the taking, petitioner contends, it has been denied just compensation.

The Government attempts to meet this objection by emphasizing the pragmatic constraints on determination of the value of real property. The Government contends that it is imperative that the trier of fact in a condemnation action be given a fixed date as of which the value of the land is to be assessed. At the time of trial, no one knows when the United States will exercise its option to purchase the property, so adoption of the date of payment as the date of valuation is infeasible. Moreover, prediction of the value of land at a future time is notoriously difficult. Under these circumstances, courts and commissions understandably have adopted the convention of using the date of the commencement of the trial as the date of the valuation.

The Government's argument provides a plausible explanation for the valuation procedure used in this case and other cases, but it does not meet petitioner's constitutional claim. However reasonable it may be to designate the date of trial as the date of valuation, if the result of that approach is to provide the owner substantially less than the fair market value of his property on the date the United States tenders payment, it violates the Fifth Amendment.

We are left with the problem of prescribing a solution to this difficulty. Petitioner suggests that we mandate an award of interest, at least for the period from the date of valuation to the date of the taking, as a rough proxy for the increase in the value of the land during that period. We decline the invitation. Change in the market value of particular tracts of land over time bears only a tenuous relationship to the market rate of interest. Some parcels appreciate at rates far in excess of the interest rate; others decline in value.⁴⁴ Thus, to require the Government to pay interest on the basis proposed by petitioner would only sometimes improve the fit between the value of condemned land on the date of its appropriation and the amount paid to the owner of such land.

Solution of the problem highlighted by petitioner requires, not a rule compelling payment of interest by the Government, but rather a procedure for modifying a condemnation award when there is a substantial delay between the date of valuation and the date the judgment is paid, during which time the value of the land changes materially. In the case before us, such a procedure is readily available. In view of the inadequacy of the commission's explanation for its valuation of petitioner's land, the Court of Appeals remanded for reconsideration of the value of the property. On remand, the District Court can easily adduce evidence pertaining to alteration in the value of petitioner's tract between March 6, 1979, and March 26, 1982. In our view, such a reassessment is both necessary and sufficient to provide petitioner just compensation.

⁴⁴ For example, it appears that the market value of timberland of the sort owned by petitioner was much higher in March 1979 than in March 1982. See Vardaman's Green Sheet, Index of Pine Sawtimber Stumpage and Timberland Prices (Jan. 15, 1983).

In other cases, such an option may not be available. However, the Federal Rules of Civil Procedure contain a procedural device that could do tolerable service in this cause. Rule 60(b) empowers a federal court, upon motion of a party, to withdraw or amend a final order for "any . . . reason justifying relief from the operation of the judgment." This provision seems to us expansive enough to encompass a motion, by the owner of condemned land, to amend a condemnation award. The evidence adduced in consideration of such a motion would be very limited. The parties would not be permitted to question the adjudicated value of the tract as of the date of its original valuation; they would be limited to the presentation of evidence and arguments on the issue of how the market value of the property altered between that date and the date on which the judgment was paid by the Government. So focused, the consideration of such a motion would be expeditious and relatively inexpensive for the parties involved. Further refinement of this procedural option we leave to the courts called upon to administer it.

IV

For the reasons set forth above, we agree with the Court of Appeals that no interest was due on the condemnation award paid to petitioner. Petitioner's meritorious contention that it is constitutionally entitled to the value of its land on the date of the taking, not on the date of the valuation, can be accommodated by allowing petitioner, on remand, to present evidence pertaining to change in the market value of the tract during the period between those two dates. On the understanding that petitioner will be afforded that opportunity, the judgment is Affirmed.

UNITED STATES v. 50 ACRES OF LAND 469 U.S. 24 (1984)

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

The Fifth Amendment requires that the United States pay "just compensation" --normally measured by fair market value-- whenever it takes private property for public use. This case involves the condemnation of property owned by a municipality. The question is whether a public condemnee is entitled to compensation measured by the cost of acquiring a substitute facility if it has a duty to replace the condemned facility. We hold that this measure of compensation is not required when the market value of the condemned property is ascertainable.

I

In 1978, as part of a flood control project, the United States condemned approximately 50 acres of land owned by the city of Duncanville, Texas. The site had been used since 1969 as a sanitary landfill. In order to replace the condemned landfill, the city acquired a 113.7-acre site and developed it into a larger and better facility. In the condemnation proceedings, the city claimed that it was entitled to recover all of the costs incurred in acquiring the substitute site and developing it as a landfill, an amount in excess of \$1,276,000. The United States, however, contended that just compensation should be determined by the fair market value of the

condemned facility and deposited \$199,950 in the registry of the court as its estimation of the amount due.

Before trial the Government filed a motion in limine to exclude any evidence of the cost of the substitute facility, arguing that it was not relevant to the calculation of fair market value. Record, Doc. No. 62. The District Court denied the motion, noting that this Court had left open the question of the proper measure of compensation for the condemnation of public property. See *United States v. 564.54 Acres of Land*, 441 U.S. 506, 509, n.3 (1979) (Lutheran Synod). The court concluded that "a complete factual record should be developed from which an independent determination of the appropriate measure of compensation can be made." Record, Doc. No. 111.

At trial, both parties submitted evidence on the fair market value of the condemned property and on the cost of the substitute landfill facility. Responding to special interrogatories, the jury found that the fair market value of the condemned property was \$225,000, and that the reasonable cost of a substitute facility was \$723,624.01. Record, Doc. Nos. 199, 200. The District Court entered judgment for the lower amount plus interest on the difference between that amount and the sum already paid. 529 F.Supp. 220 (N.D. Tex. 1981). The court found no basis for departing from the market value standard in this case, and reasoned that the application of the substitute- facilities measure of compensation would necessarily provide the city with a "windfall."

The Court of Appeals reversed and remanded for further proceedings. 706 F.2d 1356 (CA5 1983). It reasoned that the city's loss attributable to the condemnation was "the amount of money reasonably spent . . . to create a functionally equivalent facility." *Id.*, at 1360. If the city was required, either as a matter of law or as a matter of practical necessity, to replace the old landfill facility, the Court of Appeals believed that it would receive no windfall. We granted the Government's petition for certiorari, 465 U.S. 1098 (1984), and we now reverse with instructions to direct the District Court to enter judgment based on the jury's finding of fair market value.

II

The Court has repeatedly held that just compensation normally is to be measured by "the market value of the property at the time of the taking contemporaneously paid in money." *Olson v. United States*, 292 U.S. 246, 255 (1934). "Considerations that may not reasonably be held to affect market value are excluded." *Id.*, at 256. Deviation from this measure of just compensation has been required only "when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public." *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950); *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 10, n. 14 (1984).

The city contends that in this case an award of compensation measured by market value is fundamentally inconsistent with the basic principles of indemnity embodied in the Just

Compensation Clause. If the city were a private party rather than a public entity, however, the possibility that the cost of a substitute facility exceeds the market value of the condemned parcel would not justify a departure from the market value measure. The question . . . is whether a substitute-facilities measure of compensation is mandated by the Constitution when the condemnee is a local governmental entity that has a duty to replace the condemned facility.

III

The text of the Fifth Amendment certainly does not mandate a more favorable rule of compensation for public condemnees than for private parties. To the contrary, the language of the Amendment only refers to compensation for "private property," and one might argue that the Framers intended to provide greater protection for the interests of private parties than for public condemnees. That argument would be supported by the observation that many public condemnees have the power of eminent domain, and thus, unlike private parties, need not rely on the availability of property on the market in acquiring substitute facilities.

When the United States condemns a local public facility, the loss to the public entity, to the persons served by it, and to the local taxpayers may be no less acute than the loss in a taking of private property. Therefore, it is most reasonable to construe the reference to "private property" in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States. Under this construction, the same principles of just compensation presumptively apply to both private and public condemnees.

V

In this case, as in most, the market measure of compensation achieves a fair "balance between the public's need and the claimant's loss." *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949). This view is consistent with our holding in *Lutheran Synod* that fair market value constitutes "just compensation" for those private citizens who must replace their condemned property with more expensive substitutes and with our prior holdings that the Fifth Amendment does not require any award for consequential damages arising from a condemnation.

The city argues that its responsibility for municipal garbage disposal justifies a departure from the market value measure in this case. This responsibility compelled the city to arrange for a suitable replacement facility or substitute garbage disposal services. This obligation to replace a condemned facility, however, is no more compelling than the obligations assumed by private citizens. Even though most private condemnees are not legally obligated to replace property taken by the Government, economic circumstances often force them to do so. When a home is condemned, for example, its owner must find another place to live. The city's legal obligation to

maintain public services that are interrupted by a federal condemnation does not justify a distinction between public and private condemnees for the purpose of measuring "just compensation."

Finally, the substitute-facilities doctrine, as applied in this case, diverges from the principle that just compensation must be measured by an objective standard that disregards subjective values which are only of significance to an individual owner. As the Court wrote in *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949):

"The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, however, have a general demand which gives them a value transferable from one owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use. In view, however, of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship."

The subjective elements in the formula for determining the cost of reasonable substitute facilities would enhance the risk of error and prejudice. Since the condemnation contest is between the local community and a National Government that may be thought to have unlimited resources, the open-ended character of the substitute-facilities standard increases the likelihood that the city would actually derive the windfall that concerned both the District Court and the Court of Appeals. "Particularly is this true where these issues are to be left for jury determination, for juries should not be given sophisticated and abstruse formulas as the basis for their findings nor be left to apply even sensible formulas to factors that are too elusive." *Id.*, at 20.

The judgment of the Court of Appeals is reversed.

It is so ordered.

BALTIMORE v. VALSAMAKI
397 Md. 222 (2007)

Opinion by Cathell, J.

This case arises from a "quick-take" condemnation⁴⁵ by the Mayor and City Council of Baltimore ("the City"), appellant, of a property located at 1924 N. Charles Street ("the Property") in Baltimore, Maryland. The Property consists of a three story building which houses a bar and package goods store known as the Magnet. On March 9, 2006, the City filed a petition for condemnation and a petition for immediate possession and title with the Circuit Court for Baltimore City. On March 15, 2006, prior to the property owner being served with any papers, the Circuit Court granted the City's petitions, ordering that the City "be vested with possession of the fee simple interest in that property known as 1924 N. Charles Street . . . as of the 15th day of March, 2006" Pursuant to the court's order, title in the Property would vest in the City ten days after personal service of the relevant order on the owner of the Property, George Valsamaki, et al., appellee, unless he filed an answer to the City's petitions within the ten day period "alleging that the City does not have the right or power to condemn title to the property"

Mr. Valsamaki filed an answer within the requisite time period and a hearing was scheduled and held on April 18, 2006. On May 19, 2006, the Circuit Court issued a memorandum opinion denying the City's petitions for condemnation and immediate possession and title to the Property. On August 8, 2006, after a motion to reconsider had been denied, the City noted a direct appeal to this Court.

The City presents one question for our review: "Does the City have the burden to prove 'necessity' to proceed with a quick take condemnation?"

We answer this question in the affirmative, holding that under the Code of Public Local Laws of Baltimore City, §21-16(a),⁴⁶ the City must demonstrate the reason or reasons why it is

⁴⁵ A quick-take condemnation involves "[t]he immediate taking of possession of private property for public use, whereby the estimated compensation is deposited in court or paid to the condemnee until the actual amount of compensation can be established." Black's Law Dictionary 310 (8th ed. 2004). See *Bern-Shaw Ltd. P'ship v. Mayor and City Council of Baltimore*, 377 Md. 277, 281 n.1, 833 A.2d 502, 504 n.1 (2003); *King v. State Roads Comm'n*, 298 Md. 80, 85-86, 467 A.2d 1032, 1035 (1983) (Quick-take condemnation occurs where "the condemning authority takes possession of the property prior to trial upon payment into court of its estimate of the value of the property taken.").

⁴⁶ The Code of Public Local Laws of Baltimore City, §21-16, is titled "Quick-take condemnation -- in general," and states in subsection (a), titled "Petition for Immediate Taking," that:

"Whenever any proceedings are instituted under Title 12 of the Real Property Article of Public General Laws of the State of Maryland or by the Mayor and City Council of Baltimore for the acquisition of any property for any public purpose whatsoever, the Mayor and City Council of

necessary for it to have immediate possession and immediate title to a particular property via the exercise of a quick-take condemnation.

It is clear from the emphasized language of the statute that when the Legislature conferred quick-take powers on Baltimore City it did so with the limitation that such powers should be exercised only when the necessity was "immediate." We have found no prior Maryland case that addresses the "immediate" language of the enabling statute.

I. Facts

This case has its genesis in Baltimore City's urban renewal efforts. On October 25, 1982, the Mayor and City Council of Baltimore adopted Ordinance No. 82-799, which established the Charles North Urban Renewal Plan for the Charles North Revitalization Area. Ordinance No. 82-799 sets forth the goals and objectives of the Charles North Urban Renewal Plan as follows:

"The basic goal of this Urban Renewal Plan is the revitalization of the Charles/North area in order to create a unique mixed-use neighborhood with enhanced viability, stability, attractiveness, and convenience for residents of the surrounding area and of the City as a whole.

The Property is located within the boundaries of the Charles North Revitalization Area. In June 2004, the Mayor and City Council of Baltimore amended the Charles North Urban Renewal Plan by Baltimore City Ordinance No. 04-695, which specifically authorized the acquisition of the subject Property "by purchase or by condemnation, for urban renewal purposes"

The issue before us arose on March 9, 2006, when the City acted on Ordinance No. 04-695 and filed a petition for condemnation and a petition for immediate possession of and title to the Property in the Circuit Court for Baltimore City. The petition for condemnation stated in pertinent part:

"[The City] is duly authorized to acquire the Property Interest hereinafter described [the Property] for public purposes by the following Ordinance(s) of the Mayor and City Council of Baltimore, viz: Article 13 §2-7(h) 6 of the Baltimore City Code (2000 edition), approved November 11, 1999 and Ordinance No. 04-695, approved June 23, 2004." . . .

Baltimore, simultaneously with the filing of said proceedings or at any time thereafter, may file a Petition under oath stating that it is necessary for the City to have immediate possession of, or immediate title to and possession of, said property, and the reasons therefore." §21-16(a)

"This property will be used for redevelopment purposes; namely in the Charles North Project area."

The petition for immediate possession and title stated in pertinent part: "That it is necessary for [the City] to acquire immediate possession and title to the said property interest as appears from the affidavit of William N. Burgee, Director of Property Acquisition and Relocation, Department of Housing and Community Development, attached hereto and prayed to be taken as a part hereof." Relevantly, the attached affidavit read: "The property known as 1924 N. Charles Street, Block 3602, Lot 04[,] must be in possession of the Mayor and City Council of Baltimore at the earliest possible time in order to assist in a business expansion in the area." [Emphasis added]. There was no attempt in the affidavit to specify the immediacy of the necessity other than a general statement that it was needed "at the earliest possible time" "to assist in a business expansion." There was no discussion of "why." In essence, the City appears to have been using its quick-take power to "stockpile" or assemble properties.

On March 15, 2006, the Circuit Court granted the City's petitions, as discussed supra. Mr. Valsamaki, the owner of the Property, timely filed an answer challenging the City's power to condemn title to the Property and a hearing was set for April 18, 2006.

Prior to the April 18, 2006, hearing, Mr. Valsamaki attempted to obtain discovery by serving interrogatories and notices of depositions on various city officials involved with the Charles North Urban Renewal Plan, namely, Mr. Burgee and Paul J. M. Dombrowski (an official at the Baltimore Development Corporation responsible for the Charles North Project). Due to the abbreviated time period in which quick-take condemnation proceedings generally take place, the City would not have to respond under the normal discovery time line before the April 18, 2006, hearing. Therefore, Mr. Valsamaki moved to shorten the time for discovery in order to ensure a response before the hearing. On April 4, 2006, the Circuit Court for Baltimore City denied that motion and, consequently, the City did not comply with the discovery requests prior to the April 18, 2006, hearing, and Mr. Valsamaki was forced to litigate without the aid of discovery practices, practices that would have been available in a regular condemnation action.

On April 18, 2006, the hearing took place. The Charles North Urban Renewal Plan, illustrated by Ordinance No. 82-799, was introduced into evidence by the City, along with Ordinance No. 04-695, a map of the renewal area, and a photograph of the Property. The City called two witnesses at the hearing. The first witness was Mr. Dombrowski, the Director of Planning and Design for the Baltimore Development Corporation and also the Project Manager for the Charles North area. On cross examination by Mr. Valsamaki's counsel, the following colloquy occurred:

"Q Is there any plan for the development of this property?"

...

“A We wanted mixed use development, but we had no specific plans because they follow on with the proposals. They come in as part of a proposal.

...

“Q But you really, at this point in time, and at the time you adopted the amendment, you really didn't have any plan for this property; did you?

“A We are seeking mixed use development for that assemblage of properties.

“Q I'm trying to understand this. This mixed-use concept then is just a conglomeration of different uses; is that right?

“A It's exactly as it says, 'a mixed use,' mixed uses, yes.

“Q Was there any particular business that was referred to, you had in mind?

“A No.

“Q So as I understand what you're saying then, you really didn't have any specific plan for this property or for the plan when you adopted the Urban Renewal areas?

“A Not a specific plan. We would choose that when proposals came in.”⁴⁷

Mr. Valsamaki's counsel continued, asking Mr. Dombrowski specifically about the City's need for immediate possession of the Property:

“Q Is there any reason that it's necessary to have immediate possession?

“A Well, immediate possession to us means getting something going after 20-some years of non investment in the area or 30 years. It's a matter of trying to assemble the site, given the fact that we know it takes time to go through this kind of procedure with appraisals, et cetera, and relocation assistance in Mr. Valsamaki's case. So we are looking for the most expeditious way to get development going and we deferred to the Law Department to tell us how to do that.

⁴⁷ Under these circumstances, an owner of a property who is resisting condemnation has no knowledge as to what use his or her property will be put. In fact, not only is a property owner lacking of this knowledge, but the City is ignorant of specific proposals as well. The parties will only know what the use will be when proposals are received and one is chosen.

“Q I don't understand. If you haven't even started the RFP process, why it's necessary to have immediate possession, why you could [not] go the normal route and just have an ordinary condemnation in say six, nine months, something like that. I'm missing --

“A We will have an RFP done in a matter of weeks if we know that we can move ahead on the property.

“Q You don't really know whether anybody's going to respond to the RFP, do you?

“A No, we never know that in advance.”

On May 19, 2006, the Honorable John Philip Miller issued a memorandum opinion and order for the Circuit Court:

"In considering the arguments and the evidence presented by the parties, this Court finds that [the City] fails to demonstrate sufficient grounds which warrant the findings of necessity requisite for the immediate taking. The [City] impassively asserts that the Charles North Project will likely come to a temporary halt unless [the City] is awarded the Property in Interest immediately. The Court, based on all [the] evidence, is not satisfied that the [City] has met its burden. The [City] has failed to submit to the Court either a contract, a focused development plan as it pertains to the Property in Interest, or even a Request for Proposal . . . supporting its contentions and establishing necessity required under §21-16."

In support of its conclusion, the trial court cited to the recent controversial United States Supreme Court decision in *Kelo v. City of New London, Connecticut*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005). The trial court acknowledged that under *Kelo*, "not only will economic development qualify as 'public use' for the purposes of eminent domain, but that also given 'a carefully considered development plan,' a plan that is comprehensive in nature and one that was preceded by thorough deliberation, a city's taking of private property will comport with the demands of the Fifth Amendment." After applying the *Kelo* holding to the matter at hand, however, the trial court found that it was "not satisfied that the [City] ha[d] demonstrated the necessity of the taking pursuant to any specifically outlined plan or contract, or as called for by §21-16 of the Public Local Laws of Baltimore City."

II. Discussion

The City argued in the Circuit Court, and argues now on appeal, that it does not have the burden to prove necessity in order to proceed with a quick-take condemnation proceeding for immediate possession and title to a property. In opposition, Mr. Valsamaki argues that §21-16 of

the Public Local Laws of Baltimore City statutorily establishes a requirement that the City show why it is necessary for it to take immediate possession and title to property, and that in so doing the City must also show that any taking is for a public use consistent with Article XI-B of the Maryland Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

Condemnation is a function of the State's power of eminent domain. Eminent domain is defined as "[t]he inherent power of a governmental entity to take privately owned property, esp. land, and convert it to public use, subject to reasonable compensation for the taking." Black's Law Dictionary 562 (8th ed. 2004). "[T]he power of eminent domain adheres to sovereignty and requires no constitutional authority for its existence." *Lore v. Board of Public Works*, 277 Md. 356, 358, 354 A.2d 812, 814 (1976) (citing *Riden v. Philadelphia, B. & W. R. Co.*, 182 Md. 336, 339, 35 A.2d 99, 100 (1943)). The power of eminent domain, however, is limited by both the Constitution of Maryland and the United States Constitution. The right to private property, and the protection of that right, is a bedrock principle of our constitutional republic. This is explicit in the federal constitution. The Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, 13 states 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." U.S. Const. amend. V

As Justice Chase wrote for the Supreme Court in *Calder v. Bull*, 3 Dall. 386, 3 U.S. 386, 1 L. Ed. 648 (1798):

"An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . A few instances will suffice to explain what I mean. . . . [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Government, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The Legislature . . . cannot . . . violate . . . the right of private property. To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments." 3 Dall. at 388-89 (emphasis deleted).

Thus, it is evident that government, through its federal and various state legislatures, does not have the authority to take a private individual's property and convey it to another private individual for a purely private purpose. *Kelo*, 545 U.S. at , 125 S. Ct. at 2661 ("[I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.").

The State of Maryland's jurisprudence in this instance is very similar to that of the federal government. The Maryland Constitution provides that: "The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation." Md. Const. art. III, §40; The Maryland Constitution, Article XI-B, §1, does, however, constitutionally provide specific authority for condemnation actions in Baltimore City:

"The General Assembly of Maryland, by public local law, may authorize and empower the Mayor and City Council of Baltimore:

(a) To acquire, within the boundary lines of Baltimore City, land and property of every kind, and any right, interest, franchise, easement or privilege therein, by purchase, lease, gift, condemnation or any other legal means, for development or redevelopment, including, but not limited to, the comprehensive renovation or rehabilitation thereof; and

...

All land or property needed, or taken by the exercise of the power of eminent domain, by the Mayor and City Council of Baltimore for any of the aforementioned purposes or in connection with the exercise of any of the powers which may be granted to the Mayor and City Council of Baltimore pursuant to this Article is hereby declared to be needed or taken for public use."⁴⁸

The constitutional provisions in regard to quick-take condemnation actions in Baltimore City are effectuated, in a limited manner, by Code of Public Local Laws of Baltimore City, §21-16. Chapter 420 of the Acts of 1972. Section 21-16 provides the Mayor and City Council of Baltimore with the authority to institute quick-take condemnation actions by filing "a Petition under oath stating that it is necessary for the City to have immediate possession of, or immediate title to and possession of, said property, and the reasons therefore." §21-16(a) (emphasis added). The court may then grant immediate possession "[i]f it appears from a Petition for Immediate Possession, with or without supporting affidavits or sworn testimony, that the public interest requires the City to have immediate possession of said property" §21-16(d) .

By requiring the City to establish under oath the immediacy of the need for quick-take condemnation (as opposed to regular condemnation), the Legislature has imposed the burden of proof upon the City to establish that immediate need -- not imposed a burden on the property owner to prove the contrary. Quick-take condemnation, as established by §21-16, is to be utilized

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by the City only when the public interest demands that it is necessary for property to be immediately taken. It is not a power to be utilized for regular condemnation purposes.⁴⁹

An "Immediate" Necessity

The City asserts that "[t]his Court has held that the burden of proving lack of necessity in a quick take condemnation suit rests upon the party who objects to the proceeding. . . ." This argument, however, does not acknowledge the plain language of §21-16 of the Public Local Laws

In the case of regular condemnation, once the City establishes at least a minimal level of public use or purpose, judicial review may be thereafter limited to determining that the agency's decision is not so oppressive, arbitrary or unreasonable as to suggest bad faith; that, however, is not the case in assessing immediacy in a quick-take condemnation action in Baltimore City under §21-16. Rather, the court must also determine whether there is a necessity to justify an immediate taking and, in that determination, must be able to assess the reasons for the immediacy. Section 21-16 expressly requires the City to state reasons relating to immediacy, thus the City has the burden not only to present a prima facie case of public use, but, additionally, in a quick-take action, the burden to establish the necessity for an immediate taking. In the case sub judice, the City did not satisfy the basic statutory mandate of §21-16(a) of the Public Local Laws of Baltimore City.

The trial court found, based upon these petitions, as well as from the testimony and exhibits introduced at the April 18, 2006, hearing, that the City failed "to demonstrate sufficient grounds which warrant the findings of necessity requisite for the immediate taking" of the Property. We agree with Judge Miller.

It is important to note that the opportunities to challenge a condemnation are shortened and truncated when quick-take condemnation is used as opposed to regular condemnation. The

⁴⁹ There is some indication from the record that the City, generally, may be misusing its quick-take condemnation power. Discussing when quick-take is used, the City's attorney stated at oral argument that: "We make a decision to take it by quick-take because we feel that the owner has been afforded every opportunity based upon the process we have in place." Additionally, at the hearing before the Circuit Court, the City's counsel made several statements concerning when it thought quick take was appropriate. The City stated: "I think that when negotiation has taken place over a few years, then quick take becomes the appropriate measure to take to acquire a property" and "I think that 21-16 [the quick-take statute] was actually set up so that when there was a glitch in the system to acquire property, that there would be another tool for acquisition"

Quick-take is not to be used simply because negotiations to purchase the property have failed. If the negotiation process has not resulted in the sale of a property, the City has the ability to initiate regular condemnation proceedings which provide all of the procedural due process protections that are absent from a quick-take condemnation proceeding. As indicated above, there is a distinction to be made between the two types of condemnation addressed in our case history: regular condemnation and quick-take condemnation.

court processes available to an owner under the quick-take are severely curtailed, as is well exhibited in the present case. The property owner was ordered out of possession of his property just six days from the time of the filing of the action and only learned that he was dispossessed when the order was served upon him. Then the time for him to respond was so short that he was not afforded time to conduct -- or really to begin -- discovery procedures in order to be able to address the issues of public use, necessity, or immediacy. Yet, the City did not at that time have present plans for the utilization of the Property and would only know what was to be done with the Property when private developers submitted proposals to it -- which might be in an indeterminant future.

The desire for the general assemblage of properties for urban renewal might be sufficient to justify the use of regular condemnation proceedings, but absent more specific and compelling evidence than was presented here, does not satisfy the immediacy and necessity requirements under quick-take condemnation. As quick-take is used in this instance by the City, it lends itself to the view that quick-take may be used primarily for the purpose of severely limiting the ability of property owners to resist condemnation. Such a use would violate the rights of property owners, fundamental rights that are protected by the Federal and State Constitutions.

It is useful to understand some other important differences and effects between quick-take condemnation and regular condemnation, especially as they relate to the exercise of eminent domain in respect to the taking of commercial or business properties. In regular condemnation, a taking authority files suit in court to condemn the property and, while the months (or years) long process goes on, the property owner maintains possession of his residence or business, operates it in the case of a business (albeit that the pendency of condemnation proceedings can adversely affect that business, i.e., the ability to obtain financing, the ability to have credit extended to the business, and the like), or resides in it if a residence and, if ultimately, the property owner prevails on his or her lack of public use (or purpose) argument, his or her residence or business continues.

When quick-take procedures are used, the taking entity obtains almost immediate possession of the property and in the process the business being conducted on the property, for all intents and purposes, is destroyed. Then, the quick-take process seriously circumscribes the procedural due process available in regular condemnation cases, a process in regular condemnation that contemplates that a property owner have a full opportunity to at least mount an effective challenge to the public nature of the use or purpose behind the taking. Instead of having a full opportunity to challenge the justification of the condemning authority, in quick-take condemnations the property is taken and he or she is left to argue, primarily, only about compensation as the property is already gone. Even if down the road, six months, a year, whatever period of time, the property owner is able to meet the burden of challenging the intended public use of the property, the business itself is gone. The viable business, that he or she

may have spent the better part of a lifetime building up, is gone. In many instances, an owner of a family (or other) business may be unable to simply start-up where he or she was before the condemning authority, via the quick-take process, destroyed the business.

Even when residential properties are taken by quick-take condemnation, it will often be impossible to place the property owner in the pre-condemnation condition if the property owner ultimately were to prevail. By that time the owner's home may have been destroyed. It is impossible to put him or her back in a pre-quick-take position.

In essence, quick-take procedures can be used inappropriately to destroy altogether the right of the property owner to challenge the public use prong of eminent domain which, although greatly circumscribed by various state and federal cases, remains as a viable aspect of the use of eminent domain powers, or otherwise the courts would be writing language out of the constitution by judicial fiat.

The purpose of the quick-take power is for it to be used when the need for the public use is immediate. It was not conferred for the purpose of allowing a condemning authority to run "roughshod" over the owners of private property. When that happens, or begins to happen, the property owner's recourse is to the courts.

III. Conclusion

For the aforementioned reasons, we hold that, pursuant to §21-16 of the Public Local Laws of Baltimore City, the City failed to provide sufficient reasons for its immediate possession of and title to the subject Property. §21-16(a). Without evidence that the continuing existence of a particular building or property is immediately injurious to the health and safety of the public, or is otherwise immediately needed for public use, there is no way to justify the need for immediate possession of the Property via quick-take condemnation proceedings. §21-16(d). This is as opposed to offering a property owner the full process to which he or she is constitutionally due, via the exercise of the regular condemnation power. Therefore, we affirm the Circuit Court's denial of the City's petition for condemnation and petition for immediate possession and title.

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED.
COSTS TO BE PAID BY THE APPELLANT.**

Session 13. Inverse Condemnation

PUMPELLY v. GREEN BAY CO. 80 U.S. 166 (1871)

Mr. Justice Miller delivered the opinion of the court.

[The] . . . plea . . . alleges that the legislature of Wisconsin, after it became a State, projected a system of improving the navigation of the Fox and Wisconsin Rivers, which adopted the dam of Reid and Doty, then in process of construction, as part of that system; and that, under that act, a board of public works was established, which made such arrangements with Reid and Doty that they continued and completed the dam; and that, by subsequent legislation, changing the organization under which the work was carried on, the defendants finally became the owners of the dam, with such powers concerning the improvement of the navigation of the river as the legislature could confer in that regard. But it does not appear that any statute made provision for compensation to the plaintiff, or those similarly injured, for damages to their lands. So that the plea, as thus considered, presents substantially the defence that the State of Wisconsin, having, in the progress of its system of improving the navigation of the Fox River, authorized the erection of the dam as it now stands, without any provision for compensating the plaintiff for the injury which it does him, the defendant asserts the right, under legislative authority, to build and continue the dam without legal responsibility for those injuries.

And counsel for the defendant, with becoming candor, argue that the damages of which the plaintiff complains are such as the State had a right to inflict in improving the navigation of the Fox River, without making any compensation for them.

This requires a construction of the Constitution of Wisconsin; for though the Constitution of the United States provides that private property shall not be taken for public use without just compensation, it is well settled that this is a limitation on the power of the Federal government, and not on the States. The Constitution of Wisconsin, however, has a provision almost identical in language, viz.: that “the property of no person shall be taken for public use without just compensation therefore.” Indeed this limitation on the exercise of the right of eminent domain is so essentially a part of American constitutional law that it is believed that no State is now without it, and the only question that we are to consider is whether the injury to plaintiff’s property, as set forth in his declaration, is within its protection.

The declaration states that, by reason of the dam, the water of the lake was so raised as to cause it to overflow all his land, and that the overflow remained continuously from the completion of the dam, in the year 1861, to the commencement of the suit in the year 1867, and the nature of the injuries set out in the declaration are such as show that it worked an almost complete destruction of the value of the land.

The argument of the defendant is that there is no taking of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provisions 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.

In the case of *Sinnickson v. Johnson*, 2 Harrison, New Jersey, 129, the defendant had been authorized by an act of the legislature to shorten the navigation of Salem Creek by cutting a canal, and by building a dam across the stream. The canal was well built, but the dam caused the water to overflow the plaintiff's land, for which he brought suit. Although the State of New Jersey then had no such provision in her constitution as the one cited from Wisconsin, the Supreme Court held the statute to be no protection to the action for damages. Dayton, J., said "that this power to take private property reaches back of all constitutional provisions; and it seems to have been a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is inseparably connected with the other; that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle." For this proposition he cites numerous authorities, but the case is mainly valuable here as showing that overflowing land by backing the water on it was considered as "taking" it within the meaning of the principle.

In the case of *Gardner v. Newburgh*, 2 Johnson's Chancery, 162, Chancellor Kent granted an injunction to prevent the trustees of Newburgh from diverting the water of a certain stream flowing over plaintiff's land from its usual course, because the act of the legislature which authorized it had made no provision for compensating the plaintiff for the injury thus done to his land. And he did this though there was no provision in the Constitution of New York such as we have mentioned, and though he recognized that the water was taken for a public use. After citing several continental jurists on this right of eminent domain, he says that while they admit that private property may be taken for public uses when public necessity or utility requires, they all lay it down as a clear principle of natural equity that the individual whose property is thus

sacrificed must be indemnified. And he adds that the principles and practice of the English government are equally explicit on this point. It will be seen in this case that it was the diversion of the water from the plaintiff's land, which was considered as taking private property for public use, but which, under the argument of the defendant's counsel, would, like overflowing the land, be called only a consequential injury.

If these be correct statements of the limitations upon the exercise of the right of eminent domain, as the doctrine was understood before it had the benefit of constitutional sanction, by the construction now sought to be placed upon the Constitution it would become an instrument of oppression rather than protection to individual rights.

We are not unaware of the numerous cases in the State courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers, and other highways, for the public good, there is no redress; and we do not deny that the principle is a sound one, in its proper application, to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other State constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those States. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further.

We are, therefore, of opinion that the plea set up no valid defense, and that the demurrer to it should have been sustained.

UNITED STATES v. CAUSBY
328 U.S. 256 (1946)

Mr. Justice Douglas delivered the opinion of the Court.

This is a case of first impression. The problem presented is whether respondents' property was taken, within the meaning of the Fifth Amendment, by frequent and regular flights of army and navy aircraft over respondents' land at low altitudes. The Court of Claims held that there was a taking and entered judgment for respondents, one judge dissenting. 104 Ct. Cls. 342, 60 F.Supp. 751. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.

Respondents own 2.8 acres near an airport outside of Greensboro, North Carolina. It has on it a dwelling house, and also various outbuildings which were mainly used for raising chickens. The end of the airport's northwest-southeast runway is 2,220 feet from respondents' barn and 2,275 feet from their house. The path of glide to this runway passes directly over the property-- which is 100 feet wide and 1,200 feet long. The 30 to 1 safe glide angle⁵⁰ approved by the Civil Aeronautics Authority⁵¹ passes over this property at 83 feet, which is 67 feet above the house, 63 feet above the barn and 18 feet above the highest tree.⁵² The use by the United States of this airport is pursuant to a lease executed in May, 1942, for a term commencing June 1, 1942 and ending June 30, 1942, with a provision for renewals until June 30, 1967, or six months after the end of the national emergency, whichever is the earlier.

Various aircraft of the United States use this airport--bombers, transports and fighters. The direction of the prevailing wind determines when a particular runway is used. The northwest-southeast runway in question is used about four per cent of the time in taking off and about seven per cent of the time in landing. Since the United States began operations in May, 1942, its four-motored heavy bombers, other planes of the heavier type, and its fighter planes have frequently passed over respondents' land and buildings in considerable numbers and rather close together. They come close enough at times to appear barely to miss the tops of the trees and at times so close to the tops of the trees as to blow the old leaves off. The noise is startling. And at night the glare from the planes brightly lights up the place. As a result of the noise, respondents had to give up their chicken business. As many as six to ten of their chickens were killed in one day by flying into the walls from fright. The total chickens lost in that manner was about 150. Production also fell off. The result was the destruction of the use of the property as a commercial chicken farm. Respondents are frequently deprived of their sleep and the family has

⁵⁰ A 30 to 1 glide angle means one foot of elevation or descent for every 30 feet of horizontal distance.

⁵¹ Military planes are subject to the rules of the Civil Aeronautics Board where, as in the present case, there are no Army or Navy regulations to the contrary. *Cameron v. Civil Aeronautics Board*, 140 F.2d 482.

⁵² The house is approximately 16 feet high, the barn 20 feet, and the tallest tree 65 feet.

become nervous and frightened. Although there have been no airplane accidents on respondents' property, there have been several accidents near the airport and close to respondents' place. These are the essential facts found by the Court of Claims. On the basis of these facts, it found that respondents' property had depreciated in value. It held that the United States had taken an easement over the property on June 1, 1942, and that the value of the property destroyed and the easement taken was \$2,000.

I

The United States relies on the Air Commerce Act of 1926, 44 Stat. 568, 49 U.S.C. §171, as amended by the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U. S. C. §401. Under those statutes the United States has "complete and exclusive national sovereignty in the air space" over this country. 49 U. S. C. §176 (a). They grant any citizen of the United States "a public right of freedom of transit in air commerce through the navigable air space of the United States." 49 U. S. C. §403. And "navigable air space" is defined as "airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority." 49 U.S.C. §180. And it is provided that "such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation." *Id.* It is, therefore, argued that since these flights were within the minimum safe altitudes of flight which had been prescribed, they were an exercise of the declared right of travel through the airspace. The United States concludes that when flights are made within the navigable airspace without any physical invasion of the property of the landowners, there has been no taking of property. It says that at most there was merely incidental damage occurring as a consequence of authorized air navigation. It also argues that the landowner does not own superadjacent airspace which he has not subjected to possession by the erection of structures or other occupancy. Moreover, it is argued that even if the United States took airspace owned by respondents, no compensable damage was shown. Any damages are said to be merely consequential for which no compensation may be obtained under the Fifth Amendment.

It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus est solum ejus est usque ad coelum*. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits.

Common sense revolts at the idea. To recognize such private airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.

But that general principle does not control the present case. For the United States conceded on oral argument that if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment. It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken. United

States v. Miller, 317 U.S. 369. Market value fairly determined is the normal measure of the recovery. *Id.* And that value may reflect the use to which the land could readily be converted, as well as the existing use. *United States v. Powelson*, 319 U.S. 266, 275, and cases cited. If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.

We agree that in those circumstances there would be a taking. Though it would be only an easement of flight which was taken, that easement, if permanent and not merely temporary, normally would be the equivalent of a fee interest. It would be a definite exercise of complete dominion and control over the surface of the land. The fact that the planes never touched the surface would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate. The owner's right to possess and exploit the land—that is to say, his beneficial ownership of it—would be destroyed. In the supposed case, the line of flight is over the land. And the land is appropriated as directly and completely as if it was used for the runways themselves.

There is no material difference between the supposed case and the present one, except that here enjoyment and use of the land are not completely destroyed. But that does not seem to us to be controlling. The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value.

The fact that the path of glide taken by the planes was that approved by the Civil Aeronautics Authority does not change the result. The navigable airspace which Congress has placed in the public domain is “airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.” 49 U.S.C. §180. If that agency prescribed 83 feet as the minimum safe altitude, then we would have presented the question of the validity of the regulation. But nothing of the sort has been done. The path of glide governs the method of operating-- of landing or taking off. The altitude required for that operation is not the minimum safe altitude of flight which is the downward reach of the navigable airspace. The minimum prescribed by the Authority is 500 feet during the day and 1,000 feet at night for air carriers (Civil Air Regulations, Pt. 61, §§61.7400, 61.7401, Code Fed. Reg. Cum. Supp., Title 14, ch. 1), and from 300 feet to 1,000 feet for other aircraft, depending on the type of plane and the character of the terrain. *Id.*, Pt. 60, §§60.350-60.3505, Fed. Reg. Cum. Supp., *supra*. Hence, the flights in question were not within the navigable airspace which Congress placed within the public domain. If any airspace needed for landing or taking off were included, flights which were so close to the land as to render it uninhabitable would be immune. But the United States concedes, as we have said, that in that event there would be a taking. Thus, it is apparent that the

path of glide is not the minimum safe altitude of flight within the meaning of the statute. The Civil Aeronautics Authority has, of course, the power to prescribe air traffic rules. But Congress has defined navigable airspace only in terms of one of them—the minimum safe altitudes of flight.

We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land. The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. See *Hinman v. Pacific Air Transport*, 84 F.2d 755. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. As we have said, the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. We would not doubt that, if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land. The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.

We said in *United States v. Powelson*, *supra*, p. 279, that while the meaning of "property" as used in the Fifth Amendment was a federal question, "it will normally obtain its content by reference to local law." If we look to North Carolina law, we reach the same result. Sovereignty in the airspace rests in the State "except where granted to and assumed by the United States." N.C. Gen. Stats 1943, §63-11. The flight of aircraft is lawful "unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath." *Id.*, §63-13. Subject to that right of flight, "ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath . . ." *Id.*, §63-12. Our holding that there was an invasion of respondents' property is thus not inconsistent with the local law governing a landowner's claim to the immediate reaches of the superadjacent airspace.

The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this

time what those precise limits are. Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case. For the findings of the Court of Claims plainly establish that there was a diminution in value of the property and that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land.

III

The Court of Claims held, as we have noted, that an easement was taken. But the findings of fact contain no precise description as to its nature. It is not described in terms of frequency of flight, permissible altitude, or type of airplane. Nor is there a finding as to whether the easement taken was temporary or permanent. Yet an accurate description of the property taken is essential, since that interest vests in the United States. *United States v. Cress*, supra, 328-329 and cases cited.

Since on this record it is not clear whether the easement taken is a permanent or a temporary one, it would be premature for us to consider whether the amount of the award made by the Court of Claims was proper.

The judgment is reversed and the cause is remanded to the Court of Claims so that it may make the necessary findings in conformity with this opinion.

Reversed.

Mr. Justice Black, dissenting.

The Fifth Amendment provides that “private property” shall not “be taken for public use without just compensation.” The Court holds today that the Government has “taken” respondents’ property by repeatedly flying Army bombers directly above respondents’ land at a height of eighty-three feet where the light and noise from these planes caused respondents to lose sleep and their chickens to be killed. Since the effect of the Court’s decision is to limit, by the imposition of relatively absolute constitutional barriers, possible future adjustments through legislation and regulation which might become necessary with the growth of air transportation, and since in my view the Constitution does not contain such barriers, I dissent.

Mr. Justice Burton joins in this dissent.

UNITED STATES v. CLARKE
445 U.S. 253 (1980)

Mr. Justice Rehnquist delivered the opinion of the Court.

There are important legal and practical differences between an inverse condemnation suit and a condemnation proceeding. Although a landowner's action to recover just compensation for a taking by physical intrusion has come to be referred to as "inverse" or "reverse" condemnation, the simple terms "condemn" and "condemnation" are not commonly used to describe such an action. Rather, a "condemnation" proceeding is commonly understood to be an action brought by a condemning authority such as the Government in the exercise of its power of eminent domain. In *United States v. Lynah*, 188 U.S. 445 (1903), for example, which held that the Federal Government's permanent flooding of the plaintiff's land constituted a compensable "taking" under the Fifth Amendment, this Court consistently made separate reference to condemnation proceedings and to the landowner's cause of action to recover damages for the taking. *Id.*, at 462, 467, 468.

More recent decisions of this Court reaffirm this well-established distinction between condemnation actions and physical takings by governmental bodies that may entitle a landowner to sue for compensation. Thus, in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 291 (1958), when discussing the acquisition by the Government of property rights necessary to carry out a reclamation project, this Court stated that such rights must be acquired by "paying just compensation therefore, either through condemnation or, if already taken, through action of the owners in the courts." And in *United States v. Dickinson*, 331 U.S. 745, 749 (1947), this Court referred to the Government's choice "not to condemn land but to bring about a taking by a continuous process of physical events." See also *id.*, at 747-748; *Dugan v. Rank*, 372 U.S. 609, 619 (1963).

The phrase "inverse condemnation" appears to be one that was coined simply as 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. As defined by one land use planning expert, "[inverse] condemnation is 'a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.'" D. Hagman, *Urban Planning and Land Development Control Law* 328 (1971) (emphasis added). A landowner is entitled to bring such an action as a result of "the self-executing character of the constitutional provision with respect to compensation" See 6 P. Nichols, *Eminent Domain* §25.41 (3d rev. ed. 1972). A condemnation proceeding, by contrast, typically involves an action by the condemnor to effect a taking and acquire title. The phrase "inverse condemnation," as a common understanding of that

phrase would suggest, simply describes an action that is the “inverse” or “reverse” of a condemnation proceeding.

There are also important practical differences between condemnation proceedings and actions by landowners to recover compensation for “inverse condemnation.” Condemnation proceedings, depending on the applicable statute, require various affirmative action on the part of the condemning authority. To accomplish a taking by seizure, on the other hand, a condemning authority need only occupy the land in question. Such a taking thus shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation. And in the case of Indian trust lands, which present the Government ““with an almost staggering problem in attempting to discharge its trust obligations with respect to thousands upon thousands of scattered Indian allotments,”” *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 374 (1968), the United States may be placed at a significant disadvantage by this shifting of the initiative from the condemning authority to the condemnee.

Likewise, the choice of the condemning authority to take property by physical invasion rather than by a formal condemnation action may also have important monetary consequences. The value of property taken by a governmental body is to be ascertained as of the date of taking. *United States v. Miller*, 317 U.S. 369, 374 (1943). In a condemnation proceeding, the taking generally occurs sometime during the course of the proceeding, and thus compensation is based on a relatively current valuation of the land. See 1 L. Orgel, *Valuation in Eminent Domain* §21, n. 29 (2d ed. 1953). When a taking occurs by physical invasion, on the other hand, the usual rule is that the time of the invasion constitutes the act of taking, and “[it] is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued” *United States v. Dow*, 357 U.S. 17, 22 (1958).

LORETTO v. TELEPROMPTER MANHATTAN CATV CORP. .
458 U.S. 419 (1982)

Marshall, J., delivered the opinion of the Court, in which Burger, C.J., and Powell, Rehnquist, Stevens, and O'Connor, JJ., joined. Blackmun, J., filed a dissenting opinion, in which Brennan and White, JJ., joined.

Justice Marshall delivered the opinion of the Court.

This case presents the question whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a "taking" of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution. New York law provides that a landlord must permit a cable television company to install its cable facilities upon his property. In this case, the cable installation occupied portions of appellant's roof and the side of her building. The New York Court of Appeals ruled that this appropriation does not amount to a taking. 53 N. Y. 2d 124, 423 N. E. 2d 320 (1981). Because we conclude that such a physical occupation of property is a taking, we reverse.

I

Appellant Jean Loretto purchased a five-story apartment building located at 303 West 105th Street, New York City, in 1971. The previous owner had granted appellees Teleprompter Corp. and Teleprompter Manhattan CATV (collectively Teleprompter) permission to install a cable on the building and the exclusive privilege of furnishing cable television (CATV) services to the tenants. The New York Court of Appeals described the installation as follows:

"On June 1, 1970 TelePrompter installed a cable slightly less than one-half inch in diameter and of approximately 30 feet in length along the length of the building about 18 inches above the roof top, and directional taps, approximately 4 inches by 4 inches by 4 inches, on the front and rear of the roof. By June 8, 1970 the cable had been extended another 4 to 6 feet and cable had been run from the directional taps to the adjoining building at 305 West 105th Street." *Id.* at 135, 423 N. E. 2d, at 324.

Teleprompter also installed two large silver boxes along the roof cables. The cables are attached by screws or nails penetrating the masonry at approximately two-foot intervals, and other equipment is installed by bolts.

Initially, Teleprompter's roof cables did not service appellant's building. They were part of what could be described as a cable "highway" circumnavigating the city block, with service cables periodically dropped over the front or back of a building in which a tenant desired service. Crucial to such a network is the use of so-called "crossovers"- cable lines extending from one

building to another in order to reach a new group of tenants. Two years after appellant purchased the building, Teleprompter connected a “noncrossover” line— i.e., one that provided CATV service to appellant’s own tenants— by dropping a line to the first floor down the front of appellant’s building.

To facilitate tenant access to CATV, the State of New York enacted §828 of the Executive Law, effective January 1, 1973. Section 828 provides that a landlord may not “interfere with the installation of cable television facilities upon his property or premises,” and may not demand payment from any tenant for permitting CATV, or demand payment from any CATV company” in excess of any amount which the [State Commission on Cable Television] shall, by regulation, determine to be reasonable.” The landlord may, however, require the CATV company or the tenant to bear the cost of installation and to indemnify for any damage caused by the installation. Pursuant to §828(1)(b), the State Commission has ruled that a one-time \$1 payment is the normal fee to which a landlord is entitled. The Commission ruled that this nominal fee, which the Commission concluded was equivalent to what the landlord would receive if the property were condemned pursuant to New York’s Transportation Corporations Law, satisfied constitutional requirements “in the absence of a special showing of greater damages attributable to the taking.” Statement of General Policy, App. 52.

Appellant did not discover the existence of the cable until after she had purchased the building. She brought a class action against Teleprompter in 1976 on behalf of all owners of real property in the State on which Teleprompter has placed CATV components, alleging that Teleprompter’s installation was a trespass and, insofar as it relied on §828, a taking without just compensation. She requested damages and injunctive relief. The Court of Appeals, over dissent, upheld the statute. 53 N.Y. 2d 124, 423 N. E. 2d 320 (1981). The court then ruled that the law serves a legitimate police power purpose—eliminating landlord fees and conditions that inhibit the development of CATV, which has important educational and community benefits. Rejecting the argument that a physical occupation authorized by government is necessarily a taking, the court stated that the regulation does not have an excessive economic impact upon appellant when measured against her aggregate property rights, and that it does not interfere with any reasonable investment-backed expectations. Accordingly, the court held that §828 does not work a taking of appellant’s property.

In light of its holding, the Court of Appeals had no occasion to determine whether the \$1 fee ordinarily awarded for a non-crossover installation was adequate compensation for the taking. We noted probable jurisdiction. 454 U.S. 938 (1981).

II

The Court of Appeals determined that §828 serves the legitimate public purpose of “rapid development of and maximum penetration by a means of communication which has important

educational and community aspects,” 53 N. Y. 2d, at 143-144, 423 N. E. 2d, at 329, and thus is within the State’s police power. We have no reason to question that determination. It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid. See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127-128. We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention.

A

When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking. This Court has consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner’s property that causes consequential damages within, on the other. A taking has always been found only in the former situation. See *United States v. Lynah*, 188 U.S. 445, 468-470 (1903). More recent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property. In *United States v. Causby*, 328 U.S. 256 (1946), the Court ruled that frequent flights immediately above a landowner’s property constituted a taking.

Although this Court’s most recent cases have not addressed the precise issue before us, they have emphasized that physical invasion cases are special and have not repudiated the rule that any permanent physical occupation is a taking. The cases state or imply that a physical invasion is subject to a balancing process, but they do not suggest that a permanent physical occupation would ever be exempt from the Takings Clause.

In short, when the “character of the governmental action,” is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.

B

The historical rule that a permanent physical occupation of another’s property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner’s property interests. To borrow a metaphor, . . . the government does not simply take a single “strand” from the “bundle” of property rights: it chops through the bundle, taking a slice of every strand.

Property rights in a physical thing have been described as the rights “to possess, use and dispose of it.” *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). To the extent that the government permanently occupies physical property, it effectively destroys each of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights. See *Restatement of Property §7* (1936). Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no non-possessory use of the property. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Finally, whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute. Once the fact of occupation is shown, of course, a court should consider the extent of the occupation as one relevant factor in determining the compensation due. For that reason, moreover, there is less need to consider the extent of the occupation in determining whether there is a taking in the first instance.

C

Teleprompter’s cable installation on appellant’s building constitutes a taking under the traditional test. The installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building’s exterior wall. Finally, we do not agree with appellees that application of the physical occupation rule will have dire consequences for the government’s power to adjust landlord-tenant relationships. This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails. Consequently, our holding today in no way alters the analysis governing the State’s power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building.

III

Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. We do not, however,

question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property.

Furthermore, our conclusion that §828 works a taking of a portion of appellant's property does not presuppose that the fee which many landlords had obtained from Teleprompter prior to the law's enactment is a proper measure of the value of the property taken. The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand. The judgment of the New York Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice Blackmun, with whom Justice Brennan and Justice White join, dissenting.

If the Court's decisions construing the Takings Clause state anything clearly, it is that "[there] is no set formula to determine where regulation ends and taking begins." *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

In a curiously anachronistic decision, the Court today acknowledges its historical disavowal of set formulae in almost the same breath as it constructs a rigid per se takings rule: "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." To sustain its rule against our recent precedents, the Court erects a strained and untenable distinction between "temporary physical invasions," whose constitutionality concededly "is subject to a balancing process," and "permanent physical occupations," which are "[takings] without regard to other factors that a court might ordinarily examine."

In my view, the Court's approach "reduces the constitutional issue to a formalistic quibble" over whether property has been "permanently occupied" or "temporarily invaded." *Sax, Takings and the Police Power*, 74 *Yale L.J.* 36, 37 (1964). The Court's application of its formula to the facts of this case vividly illustrates that its approach is potentially dangerous as well as misguided. I therefore respectfully dissent.

RIDGE LINE, INC v. UNITED STATES
346 F.3d 1346 (Fed. Cir. 2003)

JUDGES: Before MICHEL, CLEVINGER, and BRYSON, Circuit Judges.

MICHEL, Circuit Judge.

Ridge Line, Inc. appeals from a judgment following trial by the United States Court of Federal Claims, *Ridge Line, Inc. v. United States*, 2002 U.S. Claims LEXIS 240, No. 98-CV-929 (Fed. Cl. Sept. 4, 2002), holding that increased storm drainage caused by the construction of a Postal Service facility and associated parking lots and driveways did not constitute a taking of any real property interest of Ridge Line that would justify compensation under the Takings Clause of the United States Constitution. U.S. Const. amend. V. The trial court found that the affected portion of Ridge Line's land, a ravine known as South Hollow, was not effectually destroyed nor suffered a permanent and exclusive occupation by the increased runoff from the federal land uphill from Ridge Line's property and that in any event Ridge Line failed to demonstrate quantified damages for any erosion injury to South Hollow or diminished resale value thereof. Because the trial court (1) failed to address whether the increased storm drainage constituted a taking of a flowage easement by inverse condemnation as expressly argued by Ridge Line and (2) rejected as a permissible basis of damages in any event the cost of the flood control structures Ridge Line built and twice expanded for prevention of further damage to its land, we vacate the trial court's judgment and remand for further analysis and decision consistent with this opinion.

BACKGROUND

West Virginia is so mountainous that land development often leads to greatly increased flow and velocity of storm water runoff due to the reduced capacity of water absorption by the developed property. Ridge Line owns land on which is located Southridge Centre, the largest shopping center and mixed-use commercial development in West Virginia. In 1991, the government purchased a piece of property adjacent to and uphill from the shopping center to build a United States Postal Service facility. Storm water from both the Postal Service property and Southridge Centre drains into South Hollow, which lies between the Postal Service property and the shopping center. At the time the Postal Service developed its property, Ridge Line owned only a portion of South Hollow. In the years following the construction of the Postal Service facility, other portions of South Hollow were also acquired by Ridge Line.

When the Postal Service facility was completed in late 1993, storm water runoff into South Hollow sharply increased due to the construction of impervious surfaces on much of the government land. Evidence was offered that the development increased the storm runoff by 70-150%. According to Ridge Line's evidence, approximately 80% of post-development runoff into South Hollow in 1993 was coming from the Postal Service property as opposed to Ridge Line's property. Although the Postal Service facility included a drainage swale and drains and the

Postal Service constructed a check dam on Ridge Line's property in South Hollow to control runoff, Ridge Line notes that storm water runoff into South Hollow became so extreme that it began to receive complaints of flooding from downstream neighbors, including a homeowner along Davis Creek which is fed by the effluent from South Hollow.

In 1993, Ridge Line built a storm water detention pond in South Hollow. Ridge Line claims that it was forced to construct the water detention facilities much earlier and on a larger scale than would have been required without the increased runoff caused by the government development. It asked the Postal Service to share in the cost of constructing the detention facilities. However, negotiation failed over the issue of the amount of the government's contribution. In the end, the government refused to pay anything. Ridge Line then sued the government in the Court of Federal Claims on December 19, 1998 claiming that the additional water flow caused by the development of the Postal Service facility constituted a taking by the government of a flowage easement entitling it to compensation under the Takings Clause of the United States Constitution. The taking was alleged to have occurred in 1993. Ridge Line sought the costs it has incurred to deal with the government's runoff and reasonably projected costs to be incurred in the future.

Between 1994 and 2000, Ridge Line expanded the shopping center with more recreational facilities. It also built new, larger storm water management facilities in South Hollow. Even more recently, Ridge Line added additional landfill to South Hollow, covering the original storm water detention pond and most or all of the portions of South Hollow that it claims were damaged by the erosion caused by storm water discharge from the Postal Service property.

The trial court, after a site inspection in 2002 and a two-and-a-half-day trial, found that the Postal Service development created at least a 70% increase in storm drainage onto Ridge Line's property. Ridge Line, 2002 U.S. Claims LEXIS 240. However, the trial court found that while the water might have "invaded" Ridge Line's property from time to time, the invasion was not sufficient to establish government "possession." Id. The court found also that Ridge Line did not suffer a permanent and exclusive occupation by the government that destroyed its possession, use, or disposal of its property, and that even if there were temporary invasions of the property, there was insufficient evidence of them because no loss of value of the property was shown and Ridge Line had already filled and altered the area complained of, obscuring the earlier erosion effects.. Further, the court found that Ridge Line could not prove damages because it did not produce appraisals of its property before and after the land erosion allegedly caused by the increased water runoff.

After the trial court entered judgment for the government, Ridge Line timely appealed to this court. We have jurisdiction under 28 U.S.C. §1295(a)(3).

DISCUSSION

A determination of whether a taking compensable under the Fifth Amendment has occurred is a question of law based on factual underpinnings. *Alves v. United States*, 133 F.3d 1454, 1456 (Fed. Cir. 1998). Thus, we review the trial court's legal analysis and conclusion de novo and its fact-findings for clear error. *Bass Enters. Prod. Co. v. United States*, 133 F.3d 893, 895 (Fed. Cir. 1998).

I

Despite Ridge Line's contention that the taking in this case was the appropriation of a flowage easement by inverse condemnation, the trial court confined its analysis of liability to whether the government's actions constituted a "permanent and exclusive occupation." See *Ridge Line*, 2002 U.S. Claims LEXIS 240. A permanent and exclusive physical occupation of private land by or on the authority of the government is one incontestable case for compensation under the Takings Clause. However, a permanent occupation need not exclude the property owner to be compensable as a taking. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436-38, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982) (holding that a compulsory installation of cables on apartment buildings pursuant to a state statute constituted a taking). Nor must the occupation be continuous. Thus, for purposes of takings analysis, "a 'permanent physical occupation' has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831-32, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987).

It is well established that the government may not take an easement without just compensation. *United States v. Dickinson*, 331 U.S. 745, 748, 91 L. Ed. 1789, 67 S. Ct. 1382 (1947). Similarly, government actions may not impose upon a private landowner a flowage easement without just compensation. *Dickinson*, 331 U.S. at 750-51. In *Dickinson*, the government, in building a dam, raised the water level of a river, causing permanent flooding, erosion, and intermittent flooding of abutting landowners. *Id.* at 746-47. Before the trial court, whose decision was affirmed by the United States Court of Appeals for the Fourth Circuit, the *Dickinson* landowners recovered judgments for the value of easements taken by the government to permanently flood parts of their lands, damages for erosion of the residues of their lands adjoining the flooded portions based on the cost of protective measures the landowners might have taken to prevent the erosion loss, and the value of easements for intermittent flooding of still other parts of their lands. *United States v. Dickinson*, 152 F.2d 865, 866 (4th Cir. 1946). The Supreme Court granted certiorari, and affirmed all of the damages awarded to the landowners. *Dickinson*, 331 U.S. at 750-51.

Three points made by the Supreme Court in *Dickinson* are particularly relevant to the present case. First, the Court affirmed the judgment and the value assessed for the government's taking of an easement by inverse condemnation for intermittent flooding of land. *Id.* at 751. Second, the Court held that a landowner's reclaiming his land did not disentitle him to be

compensated for the original taking committed by the government. *Id.* Third, regarding the compensation awarded for land erosion, the Court held that "if the resulting erosion which, as a practical matter, constituted part of the taking was in fact preventable by prudent measures, the cost of that prevention is a proper basis for determining the damage, as the courts below held." *Id.*

In the present case, the trial court referred to *Dickinson*, but only in the context of rejecting the government's argument that Ridge Line's claim was barred by the statute of limitations. *Ridge Line*, 2002 U.S. Claims LEXIS 240. The trial court acknowledged that *Dickinson* involved a takings claim for "damages caused by intermittent flooding due to a dam's being built" and that "erosion caused by flooding [was] the cause of action." *Id.* It apparently recognized that *Dickinson* involved inverse condemnation. However, the trial court failed to discuss the relevance of *Dickinson* to the merits -- not just the timeliness -- of Ridge Line's claim for the taking of a flowage easement.

II

Turning to the present case, Ridge Line claims that the increased storm water runoff caused by the Postal Service development constituted the government's taking of a water flowage easement in 1993 and just compensation for the taking is a proportional share of the cost in building, expanding and maintaining the flood control system in South Hollow. The trial court failed to address Ridge Line's claim for inverse condemnation of a flowage easement even though it was so presented. This was error.

The trial court thus erred in requiring that to recover Ridge Line must show that its property was "effectually destroyed" or suffered a "permanent and exclusive occupation by the government that destroyed the owner's right to possession." *Ridge Line*, 2002 U.S. Claims LEXIS 240, at *7 (quoting *Loretto*, 453 U.S. at 427 and *Boise Cascade*, 296 F.3d at 1353). *Dickinson*, in holding that intermittent flooding of private land can constitute a taking of an easement, clearly established that permanent destruction or exclusive occupation by government runoff is not always required for a successful takings claim. *Dickinson*, 331 U.S. at 751. Further, the trial court erred in stating that Ridge Line suffered no loss of use, possession, or value of its property because most of the area complained of as eroded by government runoff was later filled and altered. As *Dickinson* held, a landowner's reclaiming his land does not disentitle him to be compensated for the original taking by the government. *Id.* Moreover, the trial court erred in holding that damages could not be demonstrated simply because Ridge Line did not provide appraisals of its land value before and after the erosion of South Hollow allegedly caused by the storm water overflow. Again, *Dickinson* specifically stated that if the land erosion caused by a taking is preventable, the cost of the prevention is a proper basis for determining damages. *Id.* at 750-51. The trial court thus cannot rely on a lack of appraisals as a reason for its conclusion that no damage was proven and thus no taking occurred.

Thus, although the trial court seems to have properly determined that no taking occurred due to permanent and exclusive physical occupation by the government, it failed to address Ridge Line's principal contention: whether the increased water runoff constituted a taking of a flowage easement by inverse condemnation. We therefore vacate and remand for analysis of the evidence in accordance with the taking of a flowage easement by inverse condemnation.

III

Ridge Line's assertion of a claim for inverse condemnation invokes a two-part analysis. First, Ridge Line must establish that treatment under takings law, as opposed to tort law, is appropriate under the circumstances. See *Barnes v. United States*, 210 Ct. Cl. 467, 538 F.2d 865, 870 (Ct. Cl. 1976) (distinguishing between torts and takings; noting that "Government-induced flooding not proved to be inevitably recurring occupies the category of mere consequential injury, or tort"). The tort-taking inquiry in turn requires consideration of whether the effects Ridge Line experienced were the predictable result of the government's action, and whether the government's actions were sufficiently substantial to justify a takings remedy. If these inquiries reveal that a takings remedy is potentially available, Ridge Line must show that it possessed a protectable property interest in what it alleges the government has taken.

IV

A

"Inverse condemnation law is tied to, and parallels, tort law." 9 PATRICK J. ROHAN & MELVIN A. RESKIN, *NICHOLS ON EMINENT DOMAIN* §34.03[1] (3d ed. 1980 & Supp. 2002). Thus, not every "invasion" of private property resulting from government activity amounts to an appropriation. *Id.* The line distinguishing potential physical takings from possible torts is drawn by a two-part inquiry. First, a property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the "direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action." *Columbia Basin Orchard v. United States*, 132 Ct. Cl. 445, 132 F. Supp. 707, 709 (Ct. Cl. 1955) (holding that a claim for the loss of fruit trees resulting from the contamination of a spring resulting from the combination of the government's discharge of water into a nearby lake and unprecedented rainfall was compensable, if at all, as a tort, not a taking); *Owen v. United States*, 851 F.2d 1404, 1418 (Fed. Cir. 1988) (en banc) (remanding for a determination of whether the claimant's property loss flowed from "an intention to do an act the natural consequence of which was to take [the] property" or "was such an indirect consequence of [the government's action] as not to be a compensable taking"). Second, the nature and magnitude of the government action must be considered. Even where the effects of the government action are predictable, to constitute a taking, an invasion must appropriate a benefit to the government at the expense of the property owner, or at least preempt the owner's

right to enjoy his property for an extended period of time, rather than merely inflict an injury that reduces its value.

Here, since Ridge Line does not allege that the government intentionally appropriated its property, on remand the court must first determine whether Ridge Line proved that the increased storm runoff was the "direct, natural, or probable result" of the Postal Service development, rather than merely an incidental or consequential injury, perhaps compensable as a tort, caused, for example, by improvident conduct on the part of the government in managing its property. Specifically, the court must determine whether the increased runoff on the claimant's property was the predictable result of the government action. See *Sanguinetti v. United States*, 264 U.S. 146, 149-50, 68 L. Ed. 608, 44 S. Ct. 264, 59 Ct. Cl. 955 (1924) (holding that no taking occurred where the claimant failed to show that increased flooding resulting from the government's construction of a canal "was the direct or necessary result of the structure; [or] within the contemplation of or reasonably to be anticipated by the government"). Thus a dam construction project resulting in an increase in the water levels of the lakes from which claimants had obtained and manufactured soda was not compensable as a taking where "the result of the government's work to the properties . . . could not have been foreseen or foretold" *Horstmann Co.*, 257 U.S. at 142-43, 146 (noting that the movement of the percolating underground waters was hidden). However, where the construction and operation of a dam initiated a series of events, "all . . . in their natural order," by which the landowner was deprived of the beneficial use of portions of its land, a taking was found. *Cotton Land Co. v. United States*, 109 Ct. Cl. 816, 75 F. Supp. 232, 232-35 (Ct. Cl. 1948).

B

The second prong of the taking-tort inquiry in this case requires the court to consider whether the government's interference with any property rights of Ridge Line was substantial and frequent enough to rise to the level of a taking. In this regard, "isolated invasions, such as one or two floodings . . ., do not make a taking . . ., but repeated invasions of the same type have often been held to result in an involuntary servitude." *Eyherabide v. United States*, 170 Ct. Cl. 598, 345 F.2d 565, 569 (Ct. Cl. 1965) (citations omitted); see also *Barnes*, 538 F.2d at 870 ("Generally speaking, property may be taken by the invasion of water where subjected to intermittent, but inevitably recurring, inundation due to authorized Government action.").

V

If the court concludes that treatment of the government's conduct as a potential taking, as opposed to a tort, is appropriate, it must then consider whether the government appropriated from Ridge Line a legally protectable easement interest, a determination made in this case according to West Virginia's "reasonable use" rule. In deciding whether one who alters his land is liable to his neighbor for flooding caused by the alterations, the Supreme Court of Appeals of West Virginia decided to "approach[] each case on its individual facts with a view toward finding if a

reasonable use was being made of the property." *Morris Assocs., Inc. v. Priddy*, 181 W. Va. 588, 383 S.E.2d 770, 774 (W. Va. 1989).

Here, the government effectively shifted some of its storm water control costs to Ridge Line. By covering much of its land with impervious surfaces but failing to build water retention facilities, the government, according to Ridge Line's evidence, forced Ridge Line to build larger, more expensive control facilities in South Hollow than would otherwise have been necessary.

There was also evidence that the government aggravated the consequences that would otherwise have befallen Ridge Line as a result of the Postal Service development by gathering and concentrating much of the storm water that fell on its property into five discharge points directed onto Ridge Line's property. This multiplied its erosive power, rather than restraining it. Furthermore, Ridge Line offered evidence that the government failed to maintain the check dam it built (with consent) on Ridge Line's property, despite the request of the West Virginia Division of Environmental Protection that the dam although intended to be temporary remain permanently and be maintained. On remand, the trial court must consider this and other evidence bearing on the reasonableness of the government's actions (and inaction) in order to decide whether Ridge Line has been deprived of a cognizable property interest.

VI

To summarize, in the present case, as noted above, the trial court did not address Ridge Line's inverse condemnation contention, and, therefore, did not evaluate whether the government's construction led predictably to Ridge Line's economic injury and was sufficiently substantial. On remand, it must do so. If the court concludes that consideration as a potential taking is proper, it must then address whether the steps taken by the government in storm water retention and the amount that nevertheless invaded South Hollow were reasonable under West Virginia law, including an assessment of the relative advantage to the Postal Service and disadvantage to Ridge Line in view of the increased storm water runoff and the relative social utility of the Postal Service facility. The trial court found that storm water runoff into Ridge Line's property increased at least 70% due to the Postal Service development. However, it did not determine whether causing such an increase was reasonable, or weigh the other evidence bearing on reasonableness.

We thus vacate the trial court's judgment that no taking occurred. We hold that Ridge Line's property need not suffer an effectual destruction or a permanent and exclusive occupation by government runoff for a taking claim based on a flowage easement. However, whether there is a compensable taking in this case depends first on whether its loss may properly be analyzed under takings law as opposed to tort law, and then on whether Ridge Line has a protectable property interest under West Virginia property law that has been violated by government action.

In the event that the court determines on remand that Ridge Line has a protectable property interest and that the increased storm water flowage onto Ridge Line's property

constituted a taking of an easement in violation of that property interest, damages may be assessed based on Ridge Line's cost in constructing prudent flood control measures. See *Dickinson*, 331 U.S. at 751 (upholding the trial court's award of damages based on the cost of protective measures for preventing erosion). A share of the costs of building and maintaining storm water control facilities, proportionate to the government's quantitative contributions of storm water volumes, erosion, and sedimentation, is an entirely acceptable method of calculating damages. Before the trial court, Ridge Line has provided substantial testimony, including that of LeRoy Rashid and Eduardo Vigil, regarding necessary storm control expenditures and the government's fair share of those expenditures. On remand, the trial court must make specific findings of facts relevant to liability, and if it is found, to damages, pursuant to Rule 52 of the Rules of the Court of Federal Claims.

Alternatively, the court may determine damages based on the price the government has paid for flowage easements in comparable situations. Moreover, "just compensation" includes a recovery for "all damages, past, present and prospective." *Dickinson*, 152 F.2d at 867, *aff'd*, 331 U.S. 745, 91 L. Ed. 1789, 67 S. Ct. 1382. Thus, the damages analysis is not to be limited to 1993, the time of the alleged taking.

CONCLUSION

For the reasons set forth above, we vacate the trial court's judgment for the government and remand for further analysis consistent with this opinion. On remand, the trial court need not reopen the record, unless necessary to address the issues raised above. Accordingly, the judgment of the trial court is VACATED AND REMANDED.

Session 14. Navigation Servitude

GIBSON v. UNITED STATES 166 U.S. 269 (1897)

This was a petition to recover damages because of the construction of a dike by the United States in the Ohio River at a point off Neville Island, about nine miles west of the city of Pittsburgh. The Court of Claims made the following findings of fact:

"I. In the year 1885, and before, the claimant was the owner in her own right and in possession of a tract of land containing about 20 acres, situate on Neville Island, in the Ohio River, 9 miles below the city of Pittsburgh, in the county of Allegheny and State of Pennsylvania.

"II. The claimant's land, at the time of the alleged grievance, was in a high state of cultivation, well improved with a good dwelling house, barn and other outbuildings. The claimant was in the year 1885, and is now, engaged in market gardening, cultivating and shipping strawberries, raspberries, potatoes, melons, apples, peaches, etc., to the cities of Pittsburgh and Allegheny, Pa., for sale.

"III. The claimant's farm has a frontage of 1000 feet on the north, or main navigable, channel of the Ohio River, where the claimant has a landing, which was used in shipping the products from, and the supplies to, her said farm; that the said farm extends across the said Neville Island in a southwesterly direction to the south channel of said Ohio River, which is not navigable; that the said landing is the only one on claimant's farm from which she can ship the products from, and supplies to, her farm.

"IV. Congress, by the river and harbor acts of July 5, 1884, 23 Stat. 133, 147, and August 5, 1886, 24 Stat. 310, 327, authorized and directed the improvement of the said Ohio River as follows:

Improving the Ohio River: Continuing improvement, six hundred thousand dollars . . . (act 1884).

Improving the Ohio River: Continuing improvement, three hundred and seventy-five thousand (\$375,000) dollars . . . (act 1886).

"Under said authority Lieut. Col. William E. Merrill, of the engineer corps of the U.S. Army, by the direction of the chief of engineers of the U.S. Army, and the Secretary of War, commenced, June 17, 1885, the construction of a dike 2200 feet in length to concentrate the water-flow in the main channel of the Ohio River, beginning at a point on said Neville Island 400 feet east of the claimant's farm and running in a northwesterly direction with the main or navigable channel of the

said Ohio River to the outer point of a bar in said river known as Merriman's bar, contiguous to and extending into the said river from the northwest point of claimant's farm; that the said dike has been completed to, and beyond, the northeastern point of said Merriman's bar.

"V. The construction of said dike by the United States for the purposes aforesaid has substantially destroyed the landing of the claimant, by preventing the free egress and ingress to and from said landing on and in front of the claimant's farm, to the main or navigable channel of said river.

"The claimant is unable to use her landing for the shipment of products from, and supplies to, her farm for the greater part of the gardening season on account of said dike obstructing the passage of the boats; that she can only use the said landing at a high stage of water. That during the ordinary stage of water, the claimant cannot get the products off, or the supplies to, her farm, without going over the farms of her neighbors to reach another landing.

"VI. The claimant's land was worth \$600 per acre before the construction of the said dike; that it is now greatly reduced in value (from \$150 to \$200 per acre) by the obstruction caused by said dike; that the damage to the claimant's farm exceeds the sum of \$3000.

"VII. Claimant's access to the navigable portion of the stream was not entirely cut off; at a 9-foot stage of the water, which frequently occurs during November, December, March, April and May, she could get into her dock in any manner; that from a 3-foot stage she could communicate with the navigable channel through the chute; that at any time she could haul out to the channel by wagon.

"VIII. There was no water thrown back on claimant's land by the building of said dike, and that said dike has not itself come into physical contact with claimant's land and has not been the cause of any such physical contact in any other way. In making the improvement the defendants did not recognize any right of property in the claimant, in and to the right alleged to be affected, did not attempt or assume to take private property in and by the construction of the dike, but proceeded in the exercise of a claimed right to improve the navigation of the river."

And upon these findings the court held, as a conclusion of law, that the claimant was not entitled to recover, and dismissed the petition.]

Mr. Chief Justice Fuller delivered the opinion of the court.

All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in

the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution. *South Carolina v. Georgia*, 93 U.S. 4; *Shively v. Bowlby*, 152 U.S. 1; *Eldridge v. Trezevant*, 160 U.S. 452.

The Fifth Amendment to the Constitution of the United States provides that private property shall not "be taken for public use without just compensation." Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power.

Riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard. The legislative authority for these works consisted simply in an appropriation for their construction, but this was an assertion of a right belonging to the Government, to which riparian property was subject, and not of a right to appropriate private property, not burdened with such servitude, to public purposes.

In short, the damage resulting from the prosecution of this improvement of a navigable highway, for the public good, was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject.

Judgment affirmed.

LEWIS BLUE POINT OYSTER CULTIVATION CO. v. BRIGGS
229 U.S. 82 (1913)

Mr. Justice Lurton delivered the opinion of the court.

This was an action to restrain the defendant from dredging upon certain lands under the waters of Great South Bay in the State of New York. The defense was that the lands upon which he was engaged in dredging were under the navigable waters of the bay, which was a navigable area of the sea, over which enrolled and registered vessels passed in interstate commerce; that Congress had provided for the dredging of a channel some 2,000 feet long and 200 feet wide across said Bay, and that defendant was engaged as a contractor with the United States in dredging the channel so authorized. The plaintiff averred that this channel would pass diagonally across submerged land in said bay which it held as lessee under the owner of the fee in the bed of the bay. The land so held under lease had been planted with oysters and had been long used for the cultivation of that variety of oyster known as the "Blue Point." The claim was that the dredging of such a channel would destroy the oysters of the plaintiff, not only along the line of excavation, but for some distance on either side, and greatly impair the value of his leasehold for oyster cultivation.

The New York Court of Appeals held that the title of every owner of lands beneath navigable waters was a qualified one, and subject to the right of Congress to deepen the channel in the interest of navigation, and such a "taking" was not a "taking" of private property for which compensation could be required. The judgment of the courts below discharging the injunction and dismissing the action was therefore affirmed.

The case comes here upon the claim that the dredging of such a channel, although in the interest of navigation, is a taking of private property without just compensation, forbidden by the Fifth Amendment to the Constitution of the United States.

The foundation of the title to a large portion of the soil lying under the water of Great South Bay is found in certain royal patents made when the State of New York was a colonial dependency of Great Britain. Through the patents referred to and certain mesne conveyances, the lessors of the oyster company have been adjudged to be seized of the legal title to a large part of the land which lies at the bottom of that bay. That determination of title under the local law is not complained of, and must, of course, be accepted and followed by this court. The single question, therefore, is, whether the deepening of the channel across the bay in the interest of navigation with the incidental consequence to the oyster plantation of the lessee company is a taking of private property which may be enjoined unless provision for compensation has been made.

The cultivation of oysters upon the beds of the shallow waters of bays and inlets of the sea and of the rivers affected by the tides, has become an industry of great importance. In many localities the business is regulated by the laws of the States in which such waters are situated,

and the beds of such waters are parceled out among those owning the bottom or holding licenses from the State, and marked off by stakes indicating the boundaries of each cultivator. The contention is that whether title to such an area at the bottom of navigable salt waters comes from the State, or, as in the case here, from royal patents antedating the State's right, such actual interest is thereby acquired that when such area so planted and cultivated is invaded for the purpose of deepening the water in aid of navigation, private property is taken. For this, counsel cite the cases of *Brown v. United States*, 81 Fed. Rep. 55, decided by Circuit Court Judge Simonton; and *Richardson v. United States*, 100 Fed. Rep. 714, also decided by the same eminent judge. They also cite and rely upon *Monongahela Navigation Co. v. United States*, 148 U.S. 312. In the *Brown Case*, Judge Simonton, while recognizing that the navigable waters of the United States were within the jurisdiction of the United States which has control over their improvement for navigation, was of opinion, that so long as the owner of the bed of such bodies of water did not use it "for the erection of structures impeding or obstructing navigation," his ownership of the bottom and his right to put it to such use as did not obstruct navigation, was a property right, which could not be destroyed or taken without compensation. From these considerations he held (p. 57) that "when the Government, for the purpose of adding to the navigability of a stream, changes its natural channel, and, in doing so, occupies and assumes exclusive possession of the land of a citizen, it takes private property." In that case the Government had, in the exercise of its power of improving navigation, erected a dyke on the oyster beds of the complainant in the shallow salt water of York River, for the purpose of directing the current of the river and maintaining the channel. The effect of this was to destroy the property of the owner or lessee of the bed of the river at that point for the purpose to which it was devoted. This the learned judge ruled was a "taking" which was not lawful without compensation.

That case and the later one cited fail to recognize the qualified nature of the title which a private owner may have in the lands lying under navigable waters. If the public right of navigation is the dominant right and if, as must be the case, the title of the owner of the bed of navigable waters holds subject absolutely to the public right of navigation, this dominant right must include the right to use the bed of the water for every purpose which is in aid of navigation. This right to control, improve and regulate the navigation of such waters is one of the greatest of the powers delegated to the United States by the power to regulate commerce. Whatever power the several States had before the Union was formed, over the navigable waters within their several jurisdictions, has been delegated to the Congress, in which, therefore, is centered all of the governmental power over the subject, restricted only by such limitations as are found in other clauses of the Constitution.

By necessary implication from the dominant right of navigation, title to such submerged lands is acquired and held subject to the power of Congress to deepen the water over such lands or to use them for any structure which the interest of navigation, in its judgment, may require. The plaintiff has, therefore, no such private property right which, when taken, or incidentally

destroyed by the dredging of a deep water channel across it, entitles him to demand compensation as a condition.

The whole subject of the nature and character of the interest of the owner of such a title and the scope of the control of the Congress over navigable rivers has been fully considered by this court in *United States v. Chandler-Dunbar Water Power Co.*, just decided.

The conclusion we reach, is that the court below did not err in dismissing the action of the plaintiff in error, and the judgment is accordingly Affirmed.

UNITED STATES v. RANDS
389 U.S. 121 (1967)

Mr. Justice White delivered the opinion of the Court.

In this case the Court is asked to decide whether the compensation which the United States is constitutionally required to pay when it condemns riparian land includes the land's value as a port site. Respondents owned land along the Columbia River in the State of Oregon. They leased the land to the State with an option to purchase, it apparently being contemplated that the State would use the land as an industrial park, part of which would function as a port. The option was never exercised, for the land was taken by the United States in connection with the John Day Lock and Dam Project, authorized by Congress as part of a comprehensive plan for the development of the Columbia River. Pursuant to statute the United States then conveyed the land to the State of Oregon at a price considerably less than the option price at which respondents had hoped to sell. In the condemnation action, the trial judge determined that the compensable value of the land taken was limited to its value for sand, gravel, and agricultural purposes and that its special value as a port site could not be considered. The ultimate award was about one-fifth the claimed value of the land if used as a port. The Court of Appeals for the Ninth Circuit reversed, apparently holding that the Government had taken from respondents a compensable right of access to navigable waters and concluding that "port site value should be compensable under the Fifth Amendment." 367 F.2d 186, 191 (1966). We granted certiorari, 386 U.S. 989, because of a seeming conflict between the decision below and *United States v. Twin City Power Co.*, 350 U.S. 222 (1956). We reverse the judgment of the Court of Appeals because the principles underlying *Twin City* govern this case and the Court of Appeals erred in failing to follow them.

The Commerce Clause confers a unique position upon the Government in connection with navigable waters. "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress." *Gilman v. Philadelphia*, 3 Wall. 713, 724-725 (1866). This power to regulate navigation confers upon the United States a "dominant servitude," *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954), which extends to the entire stream and the stream bed below ordinary high-water mark. The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject. *United States v. Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 596-597 (1941); *Gibson v. United States*, 166 U.S. 269, 275-276 (1897). Thus, without being constitutionally obligated to pay compensation, the United States may change the course of a navigable stream, *South Carolina v. Georgia*, 93 U.S. 4 (1876), or otherwise impair or destroy a riparian owner's access to navigable waters, *Gibson v. United States*, 166 U.S. 269 (1897); *Scranton v. Wheeler*, 179 U.S.

141 (1900); *United States v. Commodore Park, Inc.*, 324 U.S. 386 (1945), even though the market value of the riparian owner's land is substantially diminished.

The navigational servitude of the United States does not extend beyond the high-water mark. Consequently, when fast lands are taken by the Government, just compensation must be paid. But "just as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss, . . . it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated." *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 629 (1961). Specifically, the Court has held that the Government is not required to give compensation for "water power" when it takes the riparian lands of a private power company using the stream to generate power. *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 73-74 (1913). Nor must it compensate the company for the value of its uplands as a power plant site. *Id.*, at 76. Such value does not "inhere in these parcels as upland," but depends on use of the water to which the company has no right as against the United States: "The Government had dominion over the water power of the rapids and falls and cannot be required to pay any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use." *Ibid.*

All this was made unmistakably clear in *United States v. Twin City Power Co.*, 350 U.S. 222 (1956). The United States condemned a promising site for a hydroelectric power plant and was held to be under no obligation to pay for any special value which the fast lands had for power generating purposes. The value of the land attributable to its location on the stream was "due to the flow of the stream; and if the United States were required to pay the judgments below, it would be compensating the landowner for the increment of value added to the fast lands if the flow of the stream were taken into account." 350 U.S., at 226.

We are asked to distinguish between the value of land as a power site and its value as a port site. In the power cases, the stream is used as a source of power to generate electricity. In this case, for the property to have value as a port, vessels must be able to arrive and depart by water, meanwhile using the waterside facilities of the port. In both cases, special value arises from access to, and use of, navigable waters. With regard to the constitutional duty to compensate a riparian owner, no distinction can be drawn. It is irrelevant that the licensing authority presently being exercised over hydroelectric projects may be different from, or even more stringent than, the licensing of port sites. We are dealing with the constitutional power of Congress completely to regulate navigable streams to the total exclusion of private power companies or port owners. As was true in *Twin City*, if the owner of the fast lands can demand port site value as part of his compensation, "he gets the value of a right that the Government in the exercise of its dominant servitude can grant or withhold as it chooses. . . . To require the United States to pay for this . . . value would be to create private claims in the public domain." 350 U.S., at 228.

Respondents and the Court of Appeals alike have found *Twin City* inconsistent with the holding in *United States v. River Rouge Improvement Co.*, 269 U.S. 411 (1926). In that case, the Government took waterfront property to widen and improve the navigable channel of the Rouge River. By reason of the improvements, other portions of the riparian owner's property became more valuable because they were afforded direct access to the stream for the building of docks and other purposes related to navigation. Pursuant to §6 of the Rivers and Harbors Act of 1918, the compensation award for the part of the property taken by the Government was reduced by the value of the special and direct benefits to the remainder of the land. The argument here seems to be that if the enhancement in value flowing from a riparian location is real enough to reduce the award for another part of the same owner's property, consistency demands that these same values be recognized in the award when any riparian property is taken by the Government. There is no inconsistency. *Twin City* and its predecessors do not deny that access to navigable waters may enhance the market value of riparian property. See *United States v. Commodore Park, Inc.*, 324 U.S., at 388, 390. And, in *River Rouge*, it was recognized that state law may give the riparian owner valuable rights of access to navigable waters good against other riparian owners or against the State itself. 269 U.S., at 418-419. But under *Twin City* and like cases, these rights and values are not assertable against the superior rights of the United States, are not property within the meaning of the Fifth Amendment, and need not be paid for when appropriated by the United States. Thus, when only part of the property is taken and the market value of the remainder is enhanced by reason of the improvement to navigable waters, reducing the award by the amount of the increase in value simply applies in another context the principle that special values arising from access to a navigable stream are allocable to the public, and not to private interest. Otherwise the private owner would receive a windfall to which he is not entitled.

Our attention is also directed to *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), where it was held that the Government had to pay the going-concern value of a toll lock and dam built at the implied invitation of the Government, and to the portion of the opinion in *Chandler-Dunbar* approving an award requiring the Government to pay for the value of fast lands as a site for a canal and lock to bypass the falls and rapids of the river. *Monongahela* is not in point, however, for the Court has since read it as resting "primarily upon the doctrine of estoppel" *Omnia Commercial Co., Inc. v. United States*, 261 U.S. 502, 513-514 (1923). The portion of *Chandler-Dunbar* relied on by respondents was duly noted and dealt with in *Twin City* itself, 350 U.S. 222, 226, n. (1956). That aspect of the decision has been confined to its special facts, and, in any event, if it is at all inconsistent with *Twin City*, it is only the latter which survives.

Finally, respondents urge that the Government's position subverts the policy of the Submerged Lands Act, which confirmed and vested in the States title to the lands beneath navigable waters within their boundaries and to natural resources within such lands and waters, together with the right and power to manage, develop, and use such lands and natural resources. However, reliance on that Act is misplaced, for it expressly recognized that the United States

retained "all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership Nothing in the Act was to be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power."

For the foregoing reasons, the judgment of the Court of Appeals is reversed and the case remanded with direction to reinstate the judgment of the District Court.

Reversed and remanded.

KAISER AETNA v. UNITED STATES
444 U.S. 164 (1979)

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Hawaii Kai Marina was developed by the dredging and filling of Kuapa Pond, which was a shallow lagoon separated from Maunalua Bay and the Pacific Ocean by a barrier beach. Although under Hawaii law Kuapa Pond was private property, the Court of Appeals for the Ninth Circuit held that when petitioners converted the pond into a marina and thereby connected it to the bay, it became subject to the "navigational servitude" of the Federal Government. Thus, the public acquired a right of access to what was once petitioners' private pond. We granted certiorari because of the importance of the issue and a conflict concerning the scope and nature of the servitude.

Kuapa Pond was apparently created in the late Pleistocene Period, near the end of the ice age, when the rising sea level caused the shoreline to retreat, and partial erosion of the headlands adjacent to the bay formed sediment that accreted to form a barrier beach at the mouth of the pond, creating a lagoon. It covered 523 acres on the island of Oahu, Hawaii, and extended approximately two miles inland from Maunalua Bay and the Pacific Ocean. The pond was contiguous to the bay, which is a navigable waterway of the United States, but was separated from it by the barrier beach.

Early Hawaiians used the lagoon as a fishpond and reinforced the natural sandbar with stone walls. Prior to the annexation of Hawaii, there were two openings from the pond to Maunalua Bay. The fishpond's managers placed removable sluice gates in the stone walls across these openings. Water from the bay and ocean entered the pond through the gates during high tide, and during low tide the current flow reversed toward the ocean. The Hawaiians used the tidal action to raise and catch fish such as mullet.

Kuapa Pond, and other Hawaiian fishponds, have always been considered to be private property by landowners and by the Hawaiian government. Such ponds were once an integral part of the Hawaiian feudal system. And in 1848 they were allotted as parts of large land units, known as "ahupuaas," by King Kamehameha III during the Great Mahele or royal land division. Titles to the fishponds were recognized to the same extent and in the same manner as rights in more orthodox fast land. Kuapa Pond was part of an ahupuaa that eventually vested in Bernice Pauahi Bishop and on her death formed a part of the trust corpus of petitioner Bishop Estate, the present owner.

In 1961, Bishop Estate leased a 6,000 acre area, which included Kuapa Pond, to petitioner Kaiser Aetna for subdivision development. The development is now known as "Hawaii Kai." Kaiser Aetna dredged and filled parts of Kuapa Pond, erected retaining walls, and built bridges within the development to create the Hawaii Kai Marina. Kaiser Aetna increased

the average depth of the channel from two to six feet. It also created accommodations for pleasure boats and eliminated the sluice gates.

When petitioners notified the Army Corps of Engineers of their plans in 1961, the Corps advised them they were not required to obtain permits for the development of and operations in Kuapa Pond. Kaiser Aetna subsequently informed the Corps that it planned to dredge an 8-foot-deep channel connecting Kuapa Pond to Manunalua Bay and the Pacific Ocean, and to increase the clearance of a bridge of the Kalaniana'ole Highway - which had been constructed during the early 1900's along the barrier beach separating Kuapa Pond from the bay and ocean—to a maximum of 13.5 feet over the mean sea level. These improvements were made in order to allow boats from the marina to enter into and return from the bay, as well as to provide better waters. The Corps acquiesced in the proposals, its chief of construction commenting only that the "deepening of the channel may cause erosion of the beach."

At the time of trial, a marina-style community of approximately 22,000 persons surrounded Kuapa Pond. It included approximately 1,500 marina waterfront lot lessees. The water-front lot lessees, along with at least 86 non-marina lot lessees from Hawaii Kai and 56 boat owners who are not residents of Hawaii Kai, pay fees for maintenance of the pond and for patrol boats that remove floating debris, enforce boating regulations, and maintain the privacy and security of the pond. Kaiser Aetna controls access to and use of the marina. It has generally not permitted commercial use, except for a small vessel, the Marina Queen, which could carry 25 passengers and was used for about five years to promote sales of marina lots and for a brief period by main a shopping center merchants to attract people to their shopping facilities.

In 1972, a dispute arose between petitioners and the Corps concerning whether (1) petitioners were required to obtain authorization from the Corps, in accordance with §10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §403, for future construction, excavation, or filling in the marina, and (2) petitioners were precluded from denying the public access to the pond because, as a result of the improvements, it had become a navigable water of the United States. The dispute foreseeably ripened into a lawsuit by the United States Government against petitioners in the United States District Court for the District of Hawaii.

In examining the scope of Congress' regulatory authority under the Commerce Clause, the District Court held that the pond was "navigable water of the United States" and thus subject to regulation by the Corps under §10 of the Rivers and Harbors Appropriation Act. 408 F.Supp. 42, 53 (1976). It further held, however, that the Government lacked the authority to open the now dredged pond to the public without payment of compensation to the owner. *Id.*, at 54. In reaching this holding, the District Court reasoned that although the pond was navigable for the purpose of delimiting Congress' regulatory power, it was not navigable for the purpose of defining the scope of the federal "navigational servitude" imposed by the Commerce Clause. *Ibid.* Thus, the District Court denied the Corps' request for an injunction to require petitioners to allow public access and to notify the public of the fact of the pond's accessibility.

The Court of Appeals agreed with the District Court's conclusion that the pond fell within the scope of Congress' regulatory authority, but reversed the District Court's holding that the navigational servitude did not require petitioners to grant the public access to the pond. 584 F. 2d 378 (1978). The Court of Appeals reasoned that the "federal regulatory authority over navigable waters... and the right of public use cannot consistently be separated. It is the public right of navigational use that renders regulatory control necessary in the public interest." *Id.*, at 383.

The question before us is whether the Court of Appeals erred in holding that petitioners' improvements to Kuapa Pond caused its original character to be so altered that it became subject to an overriding federal navigational servitude, thus converting into a public aquatic park that which petitioners had invested millions of dollars in improving on the assumption that it was a privately owned pond leased to Kaiser Aetna.

The Government contends that petitioners may not exclude members of the public from the Hawaii Kai Marina because "[t]he public enjoys a federally protected right of navigation over the navigable waters of the United States." Brief for United States 13. It claims the issue in dispute is whether Kuapa Pond is presently a "navigable water of the United States." *Ibid.* When petitioners dredged and improved Kuapa Pond, the Government continues, the pond—although it may once have qualified as fast land—became navigable water of the United States. The public thereby acquired a right to use Kuapa Pond as a continuous highway for navigation, and the Corps of Engineers may consequently obtain an injunction to prevent petitioners from attempting to reserve the waterway to themselves.

The position advanced by the Government, and adopted by the Court of Appeals below, presumes that the concept of "navigable waters of the United States" has a fixed meaning that remains unchanged in whatever context it is being applied. While we do not fully agree with the reasoning of the District Court, we do agree with its conclusion that all of this Court's cases dealing with the authority of Congress to regulate navigation and the so-called "navigational servitude" cannot simply be lumped into one basket. 408 F. Supp., at 48-49. As the District Court aptly stated, "any reliance upon judicial precedent must be predicated upon careful appraisal of the purpose for which the concept of 'navigability' was invoked in a particular case." *Id.*, at 49.

It is true that Kuapa Pond may fit within definitions of "navigability" articulated in past decisions of this Court. But it must be recognized that the concept of navigability in these decisions was used for purposes other than to delimit the boundaries of the navigational servitude: for example, to define the scope of Congress' regulatory authority under the Interstate Commerce Clause, see, e.g., *United States v. Appalachian Power Co.*, 311 U.S. 377 (1940); *South Carolina v. Georgia*, 93 U.S. 4 (1876); *The Montello*, 20 Wall. 430 (1874); *The Daniel Ball*, 10 Wall. 557 (1871), to determine the extent of the authority of the Corps of Engineers under the Rivers and Harbors Appropriation Act of 1899, and to establish the limits of the

jurisdiction of federal courts conferred by Art. III, §2, of the United States Constitution over admiralty and maritime [law].

Although the Government is clearly correct in maintaining that the now dredged Kuapa Pond falls within the definition of "navigable waters" as this Court has used that term in delimiting the boundaries of Congress' regulatory authority under the Commerce Clause, see, e.g., *The Daniel Ball*, supra, at 563; *The Montello*, supra, at 441-442; *United States v. Appalachian Power Co.*, supra, at 407-408, this Court has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation. Thus, while Kuapa Pond may be subject to regulation by the Corps of Engineers, acting under the authority delegated it by Congress in the Rivers and Harbors Appropriation Act, it does not follow that the pond is also subject to a public right of access.

In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a "taking," however, is an entirely separate question. This 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. 104 at 124 (1978)]. Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries. . . . When the "taking" question has involved the exercise of the public right of navigation over interstate waters that constitute highways for commerce, however, this Court has held in many cases that compensation may not be required as a result of the federal navigational servitude. See, e.g., *United States v. Chandler-Dunbar Co.*, 229 U.S. 53 (1913).

The navigational servitude is an expression of the notion that the determination whether a taking has occurred must take into consideration the important public interest in the flow of interstate waters that in their natural condition are in fact capable of supporting public navigation.

For over a century, a long line of cases decided by this Court involving Government condemnation of "fast lands" delineated the elements of compensable damages that the Government was required to pay because the lands were riparian to navigable streams. The Court was often deeply divided, and the results frequently turned on what could fairly be described as quite narrow distinctions. But this is not a case in which the Government recognizes any obligation whatever to condemn "fast lands" and pay just compensation under the Eminent Domain Clause of the Fifth Amendment to the United States Constitution. It is instead a case in which the owner of what was once a private pond, separated from concededly navigable water by a barrier beach and used for aquatic agriculture, has invested substantial amounts of money in making improvements. The Government contends that as a result of one of these

improvements, the pond's connection to the navigable water in a manner approved by the Corps of Engineers, the owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others.

The navigational servitude, which exists by virtue of the Commerce Clause in navigable streams, gives rise to an authority in the Government to assure that such streams retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce. Thus, when the Government acquires fast lands to improve navigation, it is not required under the Eminent Domain Clause to compensate landowners for certain elements of damage attributable to riparian location, such as the land's value as a hydroelectric site, *Twin City Power Co.*, supra, or a port site, *United States v. Rands*, supra. But none of these cases ever doubted that when the Government wished to acquire fast lands, it was required by the Eminent Domain Clause of the Fifth Amendment to condemn and pay fair value for that interest

Here, the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking under the logic of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation. But what petitioners now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by them with the consent of the Government. While the consent of individual officials representing the United States cannot "estop" the United States, see *Montana v. Kennedy*, 366 U.S. 308, 314-315 (1961); *INS v. Hibi*, 414 U.S. 5 (1973), it can lead to the fruition of a number of expectancies embodied in the concept of "property"—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property. In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina. Thus, if the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond while petitioners' agreement with their customers calls for an annual \$72 regular fee.

Accordingly the judgment of the Court of Appeals is reversed.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The Court holds today that, absent compensation, the public may be denied a right of access to "navigable waters of the United States" that have been created or enhanced by private means. I find that conclusion neither supported in precedent nor wise in judicial policy, and I dissent.

My disagreement with the Court lies in four areas. First, I believe the Court errs by implicitly rejecting the old and long-established "ebb and flow" test of navigability as a source for the navigational servitude the Government claims. Second, I cannot accept the notion, which I believe to be without foundation in precedent, that the federal "navigational servitude" does not extend to all "navigable waters of the United States." Third, I reach a different balance of interests on the question whether the exercise of the servitude in favor of public access requires compensation to private interests where private efforts are responsible for creating "navigability in fact." And finally, I differ on the bearing that state property law has on the questions before us today.

Nor does it advance analysis to suggest that we might decide to call certain waters "navigable" for some purposes, but "nonnavigable" for purposes of the navigational servitude. See *ante*, at 170-171. To my knowledge, no case has ever so held. In any event, to say that Kuapa Pond is somehow "nonnavigable" for present purposes, and that it is not subject to the navigational servitude for this reason, is merely to substitute one conclusion for another. To sustain its holding today, I believe that the Court must prove the more difficult contention that the navigational servitude does not extend to waters that are clearly navigable and fully subject to use as a highway for interstate commerce.

The Court, of course, concludes that there is no navigational servitude and, accordingly, that assertion of public access constitutes a compensable taking. Because I do not agree with the premise, I cannot conclude that the right to compensation for opening the pond to the public is a necessary result. Nevertheless, I think this question requires a balancing of private and public interests.

Application of this principle to the present case should lead to the conclusion that the developers of Kuapa Pond have acted at their own risk and are not entitled to compensation for the public access the Government now asserts. See *Union Bridge Co. v. United States*, 204 U.S. at 400. The chief value of the pond in its present state obviously is a value of access to navigable water. Development was undertaken to improve and enhance this value, not to improve the value of the pond as some aquatic.

I come, finally, to the question whether Kuapa Pond's status under state law ought to alter this conclusion drawn from federal law. The Court assumes, without much discussion, that Kuapa Pond is the equivalent of "fast land" for purposes of Hawaii property law. There is, to be sure, support for this assumption, and for present purposes I am prepared to follow the Court in making it. Nonetheless, I think it clear that local law concerns rights of title and use between

citizen and citizen, or between citizen and state, but does not affect the scope or effect of the federal navigational servitude.

The rights in Kuapa fisheries that have been part of Hawaii law since the Great Mahele are not unlike the right to the use of the floor of a bay that was at issue in *Lewis Blue Point Oyster Co. v. Briggs*, 229 U.S. 82 (1913). There the Court found no entitlement to compensation for destruction of an oysterbed in the course of dredging a channel. The Court reasoned: "If the public right of navigation is the dominant right and if, as must be the case, the title of the owner of the bed or navigable.

For all of the foregoing reasons, the judgment of the Court of Appeals was correct. I therefore dissent.

DELTONA CORPORATION v. UNITED STATES
57 F.2d 1184; 228 Ct. Cl. 476 (1981)

Before FRIEDMAN, Chief Judge, SKELTON, Senior Judge, and KUNZIG, Judge.

KUNZIG, Judge, delivered the opinion of the court:

In this case, plaintiff contends that it has suffered an uncompensated taking as the consequence of federal regulation affecting its development of a planned subdivision along the Gulf coast of Florida. The statutes in question - §10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §403, and §404 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1344 - and implementing regulations thereunder, prohibit, inter alia, dredging and filling in navigable waters without the authorization of the Department of the Army. The latter, stressing environmental factors, has thus far steadfastly refused to grant plaintiff the permits it needs to finish its project. We hold that while plaintiff may indeed have sustained an economic loss, the loss is not such as to constitute a Fifth Amendment taking under the circumstances herein.

I. BACKGROUND

A. Applicable Statutes and Regulations: A Pattern of Stiffening Requirements.

Until 1968, the Corps administered the Rivers and Harbors Act solely in the interest of navigation and the navigable capacity of the nation's waters. However, on December 18, 1968, in response to a growing national concern for environmental values and related federal legislation, the Corps revised its regulations to implement a new type of review termed "public interest review." Besides navigation, the Corps would consider the following additional factors in reviewing permit applications: fish and wildlife, conservation, pollution, aesthetics, ecology, the the general public interest.⁵³

On April 4, 1974, the Corps published further revised regulations so as to:

incorporate new permit programs under Section 404 of the FWPCA;

⁵³ The "public interest review" received its first judicial test in *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971), in which the court upheld the denial by the Corps of a landfill permit for fish and wildlife reasons (and not reasons related to navigation). In reaching its decision, the court reaffirmed the Department of the Army's position that it was "acting under a Congressional mandate to collaborate and consider all of these factors" when it reached its decision. The court stated:

Governmental agencies in executing a particular statutory responsibility ordinarily are required to take heed of, sometimes effectuate and other times not thwart other valid statutory governmental policies. And here the government- wide policy of environmental conservation is spectacularly revealed in at least two statutes, The Fish and Wildlife Coordination Act and the National Environmental Policy Act of 1969.[Id . at 209.]

incorporate the requirements of new federal legislation by adding to the factors to be weighed in the public interest review, including: economics; historic values; flood damage prevention; land-use classification; recreation; water supply and water quality;

adopt further criteria to be considered in the evaluation of each permit application, including the desirability of using appropriate alternatives; the extent and permanence of the beneficial and/or detrimental effects of the proposed activity; and the cumulative effect of the activity when considered in relation to other activities in the same general area;

institute a full-fledged wetlands policy to protect wetlands subject to the Corps' jurisdiction from unnecessary destruction.

The inauguration of the wetlands policy should especially be noted, as it plays a leading role in the forthcoming scenario.

B. Facts.

In 1964, plaintiffs, Deltona, purchased for \$7,500,000 a 10,000 acre parcel on the Florida Gulf coast with the intention of developing a water-oriented residential community, Marco Island. The property, then completely undeveloped, lay astride the mean high water mark and contained large areas of dense mangrove vegetation, including wetlands. Deltona's master plan called for more than 12,000 single family tracts, numerous multifamily sites, school and park areas, shopping districts, marinas, beaches and regular utilities. Structurally, the project revolved about the "finger-fill" or "landfinger" concept and would necessitate considerable dredging and filling as well as the permanent destruction of much of the natural mangrove vegetation.

Deltona divided Marco Island into five construction or permit areas to be built consecutively. These five areas, in order of scheduled completion, were Marco River, Roberts Bay, Collier Bay, Barfield Bay and Big Key. Each separate stage would take three to four years to complete. While partitioned for these limited purposes, in operation, the Marco Island community would be a thoroughly integrated, unified whole.

Because Deltona's proposed dredge and fill activities were to take place in "navigable waters of the United States" as that term is used in the Rivers and Harbors Act, it was required to obtain the proper permit from the Army Corps of Engineers before any of the work could legally get underway in 1964. Also, because its proposed dredge and fill activities were to take place in "navigable waters" as used in the FWPCA, Deltona was required after 1972 to obtain a permit from the Army Corps under that statutory scheme as well. Deltona's problems which culminated in the instant lawsuit stem from its inability to obtain all the permits which it needs to complete its project.

When in 1964 Deltona applied for a dredge and fill permit for the Marco River area, the Corps' policy was merely to consider the likely adverse impact which issuance would have upon navigation. In this case, the Corps routinely granted the necessary permit on October 27, 1964.

The second construction area was Roberts Bay. Deltona obtained its dredge and fill permit on December 18, 1969, this time pursuant to the so-called "public interest review" which had been adopted by the Corps a year earlier. The permit, however, was issued subject to the following express conditions: first, Deltona's "understand[ing] that all permit applications are independent of each other and that the granting of this permit does not necessarily mean that future applications for a permit of permits in the general area of the proposed work by Marco Island Development Corporation or others will be similarly granted;" second, its "agree[ment]... not [to] advertise or offer for sale as suitable building lots parcels of land which (1) are in whole or in part seaward of the mean high water line and which (2) could not be made suitable for the erection of residences or other structures in the absence of a Department of the Army fill permit that has not yet been issued."

Deltona applied for Corps of Engineers dredge and fill permits for the Collier Bay, Barfield Bay, and Big Key construction areas on April 9, 1973. By this time, the permit requirement imposed by §404 of the FWPCA had been added to that already imposed by §10 of the Rivers and Harbors Act. In a written decision dated April 15, 1976, the Chief of Engineers denied Deltona's application to dredge and fill in Barfield Bay and Big Key, while granting its application for Collier Bay.

The permit denials were premised upon "overriding national factors of the public interest." The decision indicated that "Corps regulation[s]... identify certain types of wetlands considered to perform functions important to the public interest."

These include wetlands that serve important natural biological functions (including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic or land species); wetlands set aside as sanctuaries or refuges; wetlands which are significant in shielding other areas from wave action, erosion, or storm damage (including barrier beaches); and wetlands that serve as valuable storage areas for storm and flood waters. The decision continued: "A review of the permit file clearly indicates that the mangrove wetlands involved in these permit applications fulfill each of these functions in a most significant way." Consequently, under governing regulations, denial of the permits was mandated unless it could be shown that "the benefits of the proposed alteration... outweigh[ed] the damage to the wetlands resource, and that the proposed alteration [was] necessary to realize those benefits." The Chief of Engineers concluded that Deltona had failed to make the requisite factual showing as to both elements.

By contrast, "[t]he permit file reveal[ed] that a significant amount of destruction ha[d] already occurred to the mangrove wetlands associated with the Collier Bay application" and that a "considerable amount of dredging and filling" had taken place, resulting in the creation of a large number of lots and approximately forty homes. The Chief of Engineers wrote: "It is my position, therefore, that this area has been already so dedicated to development that it would no longer be in the public interest to preclude completion of that development."

Deltona notes with much vigor that prior to the adverse decision by the Corps of Engineers, it had obtained all the necessary county and state permits to go forward with the development of Barfield Bay and Big Key and had entered into contracts of sale covering approximately 90% of the lots in those two areas. As a practical matter, however, it cannot consummate its plans without the federal permits. The question before this court is whether plaintiff has suffered an uncompensated taking as the consequence of federal regulation. Under the specific facts and circumstances of this case, and the tests enunciated by the courts, we conclude that plaintiff has not.

II. ANALYSIS

A. Basic Constitutional Principles.

It is well established as a matter of law that government regulation can effect a Fifth Amendment taking. While, "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), the principle generally applied is that "if regulation goes too far it will be recognized as a taking," *id.* at 415.

B. The Crucial Factor Herein and the Parties' Positions.

The crucial factor in this case is that since the late 1960's the regulatory jurisdiction of the Army Corps of Engineers has substantially expanded pursuant to §404 of the FWPCA and - under the spur of steadily evolving legislation - the Corps has greatly added to the substantive criteria governing the issuance of dredge and fill permits within its jurisdiction. When Deltona initially purchased the Marco Island property in 1964, the regulatory jurisdiction of the Corps was limited to "navigable waters of the United States" and the lone substantive criterion for the issuance of Corps dredge and fill permits was the likely adverse impact upon navigation. Pursuant to this relatively undemanding standard, Deltona routinely succeeded in 1964 in obtaining the first permit for which it applied. By 1976, when the Barfield Bay and Big Key applications were denied, the situation had been radically transformed.

The Corps' jurisdiction now extended to all "navigable waters" and the substantive criteria for granting permits had been significantly stiffened. Deltona's particular stumbling block, as we have seen, was its inability to satisfy the Corps' recently inaugurated wetlands protection policy. The impact is self-evident. As the result of an unforeseen change in the law, Deltona is no longer able to capitalize upon a reasonable investment-backed expectation which it had every justification to rely upon until the law began to change.

Deltona's position in this litigation is as follows. First, it claims that it has been deprived of all economically viable use of its land. Second, it argues that even if this factual assertion is rejected, it has undeniably been deprived of the highest and best economic use of its land and that this constitutes a taking.

The Government's position is quite the opposite. It maintains that Deltona has not been denied all economically viable use of its land and that Deltona's argument respecting "highest and best use" has no basis in the law. The Government generally asserts that whatever detrimental impact Deltona may have suffered, the injury falls well short of what is necessary to constitute a taking.

C. Tests for Determining Whether Regulation Effects a Taking.

While "[t]he 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," *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), the decisions of the Supreme Court "uniformly react the proposition that diminution in property value, standing alone, can establish a 'taking.'" *Id.* at 131, citing, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value caused by zoning law); *Hadachek v. Sebastian*, 239 U.S. 394 (1915) (87.5% diminution in value). Similarly, the Court has branded as fallacious the "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." *Penn Central Transp. Co.*, *supra*, at 130 n.27. Instead, "the 'taking' issue in these contexts is resolved by focusing on the uses the regulations permit." *Id.* at 131. In applying the foregoing considerations, it is important to bear in mind the Supreme Court's admonition:

"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.... *Penn Central Transp. Co.*, *supra*, at 130-131

D. Application of These Tests to the Case at Bar.

In this case, we take as given that the revisions in the implementing regulations of the Army Corps of Engineers, and the entire body of federal navigational and environmental laws to which they give effect, substantially advance legitimate and important federal interests. We have every reason to believe that the Corps has been enforcing these new regulations on a uniform basis nationwide. Deltona will therefore share with other landowners both the benefits and burdens of the Government's exercise of its Commerce Clause powers.

Although we have accepted that the expansion of the Corps' regulatory jurisdiction and the stiffening of its requirements for granting permits have substantially frustrated Deltona's reasonable investment-backed expectation with respect to Barfield Bay and Big Key, this development neither "extinguish[es] a fundamental attribute of ownership," [*Agins v. City of Tiburon*, 447 U.S. 255, at 262], nor prevents Deltona from deriving many other economically viable uses from its parcel -- however delineated. Indeed, the residual economic value of the

land is enormous, both proportionately and absolutely. A few statistics will suffice. In the aggregate, Barfield Bay and Big Key contain only 20% of the total acreage of Deltona's original purchase in 1964 and 33% of the developable lots. All the necessary federal permits for the development of the remainder of Marco Island -- Marco River, Roberts Bay, and Collier Bay -- have been granted. If we focus solely upon the three construction areas which became subject to the new federal restrictions promulgated during the early 1970's -- Collier Bay, Barfield Bay, and Big Key -- the salient fact emerges that while Deltona has been blocked from going forward at Barfield Bay and Big Key, it has obtained all the necessary clearances for Collier Bay, a tract approximately 25% of the three areas together. Most striking, even within Barfield Bay and Big Key, there are located 111 acres of uplands which can be developed without obtaining a Corps permit and whose total market value is approximately \$2.5 million. Deltona only paid \$1.24 million for all of Barfield Bay and Big Key in 1964.⁵⁴

Therefore, the statutes and regulations at issue in this case substantially advance legitimate and important governmental interests and do not deprive Deltona of the economically viable use of its land. Instead, Deltona's remaining land uses are plentiful and its residual economic position very great.

Moreover, when Deltona acquired the property in 1964, it knew that the development it contemplated could take place only if it obtained the necessary permits from the Corps of Engineers. Although at that time Deltona had every reason to believe that those permits would be forthcoming when it subsequently sought them, it also must have been aware that the standards and conditions governing the issuance of permits could change. Deltona had no assurance that the permits would issue, but only an expectation. Indeed, five years after Deltona acquired the property, it was given notice that its expectancy might never come to fruition when it was told, in connection with the issuance of the permit for Roberts Bay, that "the granting of this permit does not necessarily mean that future applications for permit or permits in the general area of the proposed work by Marco Island Development Corporation or others will be similarly granted."

In *Penn Central Transp. Co.*, the Supreme Court rejected as "quite simply untenable" the contention that property owners "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...." *Supra*, at 130. That is precisely this case. Deltona has been denied the ability to exploit its property by constructing a project that it theretofore had believed "was available for development."

⁵⁴ Deltona also possesses Transferable Development Rights (TDR's) granted by the county. According to the *Penn Central* case, *supra*, at 137, such rights "mitigate whatever financial burdens the law... impose[s]... and, for that reason are to be taken into account in considering the impact of regulation."

While plaintiff may very well be correct in its alternative assertion that it has been denied the highest and best economic use for its property, it is obvious from the Supreme Court tests we have cited that such an occurrence does not form a sufficient predicate for a taking. In effect, the "highest and best use" argument is merely another way of saying that there has been some diminution in value, rather than the complete destruction of all economically viable uses of the property. The Court, however, clearly rejects the notion that diminution in value, by itself, can establish a taking. Notwithstanding the changed phraseology, plaintiff's alternative argument fails as a matter of law.

We are not insensitive to the fact that the permit denials have placed Deltona in a highly difficult situation, legally and financially. The Fifth Amendment, however, does not provide a solution. In addition, Deltona certainly bears a great deal of responsibility for its current plight by having rushed into many land sale contracts before having obtained all the necessary federal permits which would enable it to meet its obligations. Note that Deltona had been specifically warned against this when it obtained its Roberts Bay permit in 1969.⁵⁵

In sum, we have rejected plaintiff's argument that the denial of highest and best use can constitute a taking. We have found that subsequent to Deltona's purchase of the land in question, a significant change occurred in the statutes and regulations affecting its land-use, and that this development did have a significant impact upon the values incident to Deltona's Marco Island property. However, in view of the many remaining economically viable uses for plaintiff's property, and the substantial public benefits which the new statutes and regulations serve to bring about, we have concluded that no taking occurred.

III. CONCLUSION OF LAW

The court concludes as a matter of law that plaintiff is not entitled to recover, and the petition is dismissed.

⁵⁵ Because of our ultimate disposition of this cause, it is unnecessary to consider the impact of the federal navigational servitude upon the issues herein. See generally *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

PART V. THE TAXING POWER

“The power of taxing the people and their property is essential to the very existence of government and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it.” CHIEF JUSTICE MARSHALL in *McCulloch v. Maryland*, 17 U.S. 316 (1819).

Session 15. Special Assessments

Historically municipal corporations financed road, sidewalk, and sewer extensions by specially assessing abutting owners. Today “smart growth” advocates seek to strategically finance and design new infrastructures so as to shape growth. Meanwhile state and local governments are on the lookout for new revenue sources which they can call something other than “taxes.” The proliferation of special assessments, exactions, fees, user- charges and excises raises legal questions of uniformity, equality and fairness.

NORWOOD v. BAKER 172 U.S. 269 (1898)

Mr. Justice Harlan delivered the opinion of the court.

This case arises out of the condemnation of certain lands for the purpose of opening a street in the Village of Norwood, a municipal corporation in Hamilton County, Ohio. The particular question presented for consideration involves the validity of an ordinance of that Village, assessing upon the appellee’s land abutting on each side of the new street an amount covering not simply a sum equal to that paid for the land taken for the street, but, in addition, the costs and expenses connected with the condemnation proceedings. By the final decree of the Circuit Court of the United States it was adjudged that the assessment complained of was in violation of the Fourteenth Amendment of the Constitution of the United States forbidding any State from depriving a person of property without due process of law; and the Village was perpetually enjoined from enforcing the assessment. 74 Fed. Rep. 997.

The present appeal was prosecuted directly to this court, because the case involved the construction and application of the Constitution of the United States.

By an ordinance approved October 19, 1891, the Village declared its intention to condemn and appropriate, and by that ordinance condemned and appropriated, the lands or grounds in question for the purpose of opening and extending Ivenhoe Avenue: and in order to make such appropriation effectual, the ordinance directed the institution of the necessary proceedings in court for an inquiry and assessment of the compensation to be paid for the property to be condemned.

The Ordinance provided that the cost and expense of the condemnation of the property, including the compensation paid to the owners, the cost of the condemnation proceedings, the cost of advertising and all other costs and the interest on bonds issued, if any, should be assessed “per front foot upon the property bounding and abutting on that part of Ivenhoe Avenue, as condemned and appropriated herein”- the assessments payable in ten annual installments if deferred, and the same collected as prescribed by law and in the assessing ordinance thereafter to be passed.

Under that ordinance, application was made by the Village to the probate court of Hamilton County for the empanelling of a jury to assess the compensation to be paid for the property to be taken. A jury was accordingly empanelled, and it assessed the plaintiff’s compensation at \$2000, declaring that they made the “assessment irrespective of any benefit to the owner from any improvement proposed by said corporation.”

The assessment was confirmed by the court, the amount assessed was paid to the owner, and it was ordered that the Village have immediate possession and ownership of the premises for the uses and purposes specified in the ordinance.

After the finding of the jury the Village council passed an ordinance levying and assessing “on each front foot of the several lots of land bounding and abutting on Ivenhoe Avenue, from Williams Avenue to a point 300 feet north,” certain sums for each of the years 1892 to 1901 inclusive, “to pay the cost and expense of condemning property for the extension of said Ivenhoe Avenue between the points aforesaid [from Williams Avenue to a point 300 feet north], together with the interest on the bonds issued to provide a fund to pay for said condemnation.”

By the same ordinance provision was made for issuing bonds to provide for the payment of the cost and expense of the condemnation, which included the amount found by the jury as compensation for the property taken, the costs in the condemnation proceedings, solicitor and expert witness fees, advertising, etc.; in all, \$2218.58.

The present suit was brought to obtain a decree restraining the Village from enforcing the assessment in question against the abutting property of the plaintiff. It was conceded that the defendant assessed back upon the plaintiff’s 300 feet of land upon either side of the strip taken (making 600 feet in all of frontage upon the strip condemned) the above sum of \$2218.58, payable in installments, with interest at six per cent.

But the Village alleged that the appropriation proceedings and consequent assessment were all in strict conformity with the laws and statutes of the State of Ohio and in pursuance of due process of law; that the opening and extension of Ivenhoe Avenue constituted a public improvement for which the abutting property was liable to assessment under the laws of Ohio; that the counsel fees, witness fees and costs included in such total assessment were a part of the legitimate expenses of such improvement; and that in any event an expense had been incurred by

the municipal corporation in opening the street “equal to the full amount of the said assessment, which is a proper charge against the complainant’s abutting property.”

The plaintiff’s suit proceeded upon the ground, distinctly stated, that the assessment in question was in violation of the Fourteenth Amendment providing that no State shall deprive any person of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws, as well as of the Bill of Rights of the Constitution of Ohio.

The taking of the plaintiff’s land for the street was under the power of eminent domain--a power which this court has said was the offspring of political necessity, and inseparable from sovereignty unless denied to it by the fundamental law. *Searl v. Lake County School District*, 133 U.S. 553. But the assessment of the abutting property for the cost and expense incurred by the Village was an exercise of the power of taxation. Except for the provision of the constitution of Ohio, the State could have authorized benefits to be deducted from the actual value of the land taken, without violating the constitutional injunction that compensation be made for private property taken for public use; for the benefits received could be properly regarded as compensation pro tanto for the property appropriated to public use. But does the exclusion of benefits from the estimate of compensation to be made for the property actually taken for public use authorize the public to charge upon the abutting property the sum paid for it, together with the entire costs incurred in the condemnation proceedings, irrespective of the question whether the property was benefited by the opening of the street?

Undoubtedly abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property--such assessments, according to well-established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements. And according to the weight of judicial authority, the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvements. In *Williams v. Eggleston*, 170 U.S. 304, 311, where the only question, as this court stated, was as to the power of the legislature to cast the burden of a public improvement upon certain towns, which had been judicially determined to be towns benefited by such improvement, it was said: “Neither can it be doubted that, if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement.”

But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen’s right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the

protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received.

In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say "substantial excess," because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment.

In *Cooley on Taxation* (2d ed. c. xx), the author, in considering the subject of taxation by special assessment, and of estimating benefits conferred upon property by a public improvement, says that, while a general levy of taxes rests upon the ground that the citizen may be required to make contribution in that mode in return for the general benefits of government, special assessments are a peculiar species of taxation, and are made upon the assumption that "a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby; their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay." Again, the author says: "There can be no justification for any proceeding which charges the land with an assessment greater than the benefits; it is a plain case of appropriating private property to public uses without compensation."

We have considered the question presented for our determination with reference only to the provisions of the National Constitution. But we are also of opinion that, under any view of that question different from the one taken in this opinion, the requirement of the constitution of Ohio that compensation be made for private property taken for public use, and that such compensation must be assessed "without deduction for benefits to any property of the owner,"

would be of little practical value if, upon the opening of a public street through private property, the abutting property of the owner, whose land was taken for the street, can, under legislative authority, be assessed not only for such amount as will be equal to the benefits received, but for such additional amount as will meet the excess of expense over benefits.

The judgment of the Circuit Court must be affirmed, upon the ground that the assessment against the plaintiff's abutting property was under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation; and it is so ordered.

FRENCH v. BARBER ASPHALT PAVING COMPANY
181 U.S. 324 (1901)

MR. JUSTICE SHIRAS, after stating the case, delivered the opinion of the court.

In its opinion in this case the Supreme Court of Missouri said that "the method adopted in the charter and ordinance of Kansas City of charging the cost of paving Forest avenue against the adjoining lots according to their frontage had been repeatedly authorized by the legislature of Missouri, and such laws had received the sanction of this court in many decisions.." Accordingly the Supreme Court of Missouri held that the assessment in question was valid, and the tax imposed collectible. And, in so far as the constitution and laws of Missouri are concerned, this court is, of course, bound by that decision.

But that court also held, against the contention of the lot owners, that the provisions of the Fourteenth Amendment to the Constitution of the United States were not applicable in the case; and our jurisdiction enables us to inquire whether the Supreme Court of Missouri were in error in so holding.

We do not deem it necessary to extend this opinion by referring to the many cases in the state courts, in which the principles of the foregoing cases have been approved and applied. It will be sufficient to state the conclusions reached, after a review of the state decisions, by two text-writers of high authority for learning and accuracy:

"The major part of the cost of a local work is sometimes collected by general tax, while a smaller portion is levied upon the estates specially benefited.

"The major part is sometimes assessed on estates benefited, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits.

"The whole cost in other cases is levied on lands in the immediate vicinity if the work.

"In a constitutional point of view, either of these methods is admissible, and one may sometimes be just and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question is legislative, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible and arbitrary rule." Cooley on Taxation, 447.

"The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the

taxing power, or included within it. . . . Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency." Dillon's Municipal Corporations, vol. 2, §752, 4th ed.

This array of authority was confronted, in the courts below, with the decision of this court in the case of *Norwood v. Baker*, 172 U.S. 269, which was claimed to overrule our previous cases, and to establish the principle that the cost of a local improvement cannot be assessed against abutting property according to frontage, unless the law, under which the improvement is made, provides for a preliminary hearing as to the benefits to be derived by the property to be assessed.

But we agree with the Supreme Court of Missouri in its view that such is not the necessary legal import of the decision in *Norwood v. Baker*. That was a case where by a village ordinance, apparently aimed at a single person, a portion of whose property was condemned for a street, the entire cost of opening the street, including not only the full amount paid for the strip condemned, but the costs and expenses of the condemnation proceedings, was thrown upon the abutting property of the person whose land was condemned. This appeared, both to the court below and to a majority of the judges of this court, to be an abuse of the law, an act of confiscation, and not a valid exercise of the taxing power. This court, however, did not affirm the decree of the trial court awarding a perpetual injunction against the making and collection of any special assessments upon Mrs. Baker's property, but said:

"It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either under existing statutes or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for so much of the expense of the opening of the street as was found upon due and proper inquiry to be equal to the special benefits accruing to the property. By the decree rendered the court avoided the performance of functions appertaining to an assessing tribunal or body, and left the subject under the control of the local authorities designated by the State."

That this decision did not go to the extent claimed by the plaintiff in error in this case is evident, because in the opinion of the majority it is expressly said that the decision was not inconsistent with our decisions in *Parsons v. District of Columbia*, 170 U.S. 45, 56, and in *Spencer v. Merchant*, 125 U.S. 345, 357.

It may be conceded that courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty or property, without due process of law. And such, in the opinion of a majority of the judges of this court, was the nature and effect of the proceedings in the case of *Norwood v. Baker*.

But there is no such a state of facts in the present case. Those facts are thus stated by the court of Missouri:

"The work done consisted of paving with asphaltum the roadway of Forest avenue in Kansas City, thirty-six feet in width, from Independence avenue to Twelfth street, a distance of one half a mile. Forest avenue is one of the oldest and best improved residence streets in the city, and all of the lots abutting thereon front the street and extend back therefrom uniformly to the depth of an ordinary city lot to an alley. The lots are all improved and used for residence purposes, and all of the lots are substantially on the grade of the street as improved, and are similarly situated with respect to the asphalt pavement. The structure of the pavement along its entire extent is uniform in distance and quality. There is no showing that there is any difference in the value of any of the lots abutting on the improvement."

What was complained of was an orderly procedure under a scheme of local improvements prescribed by the legislature and approved by the courts of the State as consistent with constitutional principles.

The judgment of the Supreme Court of Missouri is

Affirmed.

MR. JUSTICE HARLAN, (with whom concurred MR. JUSTICE WHITE and MR. JUSTICE McKENNA,) dissenting.

Does the court intend in this case to overrule the principles announced in *Norwood v. Baker*? Does it intend to reject as unsound the doctrine that "the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement?" Is it the purpose of the court, in this case, to overrule the doctrine that taxation of abutting property to meet the cost of a public improvement -- such taxation being for an amount in substantial excess of the special benefits received -- "will, to the extent of such excess, be a taking of private property for public use without compensation?" The opinion of the majority is so worded that I am not able to answer these questions with absolute confidence. It is difficult to tell just how far the court intends to go. But I am quite sure, from the intimations contained in the opinion, that it will be cited by some as resting upon the broad ground that a legislative determination as to the extent to which

land abutting on a public street may be specially assessed for the cost of paving such street is conclusive upon the owner, and that he will not be heard, in a judicial tribunal or elsewhere, to complain even if, under the rule prescribed, the cost is in substantial excess of any special benefits accruing to his property, or even if such cost equals or exceeds the value of the property specially taxed. The reasons which, in my judgment, condemn such a doctrine as inconsistent with the Constitution are set forth in *Norwood v. Baker*, and need not be repeated.

In my opinion the judgment in the present case should be reversed upon the ground that the assessment in question was made under a statutory rule excluding all inquiry as to special benefits and requiring the property abutting on the avenue in question to meet the entire cost of paving it, even if such cost was in substantial excess of the special benefits accruing to it; leaving Kansas City to obtain authority to make a new assessment upon the abutting property for so much of the cost of paving as may be found upon due inquiry to be not in excess of the special benefits accruing to such property. Any other judgment will, I think, involve a grave departure from the principles that protect private property against arbitrary legislative power exerted under the guise of taxation.

WEBB'S FABULOUS PHARMACIES v. BECKWITH
449 U.S. 155 (1980)

Justice Blackmun delivered the opinion of the Court.

This case presents the issue whether it is constitutional for a county to take as its own, under the authority of a state statute, the interest accruing on an interpleader fund deposited in the registry of the county court, when a fee, prescribed by another statute, is also charged for the clerk's services in receiving the fund into the registry. The statute which is the object of the constitutional challenge here is Fla. Stat. §28.33 (1977).⁵⁶

I

On February 12, 1976, appellant Eckerd's of College Park, Inc., entered into an agreement to purchase for \$1,812,145.77 substantially all the assets of Webb's Fabulous Pharmacies, Inc. Both Eckerd's and Webb's are Florida corporations. At the closing, Webb's debts appeared to be greater than the purchase price. Accordingly, in order to protect itself and as permitted by the Florida Bulk Transfers Act, Fla. Stat. §676.106 (4) (1977), Eckerd's filed a complaint of interpleader in the Circuit Court of Seminole County, Fla., interpleading as defendants both Webb's and Webb's creditors (almost 200 in number) and tendering the purchase price to the court.

Pursuant to §676.106 (4), the Circuit Court thereupon ordered that the amount tendered be paid to the court's clerk and that the clerk deposit it "in an assignable interest-bearing account at the highest interest." App. 4a. The court specifically reserved decision on the issue of entitlement, as between the clerk and Webb's creditors, to the interest earned on the fund while so deposited, stating that the transfer to the clerk was without prejudice to the creditors' claims to that interest. *Id.*, at 4a-5a. Eckerd's tendered the sum to the clerk on July 13, 1976, *id.*, at 6a, and that official proceeded to make the required investment.

The clerk deducted from the interpleader fund so deposited the sum of \$9,228.74 as his fee, prescribed by Fla. Stat. §28.24 (14) (1977), "for services rendered" for "receiving money into the registry of court." The fee, as the statute directed, was calculated upon the amount placed in the registry, that is, 1% of the first \$500, and 1/2% of the remainder.

⁵⁶ "The clerk of the circuit court in each county shall make an estimate of his projected financial needs for the county and shall invest any funds in designated depository banks in interest-bearing certificates or in any direct obligations of the United States in compliance with federal laws relating to receipt of and withdrawal of deposits . . . Moneys deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk, subject to the above guidelines . . . All interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court investing such moneys and shall be deposited in the same accounts as are other fees and commissions of the clerk's office. Each clerk shall, as soon as is practicable after the end of the fiscal year, report to the county governing authority the total interest earned on all investments during the preceding year."

On July 5, 1977, almost a year after the tender and payment, the Circuit Court upon its own motion appointed a receiver for Webb's. Among the receiver's stated duties were the determination of the number and amount of claims filed against the interpleader fund and the preparation and filing with the court of a list of those claims. The receiver filed a motion for an order directing the clerk to deliver the fund to him. The motion was granted, *id.*, at 14a, and the principal of the fund, reduced by the \$9,228.74 statutory fee and by \$40,200 that had been paid out pursuant to court order, was paid to the receiver on July 21. The interest earned on the interpleader fund while it was held by the clerk, but which was not turned over to the receiver, then exceeded \$90,000. Interest earned thereafter on the amount so retained brought the total to more than \$100,000. It is this aggregate interest that is the subject matter of the present litigation. Appellants make no objection to the clerk's statutory fee of \$9,228.74 taken pursuant to §28.24 (14).

The receiver then moved that the court direct the clerk to pay the accumulated interest to the receiver. The Circuit Court ruled favorably to the receiver, holding that the clerk "is not entitled to any interest earned, accrued or received on monies deposited in the registry of this Court pursuant to the Court's order . . . ; the creditors herein are the rightful parties entitled to all such interest earned on the interpleader fund while it is held by the Clerk of this Court."

Seminole County and the clerk appealed to the Florida District Court of Appeal. That court transferred the cause to the Supreme Court of Florida. The Supreme Court, in a *per curiam* opinion with one justice dissenting in part, ruled that §28.33 was "constitutional" and reversed the judgment of the Circuit Court. 374 So. 2d 951 (1979). The stated rationale was that a fund so deposited is "considered 'public money'" from the date of deposit until it leaves the account: that "the statute takes only what it creates"; and that "[there] is no unconstitutional taking because interest earned on the clerk of the circuit court's registry account is not private property."

Because it had been held elsewhere that a county's appropriation of the interest earned on private funds deposited in court in an interpleader action is an unconstitutional taking, *Sellers v. Harris County*, 483 S. W. 2d 242 (Tex. 1972); see *McMillan v. Robeson County*, 262 N. C. 413, 137 S. E. 2d 105 (1964), we noted probable jurisdiction. 445 U.S. 925 (1980).

II

It is at once apparent that Florida's statutes would allow respondent Seminole County to exact two tolls while the interpleader fund was held by the clerk of the court. The first was the statutory fee of \$9,228.74 "for services rendered," as §28.24 recites, by the clerk's office for "receiving money into the registry of court." That fee was determined by the amount of the principal deposited.

The second would be the retention of the amount, in excess of \$100,000, consisting of “[all] interest accruing from moneys deposited.” This toll would be exacted because of §28.33’s provision that the interest “shall be deemed income of the office of the clerk of the circuit court.”

An initial reading of §28.33 might prompt one to conclude that, so far as it concerns entitlement to interest, the statute applies only to interest on funds clearly owned by the county (such as charges for certifications) and that it does not apply to interest on private funds deposited under the direction of another statute. The Florida Supreme Court, however, has read §28.33 otherwise and has ruled that it applies to interest earned on deposited private funds. That reading of the State’s statute is within the Florida court’s competency, and we must take the statute as so read and interpreted.

III

The pertinent words of the Fifth Amendment of the Constitution of the United States are the familiar ones: “nor shall private property be taken for public use, without just compensation.” That prohibition, of course, applies against the States through the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 122 (1978). Our task is to determine whether the second exaction by Seminole County amounted to a “taking”—it was obviously uncompensated—within the Amendment’s proscription.

The principal sum deposited in the registry of the court plainly was private property, and was not the property of Seminole County. We do not understand that the appellees contend otherwise so far as the fund’s principal is concerned.

Appellees submit,—and we accept the proposition—that, apart from statute, Florida law does not require that interest be earned on a registry deposit. See 374 So. 2d, at 953. We, of course, also accept the further proposition, pressed upon us by the appellees, that “[property] 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” *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). But a mere unilateral expectation or an abstract need is not a property interest entitled to protection. See, for example, *Fox River Paper Co. v. Railroad Comm’n*, 274 U.S. 651 (1927); *United States v. Willow River Power Co.*, 324 U.S. 499 (1945). See also *Penn Central Transportation Co. v. New York City*, *supra*; *Andrus v. Allard*, 444 U.S. 51 (1979).

Webb’s creditors, however, had more than a unilateral expectation. The deposited fund was the amount received as the purchase price for Webb’s assets. It was property held only for the ultimate benefit of Webb’s creditors, not for the benefit of the court and not for the benefit of the county. And it was held only for the purpose of making a fair distribution among those creditors. Eventually, and inevitably, that fund, less proper charges authorized by the court,

would be distributed among the creditors as their claims were recognized by the court. The creditors thus had a state-created property right to their respective portions of the fund.

It is true, of course, that none of the creditor claimants had any right to the deposited fund until their claims were recognized and distribution was ordered. See *Aron v. Snyder*, 90 U. S. App. D. C. 325, 327, 196 F.2d 38, 40, cert. denied, 344 U.S. 854 (1952). That lack of immediate right, however, does not automatically bar a claimant ultimately determined to be entitled to all or a share of the fund from claiming a proper share of the interest, the fruit of the fund's use, that is realized in the interim. To be sure, §28.33 establishes as a matter of Florida law that interest is to be earned on deposited funds. But the State's having mandated the accrual of interest does not mean the State or its designate is entitled to assume ownership of the interest.

We therefore turn to the interest issue. What would justify the county's retention of that interest? It is obvious that the interest was not a fee for services, for any services obligation to the county was paid for and satisfied by the substantial fee charged pursuant to §28.24 and described specifically in that statute as a fee "for services" by the clerk's office. Section 28.33, in contrast, in no way relates the interest of which it speaks to "services rendered." Indeed, if the county were entitled to the interest, its officials would feel an inherent pressure and possess a natural inclination to defer distribution, for that interest return would be greater the longer the fund is held; there would be, therefore, a built-in disincentive against distributing the principal to those entitled to it.

The usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal.⁵⁷

The Florida Supreme Court, in ruling contrary to this long established general rule, relied on the words of §28.33 and then proceeded on the theory that without the statute the clerk would have no authority to invest money held in the registry, that in some way the fund assumes temporarily the status of "public money" from the time it is deposited until it leaves the account, and that the statute "takes only what it creates." Then follows the conclusion that the interest "is not private property." 374 So. 2d, at 952-953.

This Court has been permissive in upholding governmental action that may deny the property owner of some beneficial use of his property or that may restrict the owner's full exploitation of the property, if such public action is justified as promoting the general welfare. See, e. g., *Andrus v. Allard*, 444 U.S., at 64-68; *Penn Central Transportation Co. v. New York City*, 438 U.S., at 125-129.

⁵⁷ The appellees at oral argument conceded that if coupon bonds, rather than cash, had been deposited in the registry, the coupons would follow the principal and could not be claimed by the county under §28.33. Tr. of Oral Arg. 31.

Here, however, Seminole County has not merely “[adjusted] the benefits and burdens of economic life to promote the common good.” *Id.*, at 124. Rather, the exaction is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts. Indeed, “[the] Fifth Amendment’s guarantee . . . 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. 40, 49 (1960).

No police power justification is offered for the deprivation. Neither the statute nor appellees suggest any reasonable basis to sustain the taking of the interest earned by the interpleader fund. The county’s appropriation of the beneficial use of the fund is analogous to the appropriation of the use of private property in *United States v. Causby*, 328 U.S. 256 (1946). There the Court found a “taking” in the Government’s use of air space above the claimant’s land as part of the flight pattern for military aircraft, thus destroying the use of the land as a chicken farm. “Causby emphasized that Government had not merely destroyed property [but was] using a part of it for the flight of its planes.” *Penn Central*, 438 U.S., at 128, quoting from *Causby*, 328 U.S., at 262-263, n.7.

Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as “public money” because it is held temporarily by the court. The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry. To put it another way: a State, by ipse dixit, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

IV

We hold that under the narrow circumstances of this case—where there is a separate and distinct state statute authorizing a clerk’s fee “for services rendered” based upon the amount of principal deposited; where the deposited fund itself concededly is private; and where the deposit in the court’s registry is required by state statute in order for the depositor to avail itself of statutory protection from claims of creditors and others—Seminole County’s taking unto itself, under §28.33 and 1973 Fla. Laws, ch. 73-282, the interest earned on the interpleader fund while it was in the registry of the court was a taking violative of the Fifth and Fourteenth Amendments. We express no view as to the constitutionality of a statute that prescribes a county’s retention of interest earned, where the interest would be the only return to the county for services it renders.

The judgment of the Supreme Court of Florida is reversed. It is so ordered.

UNITED STATES v. SPERRY CORPORATION
493 U.S. 52 (1989)

WHITE, J., delivered the opinion for a unanimous Court. Rehnquist, Brennan, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy.

Section 502 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987 requires the Federal Reserve Bank of New York to deduct and pay into the United States Treasury a percentage of any award made by the Iran-United States Claims Tribunal in favor of an American claimant before remitting the award to the claimant. We are asked to consider in this case whether §502 violates the Just Compensation Clause or Due Process Clause of the Fifth Amendment⁵⁸ or the Origination Clause of Article I, §7.⁵⁹

I

Appellees Sperry Corporation and Sperry World Trade, Inc. (hereinafter Sperry), are American corporations that entered into contracts with the Government of Iran prior to the seizure of the United States Embassy in Tehran on November 4, 1979. The details of the seizure of the Embassy and diplomatic personnel and the ensuing diplomatic crisis want no repetition here. We need address only the means eventually established by the Governments of the United States and Iran to resolve claims by American companies against Iran.

As part of the resolution of the diplomatic crisis, the United States and Iran entered into an agreement embodied in two declarations of the Government of Algeria commonly referred to as the Algiers Accords (hereinafter the Accords). The Accords provided for the establishment in The Hague of an international arbitral tribunal, known as the Iran-United States Claims Tribunal (hereinafter the Tribunal), to hear claims brought by Americans against the Government of Iran. The establishment of the Tribunal was to preclude litigation by Americans against Iran in American courts, so the United States undertook to terminate such legal proceedings, unblock Iranian assets in the United States, and nullify all attachments against those assets. To implement the Accords, President Carter issued a series of Executive Orders on January 19, 1981, revoking all licenses permitting the exercise of "any right, power, or privilege" with respect to Iranian funds and annulling all non-Iranian interests in Iranian assets acquired after the blocking order. Exec. Orders Nos. 12276-12285, 3 CFR 104-118 (1981). On February 24, 1981, President Reagan issued an Executive Order suspending all claims that "may be presented to the . . . Tribunal" and providing that such claims "shall have no legal effect in any action now pending in any court of the United States." Exec. Order No. 12294, 3 CFR 139 (1981). This Court upheld the revocation of the licenses and the suspension of the claims in *Dames & Moore*

⁵⁸ "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." U.S. Const., Amdt. 5

⁵⁹ "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." U.S. Const., Art. I, §7, cl. 1.

v. Regan, 453 U.S. 654 (1981). Prior to the Accords, Sperry had filed suit against Iran in the United States District Court for the District of Columbia and had obtained a prejudgment attachment of blocked Iranian assets, but the Executive Orders sustained in *Dames & Moore* invalidated that attachment and prohibited Sperry from further pursuing its claims against Iran in any American courts. Sperry therefore filed a claim against Iran with the Tribunal and also began settlement negotiations with Iran. In February 1982, Sperry and Iran reached an agreement requiring the payment by Iran to Sperry of \$2.8 million. The Government of Iran gave the settlement final approval on July 8, 1982.

Sperry and Iran then filed a joint application with the Tribunal, which was granted, to have the settlement entered as an "Award on Agreed Terms." The entry of the settlement provided Sperry with a significant benefit, for it gave the settlement agreement the status of an award by the Tribunal, and under the Accords, all awards of the Tribunal are "final and binding" and are "enforceable . . . in the courts of any nation in accordance with its laws." The entry of the settlement also enabled Sperry to make use of the mechanism established by the Accords and the implementing Executive Orders for the payment of arbitral awards. As part of the Accords, \$1 billion of the unblocked Iranian assets had been placed in a Security Account in the Bank of England for the payment of awards. Awards made by the Tribunal in favor of American claimants are paid from the Security Account to the Federal Reserve Bank of New York, which then pays the awards to the claimants. See 47 Fed. Reg. 25243 (1982).

We come now to the heart of this dispute. The Accords provided that "the expenses of the Tribunal shall be borne equally by the two governments." On June 7, 1982, the Department of the Treasury issued a "Directive License" requiring the Federal Reserve Bank of New York to deduct 2% from each award certified by the Tribunal and to pay the deducted amount into the Treasury "to reimburse the United States Government for costs incurred for the benefit of U.S. nationals who have claims against Iran." When the Federal Reserve Bank of New York received Sperry's award, it deducted the 2% charge over Sperry's protest, deposited the charge in the Treasury, and paid Sperry the balance of its award.

Sperry filed suit in the United States Claims Court, contending that the 2% charge was unconstitutional and was not (as the United States argued) authorized by the Independent Offices Appropriation Act, 1952 (IOAA), 65 Stat. 290, 31 U.S.C. §483a (1976 ed.). The Claims Court held in an oral ruling on May 1, 1985, that the Directive License violated IOAA. Congress reacted swiftly by enacting §502, which specifically requires the assessment of a charge against successful American claimants before the Tribunal and directs the Federal Reserve Bank of New York to deduct from Tribunal awards paid out of the Security Account an amount equal to 1 1/2% of the first \$5 million and 1% of any amount over \$5 million. Section 502(a) states that these charges are to be deducted "as reimbursement to the United States Government for expenses incurred in connection with the arbitration of claims of United States claimants against Iran before [the] Tribunal and the maintenance of the Security Account established pursuant to

the [Accords]." Congress made §502 effective retroactive to June 7, 1982, the date on which the Treasury had issued the Directive License struck down by the Claims Court. See §502(d).

Sperry renewed its challenge to the deduction in the Claims Court, arguing that the 1 1/2% deduction authorized by §502 was unconstitutional. The Claims Court rejected the constitutional claims and dismissed Sperry's suit. 12 Cl. Ct. 736 (1987). The Court of Appeals for the Federal Circuit reversed and held that §502 was unconstitutional as it caused a taking of Sperry's private property without just compensation. 853 F.2d 904 (1988). The Court of Appeals likened the 1 1/2% deduction by the Federal Reserve Bank of New York to the permanent physical occupation by the Government of private property which, this Court held in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982), is always a "taking" requiring just compensation. The Court of Appeals was unmoved by the United States' argument that there was no taking given the benefits that Sperry had obtained from the Tribunal: "We do not see the benefit of the Tribunal to Sperry when prior to the Accords it had secured the attachment of Iranian assets sufficient to cover its eventual award and, had the President not suspended American claims, would have had no need for the Tribunal." 853 F.2d, at 908.

II

Sperry argues that the deduction is a part of Congress' scheme to shift to American claimants against Iran those costs of settling the diplomatic crisis that should have been borne by the Nation as a whole. As we see it, however, Sperry has not identified any of its property that was taken without just compensation. To the extent the Court of Appeals' decision may be read as concluding that Sperry suffered a taking of its property because its prejudgment attachment against Iranian assets was nullified by the Executive Orders implementing the Accords, see 853 F.2d, at 907, that conclusion is incorrect; we held in *Dames & Moore v. Regan*, 453 U.S., at 674, n. 6, that American litigants against Iran had no property interest in such attachments. Nor did Sperry suffer the deprivation of its claim against Iran. Sperry presented its claim to the Tribunal and settled the claim for a substantial sum. And we note that Sperry makes no claim that the gross amount of the award was less than what would have been recovered in ordinary litigation and that being forced to take the lesser amount was an unconstitutional taking of property. The case thus turns only on the constitutionality of the deduction.

As for the deduction itself, the United States urges that it is not a taking at all but is a reasonable "user fee" assessed against claimants before the Tribunal and intended to reimburse the United States for its costs in connection with the Tribunal. Sperry responds that the §502 charge cannot be upheld as a user fee because there has been no showing that the amount of the deduction approximates the cost of the Tribunal to the United States or bears any relationship to Sperry's use of the Tribunal or the value of the Tribunal's services to Sperry. None of Sperry's submissions is persuasive.

Section 502(a) specifically states that the deductions are made as "reimbursement to the United States Government for expenses incurred in connection with the arbitration of claims of

United States claimants against Iran before [the] Tribunal and the maintenance of the Security Account" Given especially this specific declaration by Congress that the deductions are intended to reimburse costs incurred by the United States, the burden must lie with Sperry to demonstrate that the reality of §502 belies its express language before we conclude that the deductions are actually takings. That burden has not been met.

This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services. Nor does the Government need to record invoices and billable hours to justify the cost of its services. All that we have required is that the user fee be a "fair approximation of the cost of benefits supplied." *Massachusetts v. United States*, 435 U.S. 444, 463, n. 19 (1978). In that case, the Court upheld a flat registration fee assessed by the Federal Government on civil aircraft, including aircraft owned by the States, against a challenge that the fee violated the principle of intergovernmental tax immunity. In holding that the registration charge could be upheld because it was a user fee rather than a tax, the Court rejected Massachusetts' argument that the "amount of the tax is a flat annual fee and hence is not directly related to the degree of use of the airways." The Court recognized that when the Federal Government applies user charges to a large number of parties, it probably will charge a user more or less than it would under a perfect user-fee system, but we declined to impose a requirement that the Government "give weight to every factor affecting appropriate compensation for airport and airway use," *id.*, at 468.

The deductions authorized by §502 are not so clearly excessive as to belie their purported character as user fees. This is not a situation where the Government has appropriated all, or most, of the award to itself and labeled the booty as a user fee. Cf. *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).⁶⁰ We need not state what percentage of the award would be too great a take to qualify as a user fee, for we are convinced that on the facts of this case, 1 1/2% does not qualify as a "taking" by any standard of excessiveness. This was obviously the judgment of Congress and we abide by it.⁶¹

⁶⁰ In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, we expressed "no view as to the constitutionality of a statute that prescribes a county's retention of interest earned, where the interest would be the only return to the county for services it renders," a situation more analogous to the case at bar.

⁶¹ Sperry argues, however, that we should not even consider the amount deducted by the Federal Reserve Bank of New York because the deduction was akin to a "permanent physical occupation" of its property and therefore was a per se taking requiring just compensation, regardless of the extent of the occupation or its economic impact. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982). The Court of Appeals agreed with Sperry. 853 F.2d 904, 906-907 (CA Fed. 1988). It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. No special constitutional importance attaches to the fact that the Government deducted its charge directly from the award rather than requiring Sperry to pay it separately. If the deduction in this case were a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance. Such a rule would be an extravagant extension of *Loretto*.

Sperry complains that the United States has taken its property by charging it for the use of procedures that it has been forced to use, or at least that it would rather not have used. But as we have explained a reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services. "A governmental body has an obvious interest in making those who specifically benefit from its services pay the cost" *Massachusetts v. United States*, 435 U.S., at 462 (plurality opinion). Though we may accept Sperry's word that it would have preferred to pursue its action against Iran in the familiar and proximate federal district courts, we cannot accept its contention that it did not benefit in any way from the procedures established by the Accords. The fact is that Sperry did benefit directly from the existence and functions of the Tribunal. The Accords that established the Tribunal and the Executive Orders that implemented the Accords assured Sperry that any award made to it, whether as the result of a settlement or otherwise, could be enforced in the courts of any nation and actually paid in this country. Had the President not agreed to the establishment of the Tribunal and the Security Account, Sperry would have had no assurance that it could have pursued its action against Iran to judgment or that a judgment would have been readily collectible. As it was, Sperry filed its claim with the Tribunal, arrived at a settlement with Iran, and had the settlement entered as a formal award by the Tribunal, which was paid in full except for the deduction at issue in this case.

It is not at all dispositive that the award to Sperry was more the result of private negotiations between Sperry and Iran than the Tribunal procedures placed at Sperry's disposal. Sperry filed its claim with the Tribunal and had a formal award entered. Furthermore, Sperry may be required to pay a charge for the availability of the Tribunal even if it never actually used the Tribunal; Sperry received the "benefit from [the Tribunal] in the sense that the services are available for [its] use." *Massachusetts v. United States*, supra, at 468. Had Sperry's negotiations with Iran failed, it would have then had the opportunity to use the hearing rooms, translation facilities, and facilities for service of documents made available through the Tribunal and the State Department. The Tribunal made available to claimants such as Sperry sufficient benefits to justify the imposition of a reasonable user fee.

III

We turn next to Sperry's due process claims. Sperry urges that §502 violates the Due Process Clause because the deductions apply to awards, such as Sperry's, made by the Tribunal prior to the enactment of the statute. Our standard of review is settled:

"Retroactive legislation does have to meet a burden not faced by legislation that has only future effects. 'It does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.' But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guaranty*

Corporation v. R. A. Gray & Co., 467 U.S. 717, 730 (1984) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976)) (citation omitted).

We agree with the United States that the retroactive application of §502 is justified by a rational legislative purpose. Retroactive application of §502 ensures that all successful claimants before the Tribunal are treated alike in that all have to contribute toward the costs of the Tribunal. If Congress had made the application of §502 prospective only, the costs of the Tribunal would have fallen disproportionately on the claimants whose awards, for whatever reason, were delayed, and Congress might have had to increase the percentage charge on those claimants to recoup a sufficient portion of the Federal Government's costs. Claimants who were fortunate enough to obtain awards prior to the enactment of the statute would have obtained a windfall by avoiding contribution. It is surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them.

Nor does §502 violate the equal protection component of the Due Process Clause because it assesses a user fee only against claimants who have actually received an award from the Tribunal and not against all claimants before the Tribunal. The classification implicitly made by §502 neither burdens fundamental constitutional rights nor creates suspect classifications, so again our standard of review is that of rationality. See *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174-175 (1980). Congress could have rationally concluded that only those who are successful before the Tribunal realize a benefit therefrom sufficient to justify assessment of a fee. Congress could also have determined that assessing a user fee against all claimants would undesirably deter those whose claims were small or uncertain of success from presenting them to the Tribunal. This case is wholly unlike *Rinaldi v. Yeager*, 384 U.S. 305 (1966), where the Court was unable to discern any legitimate interest that was served by a requirement that the State be reimbursed for the cost of criminal trial transcripts by incarcerated prisoners unsuccessful in their appeals but not by other indigent appellants, even other unsuccessful ones who had not been incarcerated. Here the costs are imposed on only the successful claimants, not, as in *Rinaldi*, only the unsuccessful ones, a situation presenting entirely different considerations. Moreover, as discussed a sensible distinction may be made between successful claimants who have completed the Tribunal proceedings and all other claimants.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

BROWN v. LEGAL FOUNDATION OF WASHINGTON
538 U.S. 216 (2003)

JUDGES: STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and KENNEDY and THOMAS, JJ., joined. KENNEDY, J., filed a dissenting opinion.

JUSTICE STEVENS delivered the opinion of the Court.

The State of Washington, like every other State in the Union, uses interest on lawyers' trust accounts (IOLTA) to pay for legal services provided to the needy. Some IOLTA programs were created by statute, but in Washington, as in most other States, the IOLTA program was established by the State Supreme Court pursuant to its authority to regulate the practice of law. In *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), a case involving the Texas IOLTA program, we held "that the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal." We did not, however, express any opinion on the question whether the income had been "taken" by the State or "as to the amount of 'just compensation,' if any, due respondents." We now confront those questions.

I

As we explained in *Phillips*, in the course of their legal practice, attorneys are frequently required to hold clients' funds for various lengths of time. It has long been recognized that they have a professional and fiduciary obligation to avoid commingling their clients' money with their own, but it is not unethical to pool several clients' funds in a single trust account. Before 1980 client funds were typically held in non-interest-bearing federally insured checking accounts. Because federal banking regulations in effect since the Great Depression prohibited banks from paying interest on checking accounts, the value of the use of the clients' money in such accounts inured to the banking institutions.

In 1980, Congress authorized federally insured banks to pay interest on a limited category of demand deposits referred to as "NOW accounts." See 87 Stat. 342, 12 U.S.C. §1832. This category includes deposits made by individuals and charitable organizations, but does not include those made by for-profit corporations or partnerships unless the deposits are made pursuant to a program under which charitable organizations have "the exclusive right to the interest."

In response to the change in federal law, Florida adopted the first IOLTA program in 1981 authorizing the use of NOW accounts for the deposit of client funds, and providing that all of the interest on such accounts be used for charitable purposes. Every State in the Nation and the District of Columbia have followed Florida's lead and adopted an IOLTA program, either through their legislatures or their highest courts. The result is that, whereas before 1980 the

banks retained the value of the use of the money deposited in non-interest-bearing client trust accounts, today, because of the adoption of IOLTA programs, that value is transferred to charitable entities providing legal services for the poor. The aggregate value of those contributions in 2001 apparently exceeded \$200 million.

In 1984, the Washington Supreme Court established its IOLTA program by amending its Rules of Professional Conduct. IOLTA Adoption Order, 102 Wn. 2d 1101. The amendments were adopted after over two years of deliberation, during which the court received hundreds of public comments and heard oral argument from the Seattle-King County Bar Association, designated to represent the proponents of the Rule, and the Walla Walla County Bar Association, designated to represent the opponents of the Rule.

In its opinion explaining the order, the court noted that earlier Rules had required attorneys to hold client trust funds "in accounts separate from their own funds," and had prohibited the use of such funds for the lawyer's own pecuniary advantage, but did not address the question whether or how such funds should be invested. Commenting on then-prevalent practice the court observed:

"In conformity with trust law, however, lawyers usually invest client trust funds in separate interest-bearing accounts and pay the interest to the clients whenever the trust funds are large enough in amount or to be held for a long enough period of time to make such investments economically feasible, that is, when the amount of interest earned exceeds the bank charges and costs of setting up the account. However, when trust funds are so nominal in amount or to be held for so short a period that the amount of interest that could be earned would not justify the cost of creating separate accounts, most attorneys simply deposit the funds in a single noninterest-bearing trust checking account containing all such trust funds from all their clients. The funds in such accounts earn no interest for either the client or the attorney. The banks, in contrast, have received the interest-free use of client money."

The court then described the four essential features of its IOLTA program: (a) the requirement that all client funds be deposited in interest-bearing trust accounts, (b) the requirement that funds that cannot earn net interest for the client be deposited in an IOLTA account, (c) the requirement that the lawyers direct the banks to pay the net interest on the IOLTA accounts to the Legal Foundation of Washington (Foundation), and (d) the requirement that the Foundation must use all funds received from IOLTA accounts for tax-exempt law-related charitable and educational purposes.

In its opinion the court responded to three objections that are relevant to our inquiry in this case. First, it rejected the contention that the new program "constitutes an unconstitutional taking of property without due process or just compensation." *Id.*, at 1104. Like other State Supreme Courts that had considered the question, it distinguished our decision in *Webb's*

Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980), on the ground that the new "program creates income where there had been none before, and the income thus created would never benefit the client under any set of circumstances." 102 Wash. 2d, at 1108 (quoting *In re Interest on Trust Accounts*, 402 So. 2d 389, 395 (Fla. 1981)).

Second, it rejected the argument that it was unethical for lawyers to rely on any factor other than the client's best interests when deciding whether to deposit funds in an IOLTA account rather than an account that would generate interest for the client. The court endorsed, and added emphasis, to the response to that argument set forth in the proponents' reply brief:

"Although the proposed amendments list several factors an attorney should consider in deciding how to invest his clients' trust funds, . . . all of these factors are really facets of a single question: Can the client's money be invested so that it will produce a net benefit for the client? If so, the attorney must invest it to earn interest for the client. Only if the money cannot earn net interest for the client is the money to go into an IOLTA account.'

This is a correct statement of an attorney's duty under trust law, as well as a proper interpretation of the proposed rule as published for public comment. However, in order to make it even clearer that IOLTA funds are only those funds that cannot, under any circumstances, earn net interest (after deducting transaction and administrative costs and bank fees) for the client, we have amended the proposed rule accordingly. See new CPR DR 9-102(C)(3). The new rule makes it absolutely clear that the enumerated factors are merely facets of the ultimate question of whether client funds could be invested profitably for the benefit of clients. If they can, then investment for the client is mandatory." 102 Wash. 2d, at 1113-1114.

The court also rejected the argument that it had failed to consider the significance of advances in computer technology that, in time, may convert IOLTA participation into an unconstitutional taking of property that could have been distributed to the client. It pointed to the fact that the Rule expressly requires attorneys to give consideration to the capability of financial institutions to calculate and pay interest on individual accounts, and added: "Thus, as cost effective sub-accounting services become available, making it possible to earn net interest for clients on increasingly smaller amounts held for increasingly shorter periods of time, more trust money will have to be invested for the clients' benefit under the new rule. The rule is therefore self-adjusting and is adequately designed to accommodate changes in banking technology without running afoul of the state or federal constitutions." *Id.*, at 1114.

Given the court's explanation of its Rule, it seems apparent that a lawyer who mistakenly uses an IOLTA account as a depository for money that could earn interest for the client would violate the Rule. Hence, the lawyer will be liable to the client for any lost interest, however minuscule the amount might be.

In 1995, the Washington Supreme Court amended its IOLTA Rules to make them applicable to Limited Practice Officers (LPOs) as well as lawyers. LPOs are non-lawyers who are licensed to act as escrowees in the closing of real estate transactions. Like lawyers, LPOs often temporarily control the funds of clients.

II

This action was commenced by a public interest law firm and four citizens to enjoin state officials from continuing to require LPOs to deposit trust funds into IOLTA accounts. Because the Court of Appeals held that the firm do[es] not have standing, *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 848-850 (CA9 2001), and since that holding was not challenged in this Court, we limit our discussion to the claims asserted by petitioners Allen Brown and Greg Hayes. The defendants, respondents in this Court, are the justices of the Washington Supreme Court, the Foundation, which receives and redistributes the interest on IOLTA accounts, and the president of the Foundation.

In their amended complaint, Brown and Hayes describe the IOLTA program, with particular reference to its application to LPOs and to some of the activities of Recipient Organizations that have received funds from the Foundation. Brown and Hayes also both allege that they regularly purchase and sell real estate and in the course of such transactions they deliver funds to LPOs who are required to deposit them in IOLTA accounts. They object to having the interest on those funds "used to finance the Recipient Organizations" and "to anyone other than themselves receiving the interest derived from those funds.". The first count of their complaint alleges that "being forced to associate with the Recipient Organizations" violates their First Amendment rights, the second count alleges that the "taking" of the interest earned on their funds in the IOLTA accounts violates the Just Compensation Clause of the Fifth Amendment; and the third count alleges that the requirement that client funds be placed in IOLTA accounts is "an illegal taking of the beneficial use of those funds." The prayer for relief sought a refund of interest earned on the plaintiffs' money that had been placed in IOLTA accounts, a declaration that the IOLTA Rules are unconstitutional, and an injunction against their enforcement against LPOs.

After discovery, the District Court granted the defendants' motion for summary judgment. As a factual matter the court concluded "that in no event can the client-depositors make any net returns on the interest accrued in these accounts. Indeed, if the funds were able to make any net return, they would not be subject to the IOLTA program." *Washington Legal Foundation v. Legal Foundation of Washington*, No. C97-0146C (WD Wash., Jan. 30, 1998), App. to Pet. for Cert. 94a. As a legal matter, the court concluded that the constitutional issue focused on what an owner has lost, not what the "taker" has gained, and that petitioners Hayes and Brown had "lost nothing."

While the case was on appeal, we decided *Phillips v. Washington Legal Foundation*, 524 U. S 156 (1998). Relying on our opinion in that case, a three-judge panel of the Ninth Circuit

decided that the IOLTA program caused a taking of petitioners' property and that further proceedings were necessary to determine whether they are entitled to just compensation. The panel concluded: "In sum, we hold that the interest generated by IOLTA pooled trust accounts is property of the clients and customers whose money is deposited into trust, and that a government appropriation of that interest for public purposes is a taking entitling them to just compensation under the Fifth Amendment. But just compensation for the takings may be less than the amount of the interest taken, or nothing, depending on the circumstances, so determining the remedy requires a remand." *Washington Legal Foundation v. Legal Foundation of Washington*, 236 F.3d 1097, 1115 (2001).

The Court of Appeals then reconsidered the case en banc. 271 F.3d 835 (CA9 2001). The en banc majority affirmed the judgment of the District Court, reasoning that there was no taking because petitioners had suffered neither an actual loss nor an interference with any investment-backed expectations, and that the regulation of the use of their property was permissible. Moreover, in the majority's view, even if there were a taking, the just compensation due was zero.

We granted certiorari. 536 U.S. 903 (2002).

III

While it confirms the state's authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a "public use" and "just compensation" must be paid to the owner. In this case, the first condition is unquestionably satisfied. If the State had imposed a special tax, or perhaps a system of user fees, to generate the funds to finance the legal services supported by the Foundation, there would be no question as to the legitimacy of the use of the public's money. The fact that public funds might pay the legal fees of a lawyer representing a tenant in a dispute with a landlord who was compelled to contribute to the program would not undermine the public character of the "use" of the funds. Provided that she receives just compensation for the taking of her property, a conscientious pacifist has no standing to object to the government's decision to use the property she formerly owned for the production of munitions. Even if there may be occasional misuses of IOLTA funds, the overall, dramatic success of these programs in serving the compelling interest in providing legal services to literally millions of needy Americans certainly qualifies the Foundation's distribution of these funds as a "public use" within the meaning of the Fifth Amendment.

Before moving on to the second condition, the "just compensation" requirement, we must address the type of taking, if any, that this case involves. As we made clear just last term:

"The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for

a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of per se rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by 'essentially ad hoc, factual inquiries,' *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), designed to allow 'careful examination and weighing of all the relevant circumstances.' *Palazzolo v. Rhode Island*], 533 U.S. [606,] 636 [2001] (O'CONNOR, J., concurring).

We agree that a per se approach is more consistent with the reasoning in our Phillips opinion than Penn Central's ad hoc analysis. As was made clear in Phillips, the interest earned in the IOLTA accounts "is the 'private property' of the owner of the principal." 524 U.S., at 172. If this is so, the transfer of the interest to the Foundation here seems more akin to the occupation of a small amount of rooftop space in Loretto.

We therefore assume that Brown and Hayes retained the beneficial ownership of at least a portion of their escrow deposits until the funds were disbursed at the closings, that those funds generated some interest in the IOLTA accounts, and that their interest was taken for a public use when it was ultimately turned over to the Foundation. As the dissenters in the Ninth Circuit explained, though, this does not end our inquiry. Instead, we must determine whether any "just compensation" is due.

IV

All of the Circuit Judges and District Judges who have confronted the compensation question, both in this case and in Phillips, have agreed that the "just compensation" required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain. This conclusion is supported by consistent and unambiguous holdings in our cases.

Applying the teaching of these cases to the question before us, it is clear that neither Brown nor Hayes is entitled to any compensation for the nonpecuniary consequences of the taking of the interest on his deposited funds, and that any pecuniary compensation must be measured by his net losses rather than the value of the public's gain. For that reason, both the majority and the dissenters on the Court of Appeals agreed that if petitioners' net loss was zero, the compensation that is due is also zero.

VI

To recapitulate: It is neither unethical nor illegal for lawyers to deposit their clients' funds in a single bank account. A state law that requires client funds that could not otherwise generate

net earnings for the client to be deposited in an IOLTA account is not a "regulatory taking." A law that requires that the interest on those funds be transferred to a different owner for a legitimate public use, however, could be a per se taking requiring the payment of "just compensation" to the client. Because that compensation is measured by the owner's pecuniary loss -- which is zero whenever the Washington law is obeyed -- there has been no violation of the Just Compensation Clause of the Fifth Amendment in this case. It is therefore unnecessary to discuss the remedial question presented in the certiorari petition. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

The Court today concludes that the State of Washington may seize private property, without paying compensation, on the ground that the former owners suffered no "net loss" because their confiscated property was created by the beneficence of a state regulatory program. In so holding the Court creates a novel exception to our oft-repeated rule that the just compensation owed to former owners of confiscated property is the fair market value of the property taken. What is more, the Court embraces a line of reasoning that we explicitly rejected in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). Our precedents compel the conclusion that petitioners are entitled to the fair market value of the interest generated by their funds held in interest on lawyers' trust accounts (IOLTA). I dissent from the Court's judgment to the contrary.

I

The Court assumes, *arguendo*, that the appropriation of petitioners' interest constitutes a "taking," but holds that just compensation is zero because without the mandatory pooling arrangements (step one) of IOLTA, petitioners' funds could not have generated any interest in the first place.⁶² This holding contravenes our decision in *Phillips* -- effectively refusing to treat the interest as the property of petitioners we held it to be -- and brushes aside 80 years of precedent on determining just compensation.

II

When a State has taken private property for a public use, the Fifth Amendment requires compensation in the amount of the market value of the property on the date it is appropriated. See *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984) (holding that just compensation is

⁶² The Court's ruminations on whether the State's IOLTA program satisfies the Fifth Amendment's "public use" requirement, come as a surprise, inasmuch as they address a non-jurisdictional constitutional issue raised by neither the parties nor their amici. Petitioners' sole contention in this Court is that the State's IOLTA program violates the just compensation requirement of the Takings Clause.

"market value of the property at the time of the taking" (emphasis added)) (quoting *Olson v. United States*, 292 U.S. 246, 255 (As we explained in *United States v. Petty Motor Co.*, 327 U.S. 372, 377 (1946), "just compensation . . . is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called 'market value.'"

In holding that any just compensation that might be owed is zero, the Court [does not] pretend to ascertain the market value of the confiscated property. Instead, the Court proclaims that just compensation is to be determined by the former property owner's "net loss." The Court is .. both...[in]consistent with *Phillips* [and] our precedents that equate just compensation with the fair market value of the property taken.

A

Consider the implications of the Court's approach for a case such as *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), which involved a Florida statute that allowed the clerk of a court, in his discretion, to invest interpleader funds deposited with that court in interest-bearing certificates, the interest earned to be deemed "'income of the office of the clerk of the circuit court.'" The appellant in *Webb's* had tendered nearly \$2 million to a state court after filing an interpleader action, and we held that the state court's retention of the more than \$100,000 in interest generated by those funds was an uncompensated taking of private property.

But what would have been just compensation for the taking in *Webb's* under today's analysis? It would consist not of the amount of interest actually earned by the principal, but rather of the amount that would have been earned had the State not provided for the clerk of court to generate the interest in the first place. That amount would have been zero since, as we noted in *Webb's*, Florida law did not require that interest be earned on a registry deposit Section 28.33's authorization for the clerk of court to invest the interpleader funds, like the Washington Supreme Court's IOLTA scheme, was a state-created opportunity to generate interest on monies that would otherwise lie fallow. As the Florida Supreme Court observed, "interest accrues only because of section 28.33. In this sense the statute takes only what it creates." *Beckwith v. Webb's Fabulous Pharmacies, Inc.*, 374 So. 2d 951, 953 (1979) (emphasis added).

In *Webb's* this Court unanimously rejected the contention that a state regulatory scheme's generation of interest that would otherwise not have come into existence gave license for the State to claim the interest for itself. What can possibly explain the contrary holding today? Surely it cannot be that the Justices look more favorably upon a nationally emulated uncompensated taking of clients' funds to support (hurrah!) legal services to the indigent than they do upon a more local uncompensated taking of clients' funds to support nothing more inspiring than the Florida circuit courts. That were surely an unprincipled distinction. But the real, principled basis for the distinction remains to be disclosed. And until it is disclosed, today's endorsement of the proposition that there is no taking when "the State giveth, and the State taketh away," has potentially far-reaching consequences. May the government now seize welfare

benefits, without paying compensation, on the ground that there was no "net loss," to the recipient? Cf. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

B

The Court's rival theory for explaining why just compensation is zero fares no better. Contrary to its aforementioned description of petitioners' "net loss" as the amount their funds would have earned in non-IOLTA accounts, the Court declares that just compensation is "the net value of the interest that was actually earned by petitioners," -- net value consisting of the value of the funds, less "transaction and administrative costs and bank fees" that would be expended in extracting the funds from the IOLTA accounts. In this case, however, there is no difference between the two. Petitioners have lost the interest that Phillips says rightfully belongs to them -- which is precisely what the government has gained. The Court's apparent fear that following the Constitution in this case will provide petitioners a "windfall" in the amount of transaction costs saved is based on the unfounded assumption that the State must return the interest directly to petitioners. The State could satisfy its obligation to pay just compensation by simply returning petitioners' money to the IOLTA account from which it was seized, leaving others to incur the accounting costs in the event petitioners seek to extract their interest from the account.

In any event, our cases that have distinguished the "property owner's loss" from the "government's gain" say nothing whatever about reducing this value to some "net" amount. But the irrationality of this aspect of the Court's opinion does not end with its blatant contradiction of a precedent (Phillips) promulgated by a Court consisting of the same Justices who sit today. Even if "net value" (rather than "market value") were the appropriate measure of just compensation, the Court has no basis whatsoever for pronouncing the "net value" of petitioners' interest to be zero. While the Court is correct that under the State's IOLTA rules, petitioners' funds could not have earned net interest in separate, non-IOLTA accounts, that has no bearing on the transaction costs that petitioners would sustain in removing their earned interest from the IOLTA accounts. The Court today arbitrarily forecloses clients from recovering the "net interest" to which (even under the Court's definition of just compensation) they are entitled. What is more, there is no reason to believe that petitioners themselves do not fall within the class of clients whose funds, though unable to earn interest in non-IOLTA accounts, nevertheless generate "net interest" in IOLTA accounts.

* * *

Perhaps we are witnessing today the emergence of a whole new concept in Compensation Clause jurisprudence: the Robin Hood Taking, in which the government's extraction of wealth from those who own it is so cleverly achieved, and the object of the government's larcenous beneficence is so highly favored by the courts (taking from the rich to give to indigent defendants) that the normal rules of the Constitution protecting private property are suspended. One must hope that that is the case. For to extend to the entire run of Compensation Clause cases

the rationale supporting today's judgment -- what the government hath given, the government may freely take away -- would be disastrous.

The Court's judgment that petitioners are not entitled to the market value of their confiscated property has no basis in law. I respectfully dissent.

JUSTICE KENNEDY, dissenting.

The principal dissenting opinion, authored by JUSTICE SCALIA, sets forth a precise, complete, and convincing case for rejecting the holding and analysis of the Court. I join the dissent in full.

It does seem appropriate to add this further observation. By mandating that the interest from these accounts serve causes the justices of the Washington Supreme Court prefer, the State not only takes property in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States but also grants to itself a monopoly which might then be used for the forced support of certain viewpoints. Had the State, with the help of Congress, not acted in violation of its constitutional responsibilities by taking for itself property which all concede to be that of the client the free market might have created various and diverse funds for pooling small interest amounts. These funds would have allowed the true owners of the property the option to express views and policies of their own choosing. Instead, as these programs stand today, the true owner cannot even opt out of the State's monopoly.

The First Amendment consequences of the State's action have not been addressed in this case, but the potential for a serious violation is there. Today's holding, then, is doubly unfortunate. One constitutional violation (the taking of property) likely will lead to another (compelled speech). These matters may have to come before the Court in due course.

DISCUSSION QUESTIONS:

When a local government “leverages the police power” and exacts a fee from a developer as a condition to issuance of a building permit, is the maximum amount of the fee the marginal cost of development to the community or the special benefit conferred on the developer? May it be either?

Session 16. General Assessments

Historically “ad valorem” property taxes served as the primary source of local revenues. The legitimacy of taxes based upon a general assessment of the “highest and best use” value of the property raises questions of fairness, and the courts have taken it upon themselves to constitutionally second-guess some of the legislative answers.

SERRANO v. PRIEST 5 Cal. 3d 584 (1971)

SULLIVAN, J. We are called upon to determine whether the California public school financing system, with its substantial dependence on local property taxes and resultant wide disparities in school revenue, violates the equal protection clause of the Fourteenth Amendment. We have determined that this funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors. Recognizing as we must that the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth, we can discern no compelling state purpose necessitating the present method of financing. We have concluded, therefore, that such a system cannot withstand constitutional challenge and must fall before the equal protection clause.

Plaintiffs, who are Los Angeles County public school children and their parents, brought this class action for declaratory and injunctive relief against certain state and county officials charged with administering the financing of the California public school system. Plaintiff children claim to represent a class consisting of all public school pupils in California, "except children in that school district, the identity of which is presently unknown, which school district affords the greatest educational opportunity of all school districts within California." Plaintiff parents purport to represent a class of all parents who have children in the school system and who pay real property taxes in the county of their residence.

Defendants are the Treasurer, the Superintendent of Public Instruction, and the Controller of the State of California, as well as the Tax Collector and Treasurer, and the Superintendent of Schools of the County of Los Angeles. The county officials are sued both in their local capacities and as representatives of a class composed of the school superintendent, tax collector and treasurer of each of the other counties in the state.

The complaint sets forth three causes of action. The first cause alleges in substance as follows: Plaintiff children attend public elementary and secondary schools located in specified school districts in Los Angeles County. This public school system is maintained throughout California by a financing plan or scheme which relies heavily on local property taxes and causes substantial disparities among individual school districts in the amount of revenue available per pupil for the districts' educational programs. Consequently, districts with smaller tax bases are not able to spend as much money per child for education as districts with larger assessed valuations.

It is alleged that "As a direct result of the financing scheme ... substantial disparities in the quality and extent of availability of educational opportunities exist and are perpetuated among the several school districts of the State. ... [Par.] The educational opportunities made available to children attending public schools in the Districts, including plaintiff children, are substantially inferior to the educational opportunities made available to children attending public schools in many other districts of the State...." The financing scheme thus fails to meet the requirements of the equal protection clause of the Fourteenth Amendment of the United States Constitution and the California Constitution in several specified respects.

In the second cause of action, plaintiff parents, after incorporating by reference all the allegations of the first cause, allege that as a direct result of the financing scheme they are required to pay a higher tax rate than taxpayers in many other school districts in order to obtain for their children the same or lesser educational opportunities afforded children in those other districts.

In the third cause of action, after incorporating by reference all the allegations of the first two causes, all plaintiffs allege that an actual controversy has arisen and now exists between the parties as to the validity and constitutionality of the financing scheme under the Fourteenth Amendment of the United States Constitution and under the California Constitution.

Plaintiffs pray for: (1) a declaration that the present financing system is unconstitutional; (2) an order directing defendants to reallocate school funds in order to remedy this invalidity; and (3) an adjudication that the trial court retain jurisdiction of the action so that it may restructure the system if defendants and the state Legislature fail to act within a reasonable time.

I

We begin our task by examining the California public school financing system which is the focal point of the complaint's allegations. At the threshold we find a fundamental statistic - over 90 percent of our public school funds derive from two basic sources: (a) local district taxes on real property and (b) aid from the State School Fund.

By far the major source of school revenue is the local real property tax. Pursuant to article IX, section 6 of the California Constitution, the Legislature has authorized the governing body of each county, and city and county, to levy taxes on the real property within a school district at a rate necessary to meet the district's annual education budget. (Ed. Code, §20701 et seq.) The amount of revenue which a district can raise in this manner thus depends largely on its tax base - i.e., the assessed valuation of real property within its borders. Tax bases vary widely throughout the state; in 1969-1970, for example, the assessed valuation per unit of average daily attendance of elementary school children ranged from a low of \$103 to a peak of \$952,156 - a ratio of nearly 1 to 10,000. (Legislative Analyst, Public School Finance, Part V, Current Issues in Educational Finance (1971) p. 7.)

The other factor determining local school revenue is the rate of taxation within the district. Although the Legislature has placed ceilings on permissible district tax rates (§20751 et seq.), these statutory maxima may be surpassed in a "tax override" election if a majority of the district's voters approve a higher rate.(§20803 et seq.) Nearly all districts have voted to override the statutory limits. Thus the locally raised funds which constitute the largest portion of school revenue are primarily a function of the value of the realty within a particular school district, coupled with the willingness of the district's residents to tax themselves for education.

Most of the remaining school revenue comes from the State School Fund pursuant to the "foundation program," through which the state undertakes to supplement local taxes in order to provide a "minimum amount of guaranteed support to all districts" (§17300.) With certain minor exceptions, the foundation program ensures that each school district will receive annually, from state or local funds, \$355 for each elementary school pupil (§§17656, 17660) and \$488 for each high school student. (§17665.)

Although equalization aid and supplemental aid temper the disparities which result from the vast variations in real property assessed valuation, wide differentials remain in the revenue available to individual districts and, consequently, in the level of educational expenditures. For example, in Los Angeles County, where plaintiff children attend school, the Baldwin Park Unified School District expended only \$577.49 to educate each of its pupils in 1968-1969; during the same year the Pasadena Unified School District spent \$840.19 on every student; and the Beverly Hills Unified School District paid out \$1,231.72 per child. (Cal. Dept. of Ed., Cal. Public Schools, Selected Statistics 1968-1969 (1970) Table IV-11, pp. 90-91.) The source of these disparities is unmistakable: in Baldwin Park the assessed valuation per child totaled only \$3,706; in Pasadena, assessed valuation was \$13,706; while in Beverly Hills, the corresponding figure was \$50,885 - a ratio of 1 to 4 to 13.(Id.) Thus, the state grants are inadequate to offset the inequalities inherent in a financing system based on widely varying local tax bases.

Similar spending disparities have been noted throughout the country, particularly when suburban communities and urban ghettos are compared. (See, e.g., Report of the National Advisory Commission on Civil Disorders (Bantam ed. 1968) pp. 434-436; U.S. Commission on Civil Rights, Racial Isolation in the Public Schools (1967) pp. 25-31; Conant, Slums and Suburbs (1961) pp. 2-3; Levi, The University, The Professions, and the Law (1968) 56 Cal.L.Rev. 251, 258-259.)

III

We take up the chief contention underlying plaintiffs' complaint, namely that the California public school financing scheme violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

As recent decisions of this court have pointed out, the United States Supreme Court has employed a two-level test for measuring legislative classifications against the equal protection

clause. "In the area of economic regulation, the high court has exercised restraint, investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose. [Citations.]

"On the other hand, in cases involving 'suspect classifications' or touching on 'fundamental interests,' [fns. omitted] the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. [Citations.] Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose." (Westbrook v. Mihaly (1970) 2 Cal.3d 765, 784-785 [87 Cal.Rptr. 839, 471 P.2d 487], vacated on other grounds (1971) 403 U.S. 915 [29 L.Ed.2d 692, 91 S.Ct. 2224])

A. Wealth as a Suspect Classification

In recent years, the United States Supreme Court has demonstrated a marked antipathy toward legislative classifications which discriminate on the basis of certain "suspect" personal characteristics. One factor which has repeatedly come under the close scrutiny of the high court is wealth. "Lines drawn on the basis of wealth or property, like those of race [citation], are traditionally disfavored." (Harper v. Virginia Bd. of Elections (1966) 383 U.S. 663, 668 [16 L.Ed.2d 169, 86 S.Ct. 1079].) Invalidating the Virginia poll tax in Harper, the court stated: "To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." (Id.) [A] careful examination on our part is especially warranted where lines are drawn on the basis of wealth ... [a] factor which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny. [Citations.]"

Plaintiffs contend that the school financing system classifies on the basis of wealth. We find this proposition irrefutable. As we have already discussed, over half of all educational revenue is raised locally by levying taxes on real property in the individual school districts. Above the foundation program minimum (\$355 per elementary student and \$488 per high school student), the wealth of a school district, as measured by its assessed valuation, is the major determinant of educational expenditures. Although the amount of money raised locally is also a function of the rate at which the residents of a district are willing to tax themselves, as a practical matter districts with small tax bases simply cannot levy taxes at a rate sufficient to produce the revenue that more affluent districts reap with minimal tax efforts.

Defendants vigorously dispute the proposition that the financing scheme discriminates on the basis of wealth. Their first argument is essentially this: through basic aid, the state distributes school funds equally to all pupils; through equalization aid, it distributes funds in a manner beneficial to the poor districts. However, state funds constitute only one part of the entire school fiscal system. The foundation program partially alleviates the great disparities in local sources of

revenue, but the system as a whole generates school revenue in proportion to the wealth of the individual district.

Defendants also argue that neither assessed valuation per pupil nor expenditure per pupil is a reliable index of the wealth of a district or of its residents. The former figure is untrustworthy, they assert, because a district with a low total assessed valuation but a minuscule number of students will have a high per pupil tax base and thus appear "wealthy." Defendants imply that the proper index of a district's wealth is the total assessed valuation of its property. We think defendants' contention misses the point. The only meaningful measure of a district's wealth in the present context is not the absolute value of its property, but the ratio of its resources to pupils, because it is the latter figure which determines how much the district can devote to educating each of its students.

But, say defendants, the expenditure per child does not accurately reflect a district's wealth because that expenditure is partly determined by the district's tax rate. Thus, a district with a high total assessed valuation might levy a low school tax, and end up spending the same amount per pupil as a poorer district whose residents opt to pay higher taxes. This argument is also meritless. Obviously, the richer district is favored when it can provide the same educational quality for its children with less tax effort. Furthermore, as a statistical matter, the poorer districts are financially unable to raise their taxes high enough to match the educational offerings of wealthier districts. (Legislative Analyst, Part V, *supra*, pp. 8-9.) Thus, affluent districts can have their cake and eat it too: they can provide a high quality education for their children while paying lower taxes. Poor districts, by contrast, have no cake at all.

Defendants, assuming for the sake of argument that the financing system does classify by wealth, nevertheless claim that no constitutional infirmity is involved because the complaint contains no allegation of purposeful or intentional discrimination. (Cf. *Gomillion v. Lightfoot* (1960) 364 U.S. 339 [5 L.Ed.2d 110, 81 S.Ct. 125].) Thus, defendants contend, any unequal treatment is only *de facto*, not *de jure*. Since the United States Supreme Court has not held *de facto* school segregation on the basis of race to be unconstitutional, so the argument goes, *de facto* classifications on the basis of wealth are presumptively valid.

We think that the whole structure of this argument must fall for want of a solid foundation in law and logic. First, none of the wealth classifications previously invalidated by the United States Supreme Court or this court has been the product of purposeful discrimination. Instead, these prior decisions have involved "unintentional" classifications whose impact simply fell more heavily on the poor.

For example, several cases have held that where important rights are at stake, the state has an affirmative obligation to relieve an indigent of the burden of his own poverty by supplying without charge certain goods or services for which others must pay. In *Griffin v. Illinois*, *supra*, 351 U.S. 12, the high court ruled that Illinois was required to provide a poor

defendant with a free transcript on appeal. *Douglas v. California*, supra, 372 U.S. 353 held that an indigent person has a right to court-appointed counsel on appeal.

Other cases dealing with the factor of wealth have held that a state may not impose on an indigent certain payments which, although neutral on their face, may have a discriminatory effect. In *Harper v. Virginia Bd. of Elections*, supra, 383 U.S. 663, the high court struck down a \$1.50 poll tax, not because its purpose was to deter indigents from voting, but because its result might be such. (*Id.* at p. 666, fn. 3 [16 L.Ed.2d at p. 172].) We held in *In re Antazo*, supra, 3 Cal.3d 100 that a poor defendant was denied equal protection of the law if he was imprisoned simply because he could not afford to pay a fine. (Accord, *Tate v. Short*, supra, 401 U.S. 395; *Williams v. Illinois*, supra, 399 U.S. 235; n18 see *Boddie v. Connecticut* (1971) 401 U.S. 371 [28 L.Ed.2d 113, 91 S.Ct. 780], discussed fn. 21 infra.) In summary, prior decisions have invalidated classifications based on wealth even in the absence of a discriminatory motivation.

We turn now to defendants' related contention that the instant case involves at most de facto discrimination. We disagree. Indeed, we find the case unusual in the extent to which governmental action is the cause of the wealth classifications. The school funding scheme is mandated in every detail by the California Constitution and statutes. Although private residential and commercial patterns may be partly responsible for the distribution of assessed valuation throughout the state, such patterns are shaped and hardened by zoning ordinances and other governmental landuse controls which promote economic exclusivity. (Cf. *San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, 956 [92 Cal.Rptr 309, 479 P.2d 669].) Governmental action drew the school district boundary lines, thus determining how much local wealth each district would contain. (Cal. Const., art. IX, §14; Ed. Code, §1601 et seq.; *Worthington S. Dist. v. Eureka S. Dist.* (1916) 173 Cal. 154, 156 [159 P. 437]; *Hughes v. Ewing* (1892) 93 Cal. 414, 417 [28 P. 1067]; *Mountain View Sch. Dist. v. City Council* (1959) 168 Cal.App.2d 89, 97 [335 P.2d 957].)

Finally, even assuming arguendo that defendants are correct in their contention that the instant discrimination based on wealth is merely de facto, and not de jure, such discrimination cannot be justified by analogy to de facto racial segregation. Although the United States Supreme Court has not yet ruled on the constitutionality of de facto racial segregation, this court eight years ago held such segregation invalid, and declared that school boards should take affirmative steps to alleviate racial imbalance, however created. (*Jackson v. Pasadena City School Dist.* (1963) 59 Cal.2d 876, 881 [31 Cal.Rptr. 606, 382 P.2d 878]; *San Francisco Unified School Dist. v. Johnson*, supra, 3 Cal.3d 937.) Consequently, any discrimination based on wealth can hardly be vindicated by reference to de facto racial segregation, which we have already condemned. In sum, we are of the view that the school financing system discriminates on the basis of the wealth of a district and its residents.

B. Education as a Fundamental Interest

But plaintiffs' equal protection attack on the fiscal system has an additional dimension. They assert that the system not only draws lines on the basis of wealth but that it "touches upon," indeed has a direct and significant impact upon, a "fundamental interest," namely education. It is urged that these two grounds, particularly in combination, establish a demonstrable denial of equal protection of the laws. To this phase of the argument we now turn our attention.

Until the present time wealth classifications have been invalidated only in conjunction with a limited number of fundamental interests - rights of defendants in criminal cases and voting rights. Plaintiffs' contention - that education is a fundamental interest which may not be conditioned on wealth - is not supported by any direct authority.

We, therefore, begin by examining the indispensable role which education plays in the modern industrial state. This role, we believe, has two significant aspects: first, education is a major determinant of an individual's chances for economic and social success in our competitive society; second, education is a unique influence on a child's development as a citizen and his participation in political and community life. "[The] pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable." (Note, *Development in the Law - Equal Protection* (1969) 82 Harv.L.Rev. 1065, 1129.) Thus, education is the lifeline of both the individual and society.

The fundamental importance of education has been recognized in other contexts by the United States Supreme Court and by this court. These decisions - while not legally controlling on the exact issue before us - are persuasive in their accurate factual description of the significance of learning.

The classic expression of this position came in *Brown v. Board of Education* (1954) 347 U.S. 483 [98 L.Ed. 873, 74 S.Ct. 686, 38 A.L.R.2d 1180], which invalidated de jure segregation by race in public schools. The high court declared: "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." (Id. at p. 493 [98 L.Ed. at p. 880].)

It is illuminating to compare in importance the right to an education with the rights of defendants in criminal cases and the right to vote - two "fundamental interests" which the Supreme Court has already protected against discrimination based on wealth. Although an individual's interest in his freedom is unique, we think that from a larger perspective, education may have far greater social significance than a free transcript or a court-appointed lawyer. "[Education] not only affects directly a vastly greater number of persons than the criminal law, but it affects them in ways which - to the state - have an enormous and much more varied significance. Aside from reducing the crime rate (the inverse relation is strong), education also supports each and every other value of a democratic society - participation, communication, and social mobility, to name but a few." (Fn. omitted.) (Coons, Clune & Sugarman, *supra*, 57 Cal.L.Rev. 305, 362-363.)

The need for an educated populace assumes greater importance as the problems of our diverse society become increasingly complex. The United States Supreme Court has repeatedly recognized the role of public education as a unifying social force and the basic tool for shaping democratic values. The public school has been termed "the most powerful agency for promoting cohesion among a heterogeneous democratic people ... at once the symbol of our democracy and the most pervasive means for promoting our common destiny." (*McCollum v. Board of Education* (1948) 333 U.S. 203, 216, 231 [92 L.Ed. 649, 661, 669, 68 S.Ct. 461, 2 A.L.R.2d 1338] (Frankfurter, J., concurring).) In *Abington School Dist. v. Schempp* (1963) 374 U.S. 203 [10 L.Ed.2d 844, 83 S.Ct. 1560], it was said that "Americans regard public schools as a most vital civic institution for the preservation of a democratic system of government." (*Id.* at p. 230 [10 L.Ed.2d at p. 863] (Brennan, J., concurring).)

We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a "fundamental interest."

First, education is essential in maintaining what several commentators have termed "free enterprise democracy" - that is, preserving an individual's opportunity to compete successfully in the economic marketplace, despite a disadvantaged background. Accordingly, the public schools of this state are the bright hope for entry of the poor and oppressed into the mainstream of American society.

Second, education is universally relevant. "Not every person finds it necessary to call upon the fire department or even the police in an entire lifetime. Relatively few are on welfare. Every person, however, benefits from education" (Fn. omitted.) (Coons, Clune & Sugarman, *supra*, 57 Cal.L.Rev. at p. 388.)

Third, public education continues over a lengthy period of life - between 10 and 13 years. Few other government services have such sustained, intensive contact with the recipient.

Fourth, education is unmatched in the extent to which it molds the personality of the youth of society. While police and fire protection, garbage collection and street lights are

essentially neutral in their effect on the individual psyche, public education actively attempts to shape a child's personal development in a manner chosen not by the child or his parents but by the state. (Coons, Clune & Sugarman, *Supra*, 57 Cal.L.Rev. at p. 389.) "[The] influence of the school is not confined to how well it can teach the disadvantaged child; it also has a significant role to pay in shaping the student's emotional and psychological make-up." (Hobson v. Hansen, *supra*, 269 F.Supp. 401, 483.)

Finally, education is so important that the state has made it compulsory - not only in the requirement of attendance but also by assignment to a particular district and school. Although a child of wealthy parents has the opportunity to attend a private school, this freedom is seldom available to the indigent. In this context, it has been suggested that "a child of the poor assigned willy-nilly to an inferior state school takes on the complexion of a prisoner, complete with a minimum sentence of 12 years." (Coons, Clune & Sugarman, *supra*, 57 Cal.L.Rev. at p. 388.)

C. The Financing System Is Not Necessary to Accomplish a Compelling State Interest

We now reach the final step in the application of the "strict scrutiny" equal protection standard - the determination of whether the California school financing system, as presently structured, is necessary to achieve a compelling state interest.

The state interest which defendants advance in support of the current fiscal scheme is California's policy "to strengthen and encourage local responsibility for control of public education." (Ed. Code, §17300.) We treat separately the two possible aspects of this goal: first, the granting to local districts of effective decision-making power over the administration of their schools; and second, the promotion of local fiscal control over the amount of money to be spent on education.

The individual district may well be in the best position to decide whom to hire, how to schedule its educational offerings, and a host of other matters which are either of significant local impact or of such a detailed nature as to require decentralized determination. But even assuming *arguendo* that local administrative control may be a compelling state interest, the present financial system cannot be considered necessary to further this interest. No matter how the state decides to finance its system of public education, it can still leave this decision-making power in the hands of local districts.

In summary, so long as the assessed valuation within a district's boundaries is a major determinant of how much it can spend for its schools, only a district with a large tax base will be truly able to decide how much it really cares about education. The poor district cannot freely choose to tax itself into an excellence which its tax rolls cannot provide. Far from being necessary to promote local fiscal choice, the present financing system actually deprives the less wealthy districts of that option.

We, therefore, arrive at these conclusions. The California Public school financing system, as presented to us by plaintiffs' complaint supplemented by matters judicially noticed, since it deals intimately with education, obviously touches upon a fundamental interest. For the reasons we have explained in detail, this system conditions the full entitlement to such interest on wealth, classifies its recipients on the basis of their collective affluence and makes the quality of a child's education depend upon the resources of his school district and ultimately upon the pocketbook of his parents. We find that such financing system as presently constituted is not necessary to the attainment of any compelling state interest. Since it does not withstand the requisite "strict scrutiny," it denies to the plaintiffs and others similarly situated the equal protection of the laws. If the allegations of the complaint are sustained, the financial system must fall and the statutes comprising it must be found unconstitutional.

In sum, we find the allegations of plaintiffs' complaint legally sufficient and we return the cause to the trial court for further proceedings. We emphasize, that our decision is not a final judgment on the merits. We deem it appropriate to point out for the benefit of the trial court on remand (see Code Civ. Proc., §43) that if, after further proceedings, that court should enter final judgment determining that the existing system of public school financing is unconstitutional and invalidating said system in whole or in part, it may properly provide for the enforcement of the judgment in such a way as to permit an orderly transition from an unconstitutional to a constitutional system of school financing. As in the cases of school desegregation (see *Brown v. Board of Education* (1955) 349 U.S. 294 [99 L.Ed. 1083, 75 S.Ct. 753]) and legislative reapportionment (see *Silver v. Brown* (1965) 63 Cal.2d 270, 281 [46 Cal.Rptr. 308, 405 P.2d 132]), a determination that an existing plan of governmental operation denies equal protection does not necessarily require invalidation of past acts undertaken pursuant to that plan or an immediate implementation of a constitutionally valid substitute. Obviously, any judgment invalidating the existing system of public school financing should make clear that the existing system is to remain operable until an appropriate new system, which is not violative of equal protection of the laws, can be put into effect.

By our holding today we further the cherished idea of American education that in a democratic society free public schools shall make available to all children equally the abundant gifts of learning. This was the credo of Horace Mann, which has been the heritage and the inspiration of this country. "I believe," he wrote, "in the existence of a great, immortal immutable principle of natural law, or natural ethics, - a principle antecedent to all human institutions, and incapable of being abrogated by any ordinance of man ... which proves the absolute right to an education of every human being that comes into the world, and which, of course, proves the correlative duty of every government to see that the means of that education are provided for all. ..." (Original italics.) (Old South Leaflets V, No. 109 (1846) pp. 177-180 (Tenth Annual Report to Mass. State Bd. of Ed.), quoted in *Readings in American Education* (1963 Lucio ed.) p. 336.)

The judgment is reversed and the cause remanded to the trial court with directions to overrule the demurrers and to allow defendants a reasonable time within which to answer.

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT v. RODRIGUEZ
411 U.S. 1 (1972)

Mr. Justice Powell delivered the opinion of the Court.

This suit attacking the Texas system of financing public education was initiated by Mexican-American parents whose children attend the elementary and secondary schools in the Edgewood Independent School District, an urban school district in San Antonio, Texas. They brought a class action on behalf of school children throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base. Named as defendants were the State Board of Education, the Commissioner of Education, the State Attorney General, and the Bexar County (San Antonio) Board of Trustees. The complaint was filed in the summer of 1968 and a three-judge court was impaneled in January 1969. In December 1971 the panel rendered its judgment in a per curiam opinion holding the Texas school finance system unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The State appealed, and we noted probable jurisdiction to consider the far-reaching constitutional questions presented. 406 U.S. 966 (1972). For the reasons stated in this opinion, we reverse the decision of the District Court.

I

The first Texas State Constitution, promulgated upon Texas' entry into the Union in 1845, provided for the establishment of a system of free schools. Early in its history, Texas adopted a dual approach to the financing of its schools, relying on mutual participation by the local school districts and the State. As early as 1883, the state constitution was amended to provide for the creation of local school districts empowered to levy ad valorem taxes with the consent of local taxpayers for the "erection . . . of school buildings" and for the "further maintenance of public free schools." Such local funds as were raised were supplemented by funds distributed to each district from the State's Permanent and Available School Funds.

Until recent times, Texas was a predominantly rural State and its population and property wealth were spread relatively evenly across the State. Sizable differences in the value of assessable property between local school districts became increasingly evident as the State became more industrialized and as rural-to-urban population shifts became more pronounced. The location of commercial and industrial property began to play a significant role in determining the amount of tax resources available to each school district. These growing disparities in population and taxable property between districts were responsible in part for increasingly notable differences in levels of local expenditure for education.

The school district in which appellees reside, the Edgewood Independent School District, has been compared throughout this litigation with the Alamo Heights Independent School District. This comparison between the least and most affluent districts in the San Antonio area serves to illustrate the manner in which the dual system of finance operates and to indicate the

extent to which substantial disparities exist despite the State's impressive progress in recent years. Edgewood is one of seven public school districts in the metropolitan area. Approximately 22,000 students are enrolled in its 25 elementary and secondary schools. The district is situated in the core-city sector of San Antonio in a residential neighborhood that has little commercial or industrial property. The residents are predominantly of Mexican-American descent: approximately 90% of the student population is Mexican-American and over 6% is Negro. The average assessed property value per pupil is \$5,960—the lowest in the metropolitan area—and the median family income (\$4,686) is also the lowest. At an equalized tax rate of \$1.05 per \$100 of assessed property—the highest in the metropolitan area—the district contributed \$26 to the education of each child for the 1967-1968 school year above its Local Fund Assignment for the Minimum Foundation Program. The Foundation Program contributed \$222 per pupil for a state-local total of \$248. Federal funds added another \$108 for a total of \$356 per pupil.

Alamo Heights is the most affluent school district in San Antonio. Its six schools, housing approximately 5,000 students, are situated in a residential community quite unlike the Edgewood District. The school population is predominantly “Anglo,” having only 18% Mexican-Americans and less than 1% Negroes. The assessed property value per pupil exceeds \$49,000, and the median family income is \$8,001. In 1967-1968 the local tax rate of \$.85 per \$100 of valuation yielded \$333 per pupil over \$225 provided from that Program, the district was able to supply \$558 per student. Supplemented by a \$36 per-pupil grant from federal sources, Alamo Heights spent \$594 per pupil.

Substantial interdistrict disparities in school expenditures found by the District Court to prevail in San Antonio and in varying degrees throughout the State still exist. And it was these disparities, largely attributable to differences in the amounts of money collected through local property taxation, that led the District Court to conclude that Texas' dual system of public school financing violated the Equal Protection Clause. The District Court held that the Texas system discriminates on the basis of wealth in the manner in which education is provided for its people. 337 F. Supp., at 282. Finding that wealth is a “suspect” classification and that education is a “fundamental” interest, the District Court held that the Texas system could be sustained only if the State could show that it was premised upon some compelling state interest. On this issue the court concluded that “[n]ot only are defendants unable to demonstrate compelling state interests . . . they fail even to establish a reasonable basis for these classifications.” *Id.*, at 284.

Texas virtually concedes that its historically rooted dual system of financing education could not withstand the strict judicial scrutiny that this Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights or that involve suspect classifications. If, as previous decisions have indicated, strict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a “heavy burden of justification,” that the State must demonstrate that its educational system has been structured with “precision,” and is “tailored” narrowly to serve legitimate objectives and that it has selected the “less drastic means” for effectuating its

objectives, the Texas financing system and its counterpart in virtually every other State will not pass muster. The State candidly admits that “[n]o one familiar with the Texas system would contend that it has yet achieved perfection.” Apart from its concession that educational financing in Texas has “defects” and “imperfections,” the State defends the system’s rationality with vigor and disputes the District Court’s finding that it lacks a “reasonable basis.”

This, then, establishes the framework for our analysis. We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. If so, the judgment of the District Court should be affirmed. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

II

A

The wealth discrimination discovered by the District Court in this case, and by several other courts that have recently struck down school-financing laws in other States, is quite unlike any of the forms of wealth discrimination heretofore reviewed by this Court. Rather than focusing on the unique features of the alleged discrimination, the courts in these cases have virtually assumed their findings of a suspect classification through a simplistic process of analysis: since, under the traditional systems of financing public schools, some poorer people receive less expensive educations than other more affluent people, these systems discriminate on the basis of wealth. This approach largely ignores the hard threshold questions, including whether it makes a difference for purposes of consideration under the Constitution that the class of disadvantaged “poor” cannot be identified or defined in customary equal protection terms, and whether the relative—rather than absolute—nature of the asserted deprivation is of significant consequence. Before a State’s laws and the justifications for the classifications they create are subjected to strict judicial scrutiny, we think these threshold considerations must be analyzed more closely than they were in the court below.

The case comes to us with no definitive description of the classifying facts or delineation of the disfavored class. Examination of the District Court’s opinion and of appellees’ complaint, briefs, and contentions at oral argument suggests, however, at least three ways in which the discrimination claimed here might be described. The Texas system of school financing might be regarded as discriminating (1) against “poor” persons whose incomes fall below some identifiable level of poverty or who might be characterized as functionally “indigent,” or (2) against those who are relatively poorer than others, or (3) against all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts. Our task must be to ascertain whether, in fact, the Texas system has been shown to discriminate on any of these possible bases and, if so, whether the resulting classification may be regarded as suspect.

The precedents of this Court provide the proper starting point. The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.

Only appellees' first possible basis for describing the class disadvantaged by the Texas school-financing system—discrimination against a class of definably “poor” persons—might arguably meet the criteria established in these prior cases. Even a cursory examination, however, demonstrates that neither of the two distinguishing characteristics of wealth classifications can be found here. First, in support of their charge that the system discriminates against the “poor,” appellees have made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level. Indeed, there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts. A recent and exhaustive study of school districts in Connecticut concluded that “[i]t is clearly incorrect . . . to contend that the ‘poor’ live in ‘poor’ districts . . . Thus, the major factual assumption that the educational financing system discriminates against the ‘poor’ - is simply false in Connecticut.” Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 *Yale L.J.* 1303, 1328-1329 (1972).

Second, neither appellees nor the District Court addressed the fact that lack of personal resources has not occasioned an absolute deprivation of the desired benefit. The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it, a sufficient answer to appellees' argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages. Nor, indeed, in view of the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense.

For these two reasons—the absence of any evidence that the financing system discriminates against any definable category of “poor” people or that it results in the absolute deprivation of education- the disadvantaged class is not susceptible of identification in traditional terms.

[It] is clear that appellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or

subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

We thus conclude that the Texas system does not operate to the peculiar disadvantage of any suspect class. But in recognition of the fact that this Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny, appellees have not relied solely on this contention. They also assert that the State's system impermissibly interferes with the exercise of a "fundamental" right and that accordingly the prior decisions of this Court require the application of the strict standard of judicial review. *Graham v. Richardson*, 403 U.S. 365, 375-376 (1971); *Kramer v. Union School District*, 395 U.S. 621 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969). It is this question—whether education is a fundamental right, in the sense that it is among the rights and liberties protected by the Constitution—which has so consumed the attention of courts and commentators in recent years.

B

In *Brown v. Board of Education*, 347 U.S. 483 (1954), a unanimous Court recognized that "education is perhaps the most important function of state and local governments." *Id.*, at 493. What was said there in the context of racial discrimination has lost none of its vitality with the passage of time:

"Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Ibid.*

This theme, expressing an abiding respect for the vital role of education in a free society, may be found in numerous opinions of Justices of this Court writing both before and after *Brown* was decided. Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that "the grave significance of education both to the individual and to our society" cannot be doubted. But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. Mr. Justice Harlan, dissenting from the Court's application of strict scrutiny to a law impinging upon the right of interstate travel, admonished that "[v]irtually every state statute affects important rights." *Shapiro v. Thompson*, 394 U.S., at 655, 661. In his view, if the degree of

judicial scrutiny of state legislation fluctuated depending on a majority's view of the importance of the interest affected, we would have gone "far toward making this Court a 'super-legislature.'" Ibid. We would, indeed, then be assuming a legislative role and one for which the Court lacks both authority and competence.

The lesson of these cases in addressing the question now before the Court is plain. It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation. It is appellees' contention, however, that education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The "marketplace of ideas" is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.

We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditure in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no

basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

Furthermore, the logical limitations on appellees' nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment.

We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive.

It should be clear, for the reasons stated above and in accord with the prior decisions of this Court, that this is not a case in which the challenged state action must be subjected to the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights.

We need not rest our decision, however, solely on the inappropriateness of the strict-scrutiny test. A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes. This case represents far more than a challenge to the manner in which Texas provides for the education of its children. We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues. We are asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures. This Court has often admonished against such interferences with the State's fiscal policies under the Equal Protection Clause.

Thus, we stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. Yet, we are urged to direct the States either to alter drastically the present system or to throw out the property tax altogether in favor of some other form of taxation. No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.

It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny. While "[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action," it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.

The foregoing considerations buttress our conclusion that Texas' system of public school finance is an inappropriate candidate for strict judicial scrutiny. These same considerations are relevant to the determination whether that system, with its conceded imperfections, nevertheless bears some rational relationship to a legitimate state purpose. It is to this question that we next turn our attention.

III

While it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others, the existence of "some inequality" in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system. It may not be condemned simply because it imperfectly effectuates the State's goals. Nor must the financing system fail because, as appellees suggest, other methods of satisfying the State's interest, which occasion "less drastic" disparities in expenditures, might be conceived. Only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative. It is also well to remember that even those districts that have reduced ability to make free decisions with respect to how much they spend on education still retain under the present system a large measure of authority as to how available funds will be allocated. They further enjoy the power to make numerous other decisions with respect to the operation of the schools. The people of Texas may be justified in believing that other systems of school financing, which place more of the financial responsibility in the hands of the State, will result in a comparable lessening of desired local autonomy. That is, they may believe that along with increased control of the purse strings at the state level will go increased control over local policies.

Appellees further urge that the Texas system is unconstitutionally arbitrary because it allows the availability of local taxable resources to turn on "happenstance." They see no justification for a system that allows, as they contend, the quality of education to fluctuate on the basis of the fortuitous positioning of the boundary lines of political subdivisions and the location of valuable commercial and industrial property. But any scheme of local taxation—indeed the very existence of identifiable local governmental units—requires the establishment of

jurisdictional boundaries that are inevitably arbitrary. It is equally inevitable that some localities are going to be blessed with more taxable assets than others. Nor is local wealth a static quantity. Changes in the level of taxable wealth within any district may result from any number of events, some of which local residents can and do influence. For instance, commercial and industrial enterprises may be encouraged to locate within a district by various actions—public and private.

Moreover, if local taxation for local expenditures were an unconstitutional method of providing for education then it might be an equally impermissible means of providing other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds. We perceive no justification for such a severe denigration of local property taxation and control as would follow from appellees' contentions. It has simply never been within the constitutional prerogative of this Court to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live.

In sum, to the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory. One also must remember that the system here challenged is not peculiar to Texas or to any other State. In its essential characteristics, the Texas plan for financing public education reflects what many educators for a half century have thought was an enlightened approach to a problem for which there is no perfect solution. We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States, especially where the alternatives proposed are only recently conceived and nowhere yet tested. The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. *McGinnis v. Royster*, 410 U.S. 263, 270 (1973). We hold that the Texas plan abundantly satisfies this standard.

Reversed.

Mr. Justice White, Mr. Justice Douglas Mr. Justice Brennan and Mr. Justice Marshall dissent

**ALLEGHENY PITTSBURGH COAL CO. v. COUNTY COMMISSION OF WEBSTER
COUNTY, WEST VIRGINIA
488 U.S. 336 (1989)**

Chief Justice Rehnquist delivered the opinion of the Court.

The West Virginia Constitution guarantees to its citizens that, with certain exceptions, “taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value” W. Va. Const., Art. X, §1. The Webster County tax assessor valued petitioners’ real property on the basis of its recent purchase price, but made only minor modifications in the assessments of land which had not been recently sold. This practice resulted in gross disparities in the assessed value of generally comparable property, and we hold that it denied petitioners the equal protection of the laws guaranteed to them by the Fourteenth Amendment.

Between 1975 and 1986, the tax assessor for Webster County, West Virginia, fixed yearly assessments for property within the County at 50% of appraised value. She fixed the appraised value at the declared consideration at which the property last sold. Some adjustments were made in the assessments of properties that had not been recently sold, although they amounted to, at most, 10% increases in 1976, 1981, and 1983 respectively.⁶³

In 1974, for example, Allegheny Pittsburgh Coal Company (Allegheny) purchased fee, surface, and mineral interests in certain properties for a stated price somewhat in excess of \$24 million, and during the tax years 1976 through 1983 its property was assessed annually at half of this figure. In 1982, Allegheny sold the property to East Kentucky Energy Corp. (Kentucky Energy) for a figure of nearly \$30 million, and the property thereafter was annually assessed at a valuation just below \$15 million. Oneida Coal Company and Shamrock Coal Company participated in similar transactions in Webster County, and the property they purchased or sold was assessed in a similar manner.

Each year, petitioners pursued relief before the County Commission of Webster County sitting as review board. They argued that the assessment policy of the Webster County assessor systematically resulted in appraisals for their property that were excessive compared to the appraised value of similar parcels that had not been recently conveyed. Each year the county commission affirmed the assessments, and each year petitioners appealed to the State Circuit Court. A group of these appeals from Allegheny and its successor in interest, Kentucky Energy,

⁶³ Petitioners contend that the adjustments to the assessments for property not recently transferred were uneven at best. According to petitioners, a study of the assessed value of all coal tracts in Webster County from 1983 to 1984 was introduced at trial and demonstrated that the assessment of 35% of the tracts was unchanged during that period. The courts below do not appear to have made specific factual findings accepting or rejecting this study or petitioners’ conclusions drawn from it. For the purposes of argument, we will accept the county’s figures since we find that, even accepting those figures, the adjustments do not dispel the constitutional flaw in the assessment system.

were consolidated by the West Virginia Circuit Court and finally decided in 1985. App. to Pet. for Cert. in No. 87-1303, p. 15a. Another group of appeals from Shamrock and Oneida were consolidated and decided by the West Virginia Circuit Court early the next year. App. to Pet. for Cert. in No. 87-1310, p. 49a.⁶⁴

The judge in both of these cases concluded that the system of real property assessment used by the Webster County assessor systematically and intentionally discriminated against Petitioners in violation of the West Virginia Constitution and the Fourteenth Amendment's Equal Protection Clause. He ordered the county commission to reduce the assessments on petitioner's property to the levels recommended by the state tax commissioner in his valuation guidelines published for use by local assessors. Underlying the judge's conclusions were findings that petitioners' tax assessments over the years were dramatically in excess of those for comparable property in the county. He found that "the assessor did not compare the various features of the real estate to which the high assessment was applied with the various features of land assessed at a much lower rate." App. to Pet. for Cert. in No. 87-1303, p. 29a; App. to Pet. for Cert. in No. 87-1310, p. 59a. "The questioned assessments were not based upon the presence of economically mineable or removable coal, oil, gas or harvestable timber in or upon petitioners' real estate, as compared to an absence of the same in or upon [neighboring] properties." Ibid. Rather, "the sole basis of the assessment of petitioners' real estate was, according to the assessor, the consideration declared in petitioners' deeds." Ibid.⁶⁵

⁶⁴ After each of these primary decisions adjudicating the validity of the assessments to the lands in question, petitioners obtained a number of other orders applying the findings in the primary decisions to their specific cases and to other appeals not consolidated in the primary decisions. See App. to Pet. for Cert. in No. 87-1310, pp. 79a, 83a, and 86a.

⁶⁵ Respondents argue in this Court that petitioners' land was not truly comparable to that of the surrounding properties. They point to the fact that one of the parcels held by Allegheny, and then by Kentucky Energy, comprising 4,287 acres, allegedly contains 32 million tons of low-sulfur coal recoverable by strip mining. This unusually valuable parcel skews the average value of all the properties, as well as serving as a basis for higher valuation of this parcel than those surrounding it.

Petitioners make a number of answers: First, they rely on respondent's stipulations that "the properties surrounding the property owned by . . . Petitioner, . . . are comparable properties in that they are substantially the same geologically as the properties of the Petitioner. . . ." Record 1319-1320, 1085. Next, they point to the factual findings of the West Virginia Circuit Court, never rejected by the West Virginia Supreme Court of Appeals, that "although the real estate of each of these petitioners is not identical to that of all other real estate in Webster County, it appears that petitioners' real estate is substantially similar to the real estate of the others in topography, location, access, development, mineral content and forestation, and that the petitioners' real estate is substantially similar to adjacent and contiguous tracts and parcels of real estate owned by others." App. to Pet. for Cert. in No. 87-1303, p. 16a; App. to Pet. for Cert. in No. 87-1310, p. 50a. Finally, they note that the court's finding were founded on the testimony of Kentucky Energy's expert witness, the one who testified to the estimated 32 million tons of Kentucky Energy's land, that the surrounding properties were equally promising. On direct examination he said:

This approach systematically produced dramatic differences in valuation between petitioners' recently transferred property and otherwise comparable surrounding land. For the years 1976 through 1982, Allegheny was assessed and taxed at approximately 35 times the rate applied to owners of comparable properties. After purchasing that land, Kentucky Energy was assessed and taxed at approximately 33 times the rate of similar parcels. From 1981 through 1985, the county assessed and taxed the Shamrock-Oneida property at roughly 8 to 20 times that of comparable neighboring coal tracts. These disparities existed notwithstanding the adjustments made to the assessments of land not recently conveyed. In the case of the property held by Allegheny and Kentucky Energy, the county's adjustment policy would have required more than 500 years to equalize the assessments.

On appeal, the Supreme Court of Appeals of West Virginia reversed. It found that the record did not support the trial court's ruling that the actions of the assessor and board of review constituted "intentional and systematic" discrimination. It held that "assessments based upon the price paid for the property in arm's length transactions are an appropriate measure of the true and actual value' of . . . property." *In re 1975 Tax Assessments against Oneida Coal Co.*, 178 W. Va. 485, 360 S. E. 2d 560, 564 (1987). That other properties might be undervalued relative to petitioners' did not require that petitioners' assessments be reduced: "Instead, they should seek to have the assessments of other taxpayers raised to market value." *Id.*, at ___, 360 S. E. 2d, at 565 (quoting *Killen v. Logan County Comm'n*, 170 W. Va. 602, 295 S. E. 2d 689, 709 (1982)). We granted certiorari to decide whether these Webster County tax assessments denied petitioners the equal protection of the law and, if so, whether petitioners could constitutionally be limited to the remedy of seeking to raise the assessments of others. 485 U.S. 976 (1988).

We agree with the import of the opinion of the Supreme Court of Appeals of West Virginia that petitioners have no constitutional complaint simply because their property is assessed for real property tax purposes at a figure equal to 50% of the price paid for it at a recent arm's-length transaction. But their complaint is a comparative one: while their property is assessed at 50% of what is roughly its current value, neighboring comparable property which has

"As far as comparing this area with the surrounding property, geologically, these same seams are present on all the other properties [suggested as comparable]. The same coal seams are present there. . . . The coal is there and I know that the chances of them being mineable are just as good there as they are on the [Kentucky Energy] properties.

". . . There may be some variations, depending on which individual seam is mineable from one property to the other, but in the long run they are similar properties located within the same area and there is no geological reason that they should not be comparable." Brief in Opposition in No. 87-1303, p. 10a-11a.

We think that petitioners' submissions justify the conclusion on the record presented to us that their properties were, in aspects relevant to valuation and assessment, comparable to surrounding property valued and assessed at markedly lower amounts.

not been recently sold is assessed at only a minor fraction of that figure. We do not understand the West Virginia Supreme Court of Appeals to have disputed this fact. We read its opinion as saying that even if there is a constitutional violation on these facts, the only remedy available to petitioners was an effort to have the assessments on the neighboring properties raised by an appropriate amount. We hold that the assessments on petitioners' property in this case violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and that petitioners may not be remitted to the remedy specified by the Supreme Court of Appeals of West Virginia.

The county argues that its assessment scheme is rationally related to its purpose of assessing properties at true current value: when available, it makes use of exceedingly accurate information about the market value of a property—the price at which it was recently purchased. As those data grow stale, it periodically adjusts the assessment based on some perception of the general change in area property values. We do not intend to cast doubt upon the theoretical basis of such a scheme. That two methods are used to assess property in the same class is, without more, of no constitutional moment. The Equal Protection Clause “applies only to taxation which in fact bears unequally on persons or property of the same class.” *Charleston Fed. Savings & Loan Assn. v. Alderson*, 324 U.S. 182, 190 (1945) (collecting cases). The use of a general adjustment as a transitional substitute for an individual reappraisal violates no constitutional command. As long as general adjustments are accurate enough over a short period of time to equalize the differences in proportion between the assessments of a class of property holders, the Equal Protection Clause is satisfied. Just as that Clause tolerates occasional errors of state law or mistakes in judgment when valuing property for tax purposes, see *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 353 (1918); *Coulter v. Louisville & Nashville R. Co.*, 196 U.S. 599 (1905), it does not require immediate general adjustment on the basis of the latest market developments. In each case, the constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners. *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526-527 (1959), and cases there cited; cf. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) (noting, in the ratemaking context, that “it is not theory, but the impact . . . that counts”).

But the present action is not an example of transitional delay in adjustment of assessed value resulting in inequalities in assessments of comparable property. Petitioners' property has been assessed at roughly 8 to 35 times more than comparable neighboring property, and these discrepancies have continued for more than 10 years with little change. The county's adjustments to the assessments of property not recently sold are too small to seasonably dissipate the remaining disparity between these assessments and the assessments based on a recent purchase price.

The States, of course, have broad powers to impose and collect taxes. A State may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable. *Allied Stores*, *supra*, at 526-527 (“The State may

impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products”). It might, for example, decide to tax property held by corporations, including petitioners, at a different rate than property held by individuals. See *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973) (Illinois ad valorem tax on personality of corporations). In each case, “if the selection or classification is neither capricious or arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.” *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 573 (1910).⁶⁶

But West Virginia has not drawn such a distinction. Its Constitution and laws provide that all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State according to its estimated market value. There is no suggestion in the opinion of the Supreme Court of West Virginia, or from any other authoritative source, that the State may have adopted a different system in practice from that specified by statute; we have held that such a system may be valid so long as the implicit policy is applied evenhandedly to all similarly situated property within the State. *Nashville C. & S. L. R. Co. v. Browning*, 310 U.S. 362, 368-369 (1940). We are not advised of any West Virginia statute or practice which authorizes individual counties of the State to fashion their own substantive assessment policies independently of state statute. See *Salsburg v. Maryland*, 346 U.S. 545 (1954). The Webster County assessor has, apparently on her own initiative, applied the tax laws of West Virginia in the manner heretofore described, with the resulting disparity in assessed value of similar property. Indeed, her practice seems contrary to that of the guide published by the West Virginia Tax Commission as an aid to local assessors in the assessment of real property.

“Intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property.” *Sunday Lake Iron Co.*, *supra*, at 352-353; *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445-446 (1923); *Cumberland Coal Co. v. Board of Revision of Tax Assessments in Greene County, Pa.*, 284 U.S. 23, 28-29 (1931). “The equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.” *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946). We have no doubt that petitioners have suffered from such “intentional systematic undervaluation by state officials” of comparable property in Webster County. Viewed in

⁶⁶ We need not and do not decide today whether the Webster County assessment method would stand on a different footing if it were the law of a State, generally applied, instead of the aberrational enforcement policy it appears to be. The State of California has adopted a similar policy as Article XIII A of its Constitution, popularly known as “Proposition 13.” Proposition 13 generally provides that property will be assessed at its 1975-1976 value, and reassessed only when transferred or constructed upon, or in a limited manner for inflation. Cal. Const., Art. XIII A, §2 (limiting inflation adjustments to 2% per year). The system is grounded on the belief that taxes should be based on the original cost of property and should not tax unrealized paper gains in the value of the property.

isolation, the assessments for petitioners' property may fully comply with West Virginia law. But the fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings. The relative undervaluation of comparable property in Webster County over time therefore denies petitioners the equal protection of the law.

A taxpayer in this situation may not be remitted by the State to the remedy of seeking to have the assessments of the undervalued property raised. "The [Equal Protection Clause] is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class." *Hillsborough*, supra, at 623, citing *Sioux City Bridge Co.*, supra, 445-447; *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931); *Cumberland Coal Co.*, supra, at 28-29. The judgment of the Supreme Court of Appeals of West Virginia is accordingly reversed, and the case is remanded for further proceedings not inconsistent with this opinion. It is so ordered.

NORDLINGER v. HAHN
505 U.S. 1 (1992)

Blackmun, J., delivered the opinion of the Court, in which Rehnquist, C. J., and White, O'Connor, Scalia, Kennedy, and Souter, JJ., joined, and in which Thomas, J., joined as to Part II-A. Thomas, J., filed an opinion concurring in part and concurring in the judgment. Stevens, J., filed a dissenting opinion.

In 1978, California voters staged what has been described as a property tax revolt by approving a statewide ballot initiative known as Proposition 13. The adoption of Proposition 13 served to amend the California Constitution to impose strict limits on the rate at which real property is taxed and on the rate at which real property assessments are increased from year to year. In this litigation, we consider a challenge under the Equal Protection Clause of the Fourteenth Amendment to the manner in which real property now is assessed under the California Constitution.

I

A

Proposition 13 followed many years of rapidly rising real property taxes in California. From fiscal years 1967-1968 to 1971-1972, revenues from these taxes increased on an average of 11.5 percent per year. See Report of the Senate Commission on Property Tax Equity and Revenue to the California State Senate 23 (1991). In response, the California Legislature enacted several property tax relief measures, including a cap on tax rates in 1972. *Id.*, at 23-24. The boom in the State's real estate market persevered, however, and the median price of an existing home doubled from \$31,530 in 1973 to \$62,430 in 1977. As a result, tax levies continued to rise because of sharply increasing assessment values. *Id.*, at 23. Some homeowners saw their tax bills double or triple during this period, well outpacing any growth in their income and ability to pay. *Id.*, at 25. See also Oakland, Proposition 13—Genesis and Consequences, 32 *Nat. Tax J.* 387, 392 (Supp. June 1979).

By 1978, property tax relief had emerged as a major political issue in California. In only one month's time, tax relief advocates collected over 1.2 million signatures to qualify Proposition 13 for the June 1978 ballot. See Lefcoe & Allison, *The Legal Aspects of Proposition 13: The Amador Valley Case*, 53 *S. Cal. L. Rev.* 173, 174 (1978). On election day, Proposition 13 received a favorable vote of 64.8 percent and carried 55 of the State's 58 counties. California Secretary of State, *Statement of Vote and Supplement, Primary Election, June 6, 1978*, p. 39. California thus had a novel constitutional amendment that led to a property tax cut of approximately \$7 billion in the first year. *Senate Commission Report*, at 28. A California homeowner with a \$50,000 home enjoyed an immediate reduction of about \$750 per year in property taxes. *Id.*, at 26.

As enacted by Proposition 13, Article XIII A of the California Constitution caps real property taxes at 1% of a property's "full cash value." §1(a). "Full cash value" is defined as the assessed valuation as of the 1975-1976 tax year or, "thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment." §2(a). The assessment "may reflect from year to year the inflationary rate not to exceed 2 percent for any given year." §2(b).

Article XIII A also contains several exemptions from this reassessment provision. One exemption authorizes the legislature to allow homeowners over the age of 55 who sell their principal residences to carry their previous base-year assessments with them to replacement residences of equal or lesser value. §2(a). A second exemption applies to transfers of a principal residence (and up to \$1 million of other real property) between parents and children. §2(h).

In short, Article XIII A combines a 1% ceiling on the property tax rate with a 2% cap on annual increases in assessed valuations. The assessment limitation, however, is subject to the exception that new construction or a change of ownership triggers a reassessment up to current appraised value. Thus, the assessment provisions of Article XIII A essentially embody an "acquisition value" system of taxation rather than the more commonplace "current value" taxation. Real property is assessed at values related to the value of the property at the time it is acquired by the taxpayer rather than to the value it has in the current real estate market.

Over time, this acquisition-value system has created dramatic disparities in the taxes paid by persons owning similar pieces of property. Property values in California have inflated far in excess of the allowed 2% cap on increases in assessments for property that is not newly constructed or that has not changed hands. See Senate Commission Report, at 31-32. As a result, longer-term property owners pay lower property taxes reflecting historic property values, while newer owners pay higher property taxes reflecting more recent values. For that reason, Proposition 13 has been labeled by some as a "welcome stranger" system—the newcomer to an established community is "welcome" in anticipation that he will contribute a larger percentage of support for local government than his settled neighbor who owns a comparable home. Indeed, in dollar terms, the differences in tax burdens are staggering. By 1989, the 44% of California home owners who have owned their homes since enactment of Proposition 13 in 1978 shouldered only 25% of the more than \$4 billion in residential property taxes paid by homeowners statewide. *Id.*, at 33. If property values continue to rise more than the annual 2% inflationary cap, this disparity will continue to grow.

B

According to her amended complaint, petitioner Stephanie Nordlinger in November 1988 purchased a house in the Baldwin Hills neighborhood of Los Angeles County for \$170,000. App. 5. The prior owners bought the home just two years before for \$121,500. *Id.*, at 6. Before her purchase, petitioner had lived in a rented apartment in Los Angeles and had not owned any real property in California. *Id.*, at 5; Tr. of Oral Arg. 12.

In early 1989, petitioner received a notice from the Los Angeles County Tax Assessor, who is a respondent here, informing her that her home had been reassessed upward to \$170,100 on account of its change in ownership. App. 7. She learned that the reassessment resulted in a property tax increase of \$453.60, up 36% to \$1,701, for the 1988-1989 fiscal year. Ibid.

Petitioner later discovered she was paying about five times more in taxes than some of her neighbors who owned comparable homes since 1975 within the same residential development. For example, one block away, a house of identical size on a lot slightly larger than petitioner's was subject to a general tax levy of only \$358.20 (based on an assessed valuation of \$35,820, which reflected the home's value in 1975 plus the up-to-2% per year inflation factor). Id., at 9-10. According to petitioner, her total property taxes over the first 10 years in her home will approach \$19,000, while any neighbor who bought a comparable home in 1975 stands to pay just \$4,100. Brief for Petitioner 3. The general tax levied against her modest home is only a few dollars short of that paid by a pre-1976 owner of a \$2.1 million Malibu beachfront home. App. 24.

After exhausting administrative remedies, petitioner brought suit against respondents in Los Angeles County Superior Court. She sought a tax refund and a declaration that her tax was unconstitutional. In her amended complaint, she alleged: "Article XIII A has created an arbitrary system which assigns disparate real property tax burdens on owners of generally comparable and similarly situated properties without regard to the use of the real property taxed, the burden the property places on government, the actual value of the property or the financial capability of the property owner." Id., at 12. Respondents demurred. Id., at 14. By minute order, the Superior Court sustained the demurrer and dismissed the complaint without leave to amend. App. to Pet. for Cert. D2.

The California Court of Appeal affirmed. *Nordlinger v. Lynch*, 225 Cal.App.3d 1259, 275 Cal. Rptr. 684 (1990). It noted that the Supreme Court of California already had rejected a constitutional challenge to the disparities in taxation resulting from Article XIII A. See *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal.3d 208, 583 P.2d 1281 (1978). Characterizing Article XIII A as an "acquisition value" system, the Court of Appeal found it survived equal protection review, because it was supported by at least two rational bases: first, it prevented property taxes from reflecting unduly inflated and unforeseen current values, and, second, it allowed property owners to estimate future liability with substantial certainty. 225 Cal.App.3d, at 1273, 275 Cal. Rptr., at 691-692 (citing *Amador*, 22 Cal.3d, at 235, 583 P.2d, at 1293).

The Court of Appeal also concluded that this Court's more recent decision in *Allegheny Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336 (1989), did not warrant a different result. At issue in *Allegheny Pittsburgh* was the practice of a West Virginia county tax assessor of assessing recently purchased property on the basis of its purchase price, while making only minor modifications in the assessments of property that had not recently been sold. Properties

that had been sold recently were reassessed and taxed at values between 8 and 35 times that of properties that had not been sold. *Id.*, at 341. This Court determined that the unequal assessment practice violated the Equal Protection Clause.

The Court of Appeal distinguished Allegheny Pittsburgh on grounds that “California has opted for an assessment method based on each individual owner’s acquisition cost,” while, “in marked contrast, the West Virginia Constitution requires property to be taxed at a uniform rate statewide according to its estimated current market value” (emphasis in original). 225 Cal.App.3d, at 1277-1278, 275 Cal. Rptr., at 695. Thus, the Court of Appeal found: “Allegheny does not prohibit the states from adopting an acquisition value assessment method. That decision merely prohibits the arbitrary enforcement of a current value assessment method” (emphasis omitted). *Id.*, at 1265, 275 Cal. Rptr., at 686.

The Court of Appeal also rejected petitioner’s argument that the effect of Article XIII A on the constitutional right to travel warranted heightened equal protection review. The court determined that the right to travel was not infringed, because Article XIII A “bases each property owner’s assessment on acquisition value, irrespective of the owner’s status as a California resident or the owner’s length of residence in the state.” *Id.*, at 1281, 275 Cal. Rptr., at 697. Any benefit to longtime California residents was deemed “incidental” to an acquisition-value approach. Finally, the Court of Appeal found its conclusion was unchanged by the exemptions in Article XIII A. *Ibid.*, 275 Cal. Rptr., at 697.

The Supreme Court of California denied review. App. to Pet. for Cert. B1. We granted certiorari. ___ U.S. ___ (1991).

II

The Equal Protection Clause of the Fourteenth Amendment, §1, commands that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decision-makers from treating differently persons who are in all relevant respects alike. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

As a general rule, “legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.” *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961). Accordingly, this Court’s cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest. See, e.g., *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-441 (1985); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

B

The appropriate standard of review is whether the difference in treatment between newer and older owners rationally furthers a legitimate state interest. In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, see *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 174, 179 (1980), the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision-maker, see *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981), and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational, see *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S., at 446. This standard is especially deferential in the context of classifications made by complex tax laws. “In structuring internal taxation schemes the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.” *Williams v. Vermont*, 472 U.S. 14, 22 (1985), quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973). See also *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 547 (1983) (“Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes”).

As between newer and older owners, Article XIII A does not discriminate with respect to either the tax rate or the annual rate of adjustment in assessments. Newer and older owners alike benefit in both the short and long run from the protections of a 1% tax rate ceiling and no more than a 2% increase in assessment value per year. New owners and old owners are treated differently with respect to one factor only—the basis on which their property is initially assessed. Petitioner’s true complaint is that the State has denied her—a new owner—the benefit of the same assessment value that her neighbors—older owners—enjoy.

We have no difficulty in ascertaining at least two rational or reasonable considerations of difference or policy that justify denying petitioner the benefits of her neighbors’ lower assessments. First, the State has a legitimate interest in local neighborhood preservation, continuity, and stability. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The State therefore legitimately can decide to structure its tax system to discourage rapid turnover in ownership of homes and businesses, for example, in order to inhibit displacement of lower income families by the forces of gentrification or of established, “mom-and-pop” businesses by newer chain operations. By permitting older owners to pay progressively less in taxes than new owners of comparable property, the Article XIII A assessment scheme rationally furthers this interest.

Second, the State legitimately can conclude that a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner. The State may deny a new owner at the point of purchase the right to “lock in” to the same assessed value as is enjoyed by an existing owner of comparable property, because an existing owner rationally may be thought to have vested expectations in his property or home that are more deserving of protection than the anticipatory expectations of a new owner

at the point of purchase. A new owner has full information about the scope of future tax liability before acquiring the property, and if he thinks the future tax burden is too demanding, he can decide not to complete the purchase at all. By contrast, the existing owner, already saddled with his purchase, does not have the option of deciding not to buy his home if taxes become prohibitively high. To meet his tax obligations, he might be forced to sell his home or to divert his income away from the purchase of food, clothing, and other necessities. In short, the State may decide that it is worse to have owned and lost, than never to have owned at all.

This Court previously has acknowledged that classifications serving to protect legitimate expectation and reliance interests do not deny equal protection of the laws. “The protection of reasonable reliance interests is not only a legitimate governmental objective: it provides an exceedingly persuasive justification. . . .” (internal quotations omitted). *Heckler v. Mathews*, 465 U.S. 728, 746 (1984). For example, in *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988), the Court determined that a prohibition on user fees for bus service in “reorganized” school districts but not in “nonreorganized” school districts does not violate the Equal Protection Clause, because “the legislature could conceivably have believed that such a policy would serve the legitimate purpose of fulfilling the reasonable expectations of those residing in districts with free busing arrangements imposed by reorganization plans.” *Id.*, at 465. Similarly, in *United States Railroad Retirement Bd. v. Fritz*, *supra*, the Court determined that a denial of dual “windfall” retirement benefits to some railroad workers but not others did not violate the Equal Protection Clause, because “Congress could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed in the railroad industry had a greater equitable claim to those benefits than the members of appellee’s class who were no longer in railroad employment when they became eligible for dual benefits.” 449 U.S., at 178. Finally, in *New Orleans v. Dukes*, *supra*, the Court determined that an ordinance banning certain street-vendor operations, but grandfathering existing vendors who had been in operation for more than eight years, did not violate the Equal Protection Clause because the “city could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation.” 427 U.S., at 305.

Petitioner argues that Article XIII A cannot be distinguished from the tax assessment practice found to violate the Equal Protection Clause in *Allegheny Pittsburgh*. Like Article XIII A, the practice at issue in *Allegheny Pittsburgh* resulted in dramatic disparities in taxation of properties of comparable value. But an obvious and critical factual difference between this case and *Allegheny Pittsburgh* is the absence of any indication in *Allegheny Pittsburgh* that the policies underlying an acquisition-value taxation scheme could conceivably have been the purpose for the Webster County tax assessor’s unequal assessment scheme. In the first place, Webster County argued that “its assessment scheme is rationally related to its purpose of assessing properties at true current value” (emphasis added). *Id.*, at 488 U.S., at 343. Moreover, the West Virginia “Constitution and laws provide that all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State according to its estimated market value,”

and the Court found “no suggestion” that “the State may have adopted a different system in practice from that specified by statute.” *Id.*, at 345.

To be sure, the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification. *United States Railroad Retirement Bd. v. Fritz*, 449 U.S., at 179. See also *McDonald v. Board of Election Comm’rs of Chicago*, 394 U.S. 802, 809 (1969) (legitimate state purpose may be ascertained even when the legislative or administrative history is silent). Nevertheless, this Court’s review does require that a purpose may conceivably or “may reasonably have been the purpose and policy” of the relevant governmental decisionmaker. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528-529 (1959). See also *Schweiker v. Wilson*, 450 U.S. 221, 235 (1981) (classificatory scheme must “rationally advance a reasonable and identifiable governmental objective” (emphasis added)). *Allegheny Pittsburgh* was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme. By contrast, Article XIII A was enacted precisely to achieve the benefits of an acquisition-value system. *Allegheny Pittsburgh* is not controlling here.

III

Petitioner and amici argue with some appeal that Article XIII A frustrates the “American dream” of home ownership for many younger and poorer California families. They argue that Article XIII A places start-up businesses that depend on ownership of property at a severe disadvantage in competing with established businesses. They argue that Article XIII A dampens demand for and construction of new housing and buildings. And they argue that Article XIII A constricts local tax revenues at the expense of public education and vital services.

Time and again, however, this Court has made clear in the rational-basis context that the “Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted” (footnote omitted). *Vance v. Bradley*, 440 U.S. 93, 97 (1979). Certainly, California’s grand experiment appears to vest benefits in a broad, powerful, and entrenched segment of society, and, as the Court of Appeal surmised, ordinary democratic processes may be unlikely to prompt its reconsideration or repeal. See 225 Cal. App. 3d, at 1282, n.11, 275 Cal. Rptr., at 698, n. 11. Yet many wise and well-intentioned laws suffer from the same malady. Article XIII A is not palpably arbitrary, and we must decline petitioner’s request to upset the will of the people of California.

The judgment of the Court of Appeal is affirmed.

It is so ordered.

Justice Thomas, concurring in part and concurring in the judgment.

In *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336 (1989), this Court struck down an assessment method used in Webster County, West Virginia, that operated precisely the same way as the California scheme being challenged today. I agree with the Court that Proposition 13 is constitutional. But I also agree with Justice Stevens that *Allegheny Pittsburgh* cannot be distinguished, see post, at 5. To me *Allegheny Pittsburgh* represents a “needlessly intrusive judicial infringement on the State’s legislative powers,” *New Orleans v. Dukes*, 427 U.S. 297, 306 (1976) (per curiam).

Justice Stevens, dissenting.

During the two past decades, California property owners have enjoyed extraordinary prosperity. As the State’s population has mushroomed, so has the value of its real estate. Between 1976 and 1986 alone, the total assessed value of California property subject to property taxation increased tenfold.⁶⁷ Simply put, those who invested in California real estate in the 1970s are among the most fortunate capitalists in the world.

Proposition 13 has provided these successful investors with a tremendous windfall and, in doing so, has created severe inequities in California’s property tax scheme. These property owners (hereinafter “the Squires”) are guaranteed that, so long as they retain their property and do not improve it, their taxes will not increase more than 2% in any given year. As a direct result of this windfall for the Squires, later purchasers must pay far more than their fair share of property taxes.

The specific disparity that prompted petitioner to challenge the constitutionality of Proposition 13 is the fact that her annual property tax bill is almost 5 times as large as that of her neighbors who own comparable homes: While her neighbors’ 1989 taxes averaged less than \$400, petitioner was taxed \$1,700. App. 18-20. This disparity is not unusual under Proposition 13. Indeed, some homeowners pay 17 times as much in taxes as their neighbors with comparable property. See *id.*, at 76-77. For vacant land, the disparities may be as great as 500 to 1. App. to Pet. for Cert. A7. Moreover, as Proposition 13 controls the taxation of commercial property as well as residential property, the regime greatly favors the commercial enterprises of the Squires, placing new businesses at a substantial disadvantage.

As a result of Proposition 13, the Squires, who own 44% of the owner-occupied residences, paid only 25% of the total taxes collected from homeowners in 1989. Report of Senate Commission on Property Tax Equity and Revenue to the California State Senate 33

⁶⁷ Glennon, *Taxation and Equal Protection*, 58 *Geo. Wash. L. Rev.* 261, 270, n.49 (1990). “For the same period, [property values in] Hawaii rose approximately 450%; Washington, D.C. approximately 350%; and New York approximately 125%.” *Ibid.* (citing 2 U.S. Dept. of Commerce, Bureau of Census, *Taxable Property Values* 86-111, Table 12 (1987); 2 U.S. Dept. of Commerce, Bureau of Census, *Taxable Property Values and Assessment/Sales Price Ratios* 42, Table 2 (1977)).

(1991) (Commission Report). These disparities are aggravated by §2 of Proposition 13, which exempts from reappraisal a property owner's home and up to \$1 million of other real property when that property is transferred to a child of the owner. This exemption can be invoked repeatedly and indefinitely, allowing the Proposition 13 windfall to be passed from generation to generation. As the California Senate Commission on Property Tax Equity and Revenue observed:

“The inequity is clear. One young family buys a new home and is assessed at full market value. Another young family inherits its home, but pays taxes based on their parents' date of acquisition even though both homes are of identical value. Not only does this constitutional provision offend a policy of equal tax treatment for taxpayers in similar situations, it appears to favor the housing needs of children with homeowner-parents over children with non-homeowner-parents. With the repeal of the state's gift and inheritance tax in 1982, the rationale for this exemption is negligible.” Commission Report, at 9-10.

The Commission was too generous. To my mind, the rationale for such disparity is not merely “negligible,” it is nonexistent. Such a law establishes a privilege of a medieval character: Two families with equal needs and equal resources are treated differently solely because of their different heritage.

In my opinion, such disparate treatment of similarly situated taxpayers is arbitrary and unreasonable. Although the Court today recognizes these gross inequities, . . . , its analysis of the justification for those inequities consists largely of a restatement of the benefits that accrue to long-time property owners. That a law benefits those it benefits cannot be an adequate justification for severe inequalities such as those created by Proposition 13.

Just three Terms ago, this Court unanimously invalidated Webster County, West Virginia's assessment scheme under rational-basis scrutiny. Webster County employed a de facto Proposition 13 assessment system: The County assessed recently purchased property on the basis of its purchase price but made only occasional adjustments (averaging 3-4% per year) to the assessments of other properties. Just as in this case, “this approach systematically produced dramatic differences in valuation between . . . recently transferred property and otherwise comparable surrounding land.” *Allegheny Pittsburgh*, 488 U.S., at 341.

The “intentional systematic undervaluation,” *id.*, at 345, found constitutionally infirm in *Allegheny Pittsburgh* has been codified in California by Proposition 13. That the discrimination in *Allegheny Pittsburgh* was de facto and the discrimination in this case de jure makes little difference. “The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 352-353 (1918) (emphasis added). If anything, the inequality created by Proposition 13 is constitutionally

more problematic because it is the product of a state-wide policy rather than the result of an individual assessor's mal-administration.

Thus, if our unanimous holding in *Allegheny Pittsburgh* was sound—and I remain convinced that it was—it follows inexorably that Proposition 13, like Webster County's assessment scheme, violates the Equal Protection Clause. Indeed, in my opinion, state-wide discrimination is far more invidious than a local aberration that creates a tax dis-parity.

In my opinion, it is irrational to treat similarly situated persons differently on the basis of the date they joined the class of property owners. Until today, I would have thought this proposition far from controversial. In *Zobel v. Williams*, 457 U.S. 55 (1982), we ruled that Alaska's program of distributing cash dividends on the basis of the recipient's years of residency in the State violated the Equal Protection Clause.

Accordingly, I respectfully dissent.

DISCUSSION QUESTION:

At the 1993 election the California voters narrowly defeated Proposition 174, an initiative which would have provided \$2,600 school vouchers which families could apply towards the cost of private primary and secondary education for their children. What is the political connection between Proposition 13 and this effort to privatize education?

PART VI. SCOPE OF JUDICIAL REVIEW

“The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States...” CHIEF JUSTICE MARSHALL in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)

Session 17. Vested Rights

Central to the historic notion of the police power was the government’s interest in protecting public health, safety and morality. Legislative abatement of nuisances were among the earliest exercises of this power. Since the sixteenth century the power (and indeed the duty) of city officials to keep hogs off the street, and to suppress other nuisances has been recognized. The coming of Industrial Revolution expanded the definition of nuisance to include pollution controls; the advent of the Social Gospel legitimized its use to regulate alcohol, gambling and prostitution. Article I, section 10 of the U.S. Constitution prohibits states from impairing the obligation of contracts. Can then the legislature “bargain away its police power” and thereby be constitutionally constrained from changing its mind?

FLETCHER v. PECK 10 U.S. 87 (1810)

Marshall, C. J. delivered the opinion of the court as follows:

The suit was instituted on several covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Gunn and others, in the year 1795, from the state of Georgia, the contract for which was made in the form of a bill passed by the legislature of that state.

The first count in the declaration set forth a breach in the second covenant contained in the deed. The covenant is, “that the legislature of the state of Georgia, at the time of passing the act of sale aforesaid, had good right to sell and dispose of the same in manner pointed out by the said act.” The breach assigned is that the legislature had no power to sell.

The plea in bar sets forth the constitution of the state of Georgia, and avers that the lands sold by the defendant to the plaintiff, were within that state. It then sets forth the granting act, and avers the power of the legislature to sell and dispose of the premises as pointed out by the act.

That the legislature of Georgia, unless restrained by its own constitution, possesses the power of disposing of the unappropriated lands within its own limits, in such manner as its own judgment shall dictate, is a proposition not to be controverted. The only question, then, presented for the consideration of the court, is this, did the then constitution of the state of

Georgia prohibit the legislature to dispose of the lands, which were the subject of this contract, in the manner stipulated by the contract?

The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

In this case the court can perceive no such opposition. In the constitution of Georgia, adopted in the year 1789, the court can perceive no restriction on the legislative power, which inhibits the passage of the act of 1795. The court cannot say that, in passing that act, the legislature has transcended its powers, and violated the constitution.

The 3d covenant is, that all the title which the state of Georgia ever had in the premises had been legally conveyed to John Peck, the grantor. The 2d count assigns, in substance, as a breach of this covenant, that the original grantees from the state of Georgia promised and assured divers members of the legislature, then sitting in general assembly, that if the said members would assent to, and vote for, the passing of the act, and if the said bill should pass, such members should have a share of, and be interested in, all the lands purchased from the said state by virtue of such law. And that divers of the said members, to whom the said promises were made, were unduly influenced thereby, and, under such influence, did vote for the passing of the said bill; by reason whereof the said law was a nullity, &c. and so the title of the state of Georgia did not pass to the said Peck, &c.

The plea to this count, after protesting that the promises it alleges were not made, avers, that until after the purchase made from the original grantees by James Greenleaf, under whom the said Peck claims, neither the said James Greenleaf, nor the said Peck, nor any of the mesne vendors between the said Greenleaf and Peck, had any notice or knowledge that any such promises or assurances were made by the said original grantees, or either of them, to any of the members of the legislature of the state of Georgia.

That corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would, in any case, be competent, on proceedings instituted by the state itself, to vacate a contract thus formed, and to annul rights acquired, under that contract, by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular

inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

If the majority of the legislature be corrupted, it may well be doubted, whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned.

Whatever difficulties this subject might present, when viewed under aspects of which it may be susceptible, this court can perceive none in the particular pleadings now under consideration.

This is not a bill brought by the state of Georgia, to annul the contract, nor does it appear to the court, by this count, that the state of Georgia is dissatisfied with the sale that has been made. The case, as made out in the pleadings, is simply this. One individual who holds lands in the state of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns, as a breach, that some of the members of the legislature were induced to vote in favour of the law, which constituted the contract, by being promised an interest in it, and that therefore the act is a mere nullity.

This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent, in the extreme, upon a private contract, between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature.

The third count recites the undue means practiced on certain members of the legislature, as stated in the second count, and then alleges that, in consequence of these practices, and of other causes, a subsequent legislature passed an act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void, and asserting the title of the state to the lands it contained. The count proceeds to recite at large, this rescinding act, and concludes with averring that, by reason of this act, the title of the said Peck in the premises was constitutionally and legally impaired, and rendered null and void.

After protesting, as before, that no such promises were made as stated in this count, the defendant again pleads that himself and the first purchaser under the original grantees, and all intermediate holders of the property, were purchasers without notice.

The importance and the difficulty of the questions, presented by these pleadings, are deeply felt by the court.

The lands in controversy vested absolutely in James Gunn and others, the original grantees, by the conveyance of the governor, made in pursuance of an act of assembly to which the legislature was fully competent. Being thus in full possession of the legal estate, they, for a valuable consideration, conveyed portions of the land to those who were willing to purchase. If the original transaction was infected with fraud, these purchasers did not participate in it, and had no notice of it. They were innocent. Yet the legislature of Georgia has involved them in the fate of the first parties to the transaction, and, if the act be valid, has annihilated their rights also.

The legislature of Georgia was a party to this transaction; and for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power which must find its vindication in a train of reasoning not often heard in courts of justice.

But the real party, it is said, are the people, and when their agents are unfaithful, the acts of those agents cease to be obligatory.

It is, however, to be recollected that the people can act only by these agents, and that, while within the powers conferred on them, their acts must be considered as the acts of the people. If the agents be corrupt, others may be chosen, and, if their contracts be examinable, the common sentiment, as well as common usage of mankind, points out a mode by which this examination may be made, and their validity determined.

If the legislature of Georgia was not bound to submit its pretensions to those tribunals which are established for the security of property, and to decide on human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded.

If the legislature be its own judge in its own case, it would seem equitable that its decision should be regulated by those rules which would have regulated the decision of a judicial tribunal. The question was, in its nature, a question of title, and the tribunal which decided it was either acting in the character of a court of justice, and performing a duty usually assigned to a court, or it was exerting a mere act of power in which it was controlled only by its own will.

If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles, which, according to every legal test, are perfect, are acquired with that confidence which is

inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law, he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle be overturned.

A court of chancery, therefore, had a bill been brought to set aside the conveyance made to James Gunn and others, as being obtained by improper practices with the legislature, whatever might have been its decision as respected the original grantees, would have been bound, by its own rules, and by the clearest principles of equity, to leave unmolested those who were purchasers, without notice, for a valuable consideration.

If the legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its power alone, and the same power may divest any other individual of his lands, if it shall be the will of the legislature so to exert it.

It is not intended to speak with disrespect of the legislature of Georgia, or of its acts. Far from it. The question is a general question, and is treated as one. For although such powerful objections to a legislative grant, as are alleged against this, may not again exist, yet the principle, on which alone this rescinding act is to be supported, may be applied to every case to which it shall be the will of any legislature to apply it. The principle is this; that a legislature may, by its own act, divest the vested estate of any man whatever, for reasons which shall, by itself, be deemed sufficient.

In this case the legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, and which would have justified its abrogation so far as respected those to whom crime was imputable. But the grant, when issued, conveyed an estate in fee-simple to the grantee, clothed with all the solemnities which law can bestow. This estate was transferrable; and those who purchased parts of it were not stained by that guilt which infected the original transaction. Their case is not distinguishable from the ordinary case of purchasers of a legal estate without knowledge of any secret fraud which might have led to the emanation of the original grant. According to the well known course of equity, their rights could not be affected by such fraud. Their situation was the same, their title was the same, with that of every other member of the community who holds land by regular conveyances from the original patentee.

Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held?

The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.

When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation.

To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.

It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.

The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire; she is a member of the American union; and that union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass. The constitution of the United States declares that no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.

Does the case now under consideration come within this prohibitory section of the constitution?

In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract?

A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected.

If, under a fair construction the constitution, grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state.

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

STONE v. MISSISSIPPI
101 U.S. 814 (1879)

Mr. Chief Justice Waite delivered the opinion of the court.

It is now too late to contend that any contract which a State actually enters into when granting a charter to a private corporation is not within the protection of the clause in the Constitution of the United States that prohibits States from passing laws impairing the obligation of contracts. Art. 1, sect. 10. The doctrines of *Trustees of Dartmouth College v. Woodward* (4 Wheat. 518), announced by this court more than sixty years ago, have become so imbedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the Constitution itself. In this connection, however, it is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain. If there is no contract, there is nothing in the grant on which the Constitution can act. Consequently, the first inquiry in this class of cases always is, whether a contract has in fact been entered into, and if so, what its obligations are.

In the present case the question is whether the State of Mississippi, in its sovereign capacity, did by the charter now under consideration bind itself irrevocably by a contract to permit “the Mississippi Agricultural, Educational, and Manufacturing Aid Society,” for twenty-five years, “to receive subscriptions, and sell and dispose of certificates of subscription which shall entitle the holders thereof to” “any lands, books, paintings, antiques, scientific instruments or apparatus, or any other property or thing that may be ornamental, valuable, or useful,” “awarded to them” “by the casting of lots, or by lot, chance, or otherwise.” There can be no dispute but that under this form of words the legislature of the State chartered a lottery company, having all the powers incident to such a corporation, for twenty-five years, and that in consideration thereof the company paid into the State treasury \$5,000 for the use of a university, and agreed to pay, and until the commencement of this suit did pay, an annual tax of \$1,000 and “one-half of one per cent on the amount of receipts derived from the sale of certificates of tickets.” If the legislature that granted this charter had the power to bind the people of the State and all succeeding legislatures to allow the corporation to continue its corporate business during the whole term of its authorized existence, there is no doubt about the sufficiency of the language employed to effect that object, although there was an evident purpose to conceal the vice of the transaction by the phrases that were used. Whether the alleged contract exists, therefore, or not, depends on the authority of the legislature to bind the State and the people of the State in that way.

All agree that the legislature cannot bargain away the police power of a State. “Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police.” *Metropolitan Board of Excise v. Barrie*, 34 N.Y. 657; *Boyd v. Alabama*, 94 U.S. 645. Many

attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respect accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals. *Beer Company v. Massachusetts*, 97 id. 25; *Patterson v. Kentucky*, id. 501. Neither can it be denied that lotteries are proper subjects for the exercise of this power. We are aware that formerly, when the sources of public revenue were fewer than now, they were used in some or all of the States, and even in the District of Columbia, to raise money for the erection of public buildings, making public improvements, and not infrequently for educational and religious purposes; but this court said, more than thirty years ago, speaking through Mr. Justice Grier, in *Phalen v. Virginia* (8 How. 163, 168), that “experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; and it plunders the ignorant and simple.” Happily, under the influence of restrictive legislation, the evils are not so apparent now; but we very much fear that with the same opportunities of indulgence the same results would be manifested.

If lotteries are to be tolerated at all, it is no doubt better that they should be regulated by law, so that the people may be protected as far as possible against the inherent vices of the system; but that they are demoralizing in their effects, no matter how carefully regulated, cannot admit of a doubt. When the government is untrammelled by any claim of vested rights or chartered privileges, no one has ever supposed that lotteries could not lawfully be suppressed, and those who manage them punished severely as violators of the rules of social morality. From 1822 to 1867, without any constitutional requirement, they were prohibited by law in Mississippi, and those who conducted them punished as a kind of gambler. During the provisional government of that State, in 1867, at the close of the late civil war, the present act of incorporation, with more of like character, was passed. The next year, 1868, the people, in adopting a new constitution with a view to the resumption of their political rights as one of the United States, provided that “the legislature shall never authorize any lottery, nor shall the sale of lottery-tickets be allowed, nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold.” Art. 12, sect. 15. There is now scarcely a State in the Union where lotteries are tolerated, and Congress has enacted a special statute, the object of which is to close the mails against them. Rev. Stat., sect. 3894; 19 Stat. 90, sect. 2.

The question is therefore directly presented, whether, in view of these facts, the legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special

exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. *Beer Company v. Massachusetts*, *supra*.

In *Trustees of Dartmouth College v. Woodward* (4 Wheat. 518), it was argued that the contract clause of the Constitution, if given the effect contended for in respect to corporate franchises, “would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for the purpose of internal government, and which, to subserve those purposes, ought to vary with varying circumstances” (p. 628); but Mr. Chief Justice Marshall, when he announced the opinion of the court, was careful to say (p. 629), “that the framers of the Constitution did not intend to restrain States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed.” The present case, we think, comes within this limitation. We have held, not, however, without strong opposition at times, that this clause protected a corporation in its charter exemptions from taxation. While taxation is in general necessary for the support of government, it is not part of the government itself. Government was not organized for the purposes of taxation, but taxation may be necessary for the purposes of government. As such, taxation becomes an incident to the exercise of the legitimate functions of government, but nothing more. No government dependent on taxation for support can bargain away its whole power of taxation, for that would be substantially abdication. All that has been determined thus far is, that for a consideration it may, in the exercise of a reasonable discretion, and for the public good, surrender a part of its powers in this particular.

But the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must “vary with varying circumstances.” They may create corporations, and give them, so to speak, a limited citizenship; but as citizens, limited in their privileges, or otherwise, these creatures of the government creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality.

The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty. They are not, in the legal acceptation of the term, *mala in se*, but, as we have just seen, may properly be made *mala prohibita*. They are a species of gambling, and

wrong in their influences. They disturb the checks and balances of a well-ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, “by the casting of lots, or by lot, chance, or otherwise,” might be “awarded” to them from the accumulations of others. Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to further legislative and constitutional control or withdrawal.

On the whole, we find no error in the record.

Judgment affirmed.

HOME BUILDING & LOAN ASSOCIATION v. BLAISDELL
290 U.S. 398 (1934)

Judges: Hughes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Stone, Roberts, Cardozo

Mr. Chief Justice Hughes delivered the opinion of the Court.

Appellant contests the validity of Chapter 339 of the Laws of Minnesota of 1933, p. 514, approved April 18, 1933, called the Minnesota Mortgage Moratorium Law, as being repugnant to the contract clause (Art. I, §10) . . . The statute was sustained by the Supreme Court of Minnesota, 189 Minn. 422, 448; 249 N. W. 334, 893, and the case comes here on appeal.

The Act provides that, during the emergency declared to exist, relief may be had through authorized judicial proceedings with respect to foreclosures of mortgages, and execution sales, of real estate; that sales may be postponed and periods of redemption may be extended.

Invoking the relevant provision of the statute, appellees applied to the District Court of Hennepin County for an order extending the period of redemption from a foreclosure sale. Their petition stated that they owned a lot in Minneapolis which they had mortgaged to appellant; that the mortgage contained a valid power of sale by advertisement and that by reason of their default the mortgage had been foreclosed and sold to appellant on May 2, 1932, for \$3700.98; that appellant was the holder of the sheriff's certificate of sale; that because of the economic depression appellees had been unable to obtain a new loan or to redeem, and that unless the period of redemption were extended the property would be irretrievably lost; and that the reasonable value of the property greatly exceeded the amount due on the mortgage including all liens, costs and expenses.

On the hearing, appellant objected to the introduction of evidence upon the ground that the statute was invalid under the federal and state constitutions, and moved that the petition be dismissed.

The court entered its judgment extending the period of redemption to May 1, 1935, subject to the condition that the appellees should pay to the appellant \$40 a month through the extended period from May 2, 1933, that is, that in each of the months of August, September, and October, 1933, the payments should be \$80, in two installments, and thereafter \$40 a month, all these amounts to go to the payment of taxes, insurance, interest, and mortgage indebtedness. It is this judgment, sustained by the Supreme Court of the State on the authority of its former opinion, which is here under review. 189 Minn. 448; 249 N. W. 893.

The state court upheld the statute as an emergency measure. Although conceding that the obligations of the mortgage contract were impaired, the court decided that what it thus described as an impairment was, notwithstanding the contract clause of the Federal Constitution, within the

police power of the State as that power was called into exercise by the public economic emergency which the legislature had found to exist.

The statute does not impair the integrity of the mortgage indebtedness. The obligation for interest remains. The statute does not affect the validity of the sale or the right of a mortgagee-purchaser to title in fee, or his right to obtain a deficiency judgment, if the mortgagor fails to redeem within the prescribed period.

In determining whether the provision for this temporary and conditional relief exceeds the power of the State by reason of the clause in the Federal Constitution prohibiting impairment of the obligations of contracts, we must consider the relation of emergency to constitutional power, the historical setting of the contract clause, the development of the jurisprudence of this Court in the construction of that clause, and the principles of construction which we may consider to be established.

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.

In the construction of the contract clause, the debates in the Constitutional Convention are of little aid. But the reasons which led to the adoption of that clause, and of the other prohibitions of Section 10 of Article I, are not left in doubt and have frequently been described with eloquent emphasis. The widespread distress following the revolutionary period, and the plight of debtors, had called forth in the States an ignoble array of legislative schemes for the defeat of creditors and the invasion of contractual obligations. Legislative interferences had been so numerous and extreme that the confidence essential to prosperous trade had been undermined and the utter destruction of credit was threatened. "The sober people of America" were convinced that some "thorough reform" was needed which would "inspire a general prudence and industry, and give a regular course to the business of society." The Federalist, No. 44. It was necessary to interpose the restraining power of a central authority in order to secure the foundations even of "private faith." The occasion and general purpose of the contract clause are summed up in the terse statement of Chief Justice Marshall in *Ogden v. Saunders*, 12 Wheat. pp. 213, 354, 355:

"The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society,

and destroy all confidence between man and man. This mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government.”

But full recognition of the occasion and general purpose of the clause does not suffice to fix its precise scope. Nor does an examination of the details of prior legislation in the States yield criteria which can be considered controlling. To ascertain the scope of the constitutional prohibition we examine the course of judicial decisions in its application. These put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.

The inescapable problems of construction have been: What is a contract? What are the obligations of contracts? What constitutes impairment of these obligations? What residuum of power is there still in the States in relation to the operation of contracts, to protect the vital interests of the community? Questions of this character, “of no small nicety and intricacy, have vexed the legislative halls, as well as the judicial tribunals, with an uncounted variety and frequency of litigation and speculation.” Story on the Constitution, §1375.

The State continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end “has the result of modifying or abrogating contracts already in effect.” *Stephenson v. Binford*, 287 U.S. 251, 276. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.

The legislature cannot “bargain away the public health or the public morals.” Thus, the constitutional provision against the impairment of contracts was held not to be violated by an amendment of the state constitution which put an end to a lottery theretofore authorized by the legislature. *Stone v. Mississippi*, 101 U.S. 814, 819. See also, *Douglas v. Kentucky*, 168 U.S. 488, 497-499; compare *New Orleans v. Houston*, 119 U.S. 265, 275. The lottery was a valid enterprise when established under express state authority, but the legislature in the public interest could put a stop to it. A similar rule has been applied to the control by the State of the sale of intoxicating liquors. *Beer Co. v. Massachusetts*, 97 U.S. 25, 32, 33; see *Mugler v. Kansas*, 123 U.S. 623, 664, 665. The States retain adequate power to protect the public health against the maintenance of nuisances despite insistence upon existing contracts. *Fertilizing Co. v. Hyde*

Park, 97 U.S. 659, 667; *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 750. Legislation to protect the public safety comes within the same category of reserved power. *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U.S. 57, 70, 74; *Texas & N. O. R. Co. v. Miller*, 221 U.S. 408, 414; *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U.S. 548, 558.

The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts. In *Manigault v. Springs*, 199 U.S. 473, riparian owners in South Carolina had made a contract for a clear passage through a creek by the removal of existing obstructions. Later, the legislature of the State, by virtue of its broad authority to make public improvements, and in order to increase the taxable value of the lowlands which would be drained, authorized the construction of a dam across the creek. The Court sustained the statute upon the ground that the private interests were subservient to the public right. The Court said (*id.*, p. 480): "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 wealth, 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."

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a constitution we are expounding" (*McCulloch v. Maryland*, 4 Wheat. 316, 407)—"a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *Id.*, p. 415.

With a growing recognition of public needs and the relation of individual right to public security, the court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests.

We are of the opinion that the Minnesota statute as here applied does not violate the contract clause of the Federal Constitution. Whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned.

The judgment of the Supreme Court of Minnesota is affirmed.

Judgment affirmed.

Mr. Justice Sutherland, dissenting.

Few questions of greater moment than that just decided have been submitted for judicial inquiry during this generation. The effect of the Minnesota legislation, though serious enough in itself, is of trivial significance compared with the far more serious and dangerous inroads upon the limitations of the Constitution which are almost certain to ensue as a consequence naturally following any step beyond the boundaries fixed by that instrument. And those of us who are thus apprehensive of the effect of this decision would, in a matter so important, be neglectful of our duty should we fail to spread upon the permanent records of the court the reasons which move us to the opposite view.

A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time. If the contract impairment clause, when framed and adopted, meant that the terms of a contract for the payment of money could not be altered in invitum by a state statute enacted for the relief of hardly pressed debtors to the end and with the effect of postponing payment or enforcement during and because of an economic or financial emergency, it is but to state the obvious to say that it means the same now. This view, at once so rational in its application to the written word, and so necessary to the stability of constitutional principles, though from time to time challenged, has never, unless recently, been put within the realm of doubt by the decisions of this court.

Following the Revolution, and prior to the adoption of the Constitution, the American people found themselves in a greatly impoverished condition. Their commerce had been well-nigh annihilated. They were not only without luxuries, but in great degree were destitute of the ordinary comforts and necessities of life. In these circumstances they incurred indebtedness in the purchase of imported goods and otherwise, far beyond their capacity to pay. From this situation there arose a divided sentiment. On the one hand, an exact observance of public and private engagements was insistently urged. A violation of the faith of the nation or the pledges of the private individual, it was insisted, was equally forbidden by the principles of moral justice and of sound policy. Individual distress, it was urged, should be alleviated only by industry and frugality, not by relaxation of law or by a sacrifice of the rights of others. Indiscretion or imprudence was not to be relieved by legislation, but restrained by the conviction that a full compliance with contracts would be exacted. On the other hand, it was insisted that the case of the debtor should be viewed with tenderness; and efforts were constantly directed toward relieving him from an exact compliance with his contract. As a result of the latter view, state laws were passed suspending the collection of debts, remitting or suspending the collection of taxes, providing for the emission of paper money, delaying legal proceedings, etc. There followed, as there must always follow from such a course, a long trail of ills, one of the direct consequences being a loss of confidence in the government and in the good faith of the people. Bonds of men whose ability to pay their debts was unquestionable could not be negotiated except at a discount of thirty, forty, or fifty per cent. Real property could be sold only at a ruinous loss.

Debtors, instead of seeking to meet their obligations by painful effort, by industry and economy, began to rest their hopes entirely upon legislative interference. The impossibility of payment of public or private debts was widely asserted, and in some instances threats were made of suspending the administration of justice by violence. The circulation of depreciated currency became common. Resentment against lawyers and courts was freely manifested, and in many instances the course of the law was arrested and judges restrained from proceeding in the execution of their duty by popular and tumultuous assemblages. This state of things alarmed all thoughtful men, and led them to seek some effective remedy. Marshall, *Life of Washington* (1807), Vol. 5, pp. 88-131.

In the midst of this confused, gloomy, and seriously exigent condition of affairs, the Constitutional Convention of 1787 met at Philadelphia. The defects of the Articles of Confederation were so great as to be beyond all hope of amendment, and the Convention, acting in technical excess of its authority, proceeded to frame for submission to the people of the several states an entirely new Constitution.

If it be possible by resort to the testimony of history to put any question of constitutional intent beyond the domain of uncertainty, the foregoing leaves no reasonable ground upon which to base a denial that the clause of the Constitution now under consideration was meant to foreclose state action impairing the obligation of contracts primarily and especially in respect of such action aimed at giving relief to debtors in time of emergency.

The emergency was quite as serious as that which the country has faced during the past three years. Indeed, it was so great that in one instance, at least, a state repudiated a portion of its public debt, and others were strongly tempted to do so.

The present exigency is nothing new. From the beginning of our existence as a nation, periods of depression, of industrial failure, of financial distress, of unpaid and unpayable indebtedness, have alternated with years of plenty. The vital lesson that expenditure beyond income begets poverty, that public or private extravagance, financed by promises to pay, either must end in complete or partial repudiation or the promises be fulfilled by self-denial and painful effort, though constantly taught by bitter experience, seems never to be learned; and the attempt by legislative devices to shift the misfortune of the debtor to the shoulders of the creditor without coming into conflict with the contract impairment clause has been persistent and oft-repeated.

The defense of the Minnesota law is made upon grounds which were discountenanced by the makers of the Constitution and have many times been rejected by this court. That defense should not now succeed, because it constitutes an effort to overthrow the constitutional provision by an appeal to facts and circumstances identical with those which brought it into existence.

I am authorized to say that Mr. Justice Van DeVanter, Mr. Justice McReynolds and Mr. Justice Butler concur in this opinion.

UNITED STATES TRUST COMPANY OF NEW YORK v. NEW JERSEY
431 U.S. 1 (1976)

Mr. Justice Blackmun delivered the opinion of the Court.

This case presents a challenge to a New Jersey statute, 1974 N.J. Laws, c. 25, as violative of the Contract Clause of the United States Constitution. That statute, together with a concurrent and parallel New York statute, 1974 N. Y. Laws, c. 993, repealed a statutory covenant made by the two States in 1962 that had limited the ability of The Port Authority of New York and New Jersey to subsidize rail passenger transportation from revenues and reserves.

The suit, one for declaratory relief, was instituted by appellant United States Trust Company of New York in the Superior Court of New Jersey, Law Division, Bergen County. Named as defendants were the State of New Jersey, its Governor, and its Attorney General. Plaintiff-appellant sued as trustee for two series of Port Authority Consolidated Bonds, as a holder of Port Authority Consolidated Bonds, and on behalf of all holders of such bonds.

After a trial, the Superior Court ruled that the statutory repeal was a reasonable exercise of New Jersey's police power, and declared that it was not prohibited by the Contract Clause or by its counterpart in the New Jersey Constitution, Art. IV, §7, P3. Accordingly, appellant's complaint was dismissed. 134 N.J. Super. 124, 338 A. 2d 833 (1975). The Supreme Court of New Jersey, on direct appeal and by per curiam opinion, affirmed "substantially for the reasons set forth in the [trial court's] opinion." 69 N.J. 253, 256, 353 A. 2d 514, 515 (1976). We noted probable jurisdiction. 427 U.S. 903 (1976).

I

BACKGROUND

A. Establishment of the Port Authority.

The Port Authority was established in 1921 by a bistate compact to effectuate "a better co-ordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York." The compact, as the Constitution requires, Art. I, §10, cl. 3, received congressional consent. 42 Stat. 174.

The compact granted the Port Authority enumerated powers and, by its Art. III, "such other and additional powers as shall be conferred upon it by the Legislature of either State concurred in by the Legislature of the other, or by Act or Acts of Congress." The powers are enumerated in Art. VI. Among them is "full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within said district." "Transportation facility" is defined, in Art. XXII, to include "railroads, steam or electric, . . . for use for the transportation or carriage of persons or property."

The Port Authority was conceived as a financially independent entity, with funds primarily derived from private investors. The preamble to the compact speaks of the “encouragement of the investment of capital,” and the Port Authority was given power to mortgage its facilities and to pledge its revenues to secure the payment of bonds issued to private investors.

B. Initial Policy Regarding Mass Transit.

In 1927 the New Jersey Legislature, in an Act approved by the Governor, directed the Port Authority to make plans “supplementary to or amendatory of the comprehensive plan . . . as will provide adequate interstate and suburban transportation facilities for passengers.” 1927 Laws, c. 277. The New York Legislature followed suit in 1928, but its bill encountered executive veto. The trial court observed that this veto “to all intents and purposes ended any legislative effort to involve the Port Authority in an active role in commuter transit for the next 30 years.” 134 N.J. Super., at 149, 338 A. 2d, at 846.

C. Port Authority Fiscal Policy.

Four bridges for motor vehicles were constructed by the Port Authority. A separate series of revenue bonds was issued for each bridge. Revenue initially was below expectations, but the bridges ultimately accounted for much of the Port Authority’s financial strength. The legislatures transferred the operation and revenues of the successful Holland Tunnel to the Port Authority, and this more than made up for the early bridge deficits.

In 1952, the Port Authority abandoned the practice of earmarking specific facility revenues as security for bonds of that facility. The Port Authority’s Consolidated Bond Resolution established the present method of financing its activities; under this method its bonds are secured by a pledge of the general reserve fund.

D. Renewed Interest in Mass Transit.

Meanwhile, the two States struggled with the passenger transportation problem. Many studies were made. The situation was recognized as critical, great costs were envisioned, and substantial deficits were predicted for any mass transit operation. The Port Authority itself financed a study conducted by the Metropolitan Rapid Transit Commission which the States had established in 1954.

E. The 1962 Statutory Covenant.

In 1960 the takeover of the Hudson & Manhattan Railroad by the Port Authority was proposed. This was a privately owned interstate electric commuter system then linking Manhattan, Newark, and Hoboken through the Hudson tubes. It had been in reorganization for many years, and in 1959 the Bankruptcy Court and the United States District Court had approved a plan that left it with cash sufficient to continue operations for two years but with no funds for

capital expenditures. In re Hudson & Manhattan R. Co., 174 F. Supp. 148 (SDNY 1959), aff'd sub nom. Spitzer v. Stichman, 278 F. 2d 402 (CA2 1960).

A special committee of the New Jersey Senate was formed to determine whether the Port Authority was “fulfilling its statutory duties and obligations,” App. 605a. The committee concluded that the solution to bondholder concern was “[l]imiting by a constitutionally protected statutory covenant with Port Authority bondholders the extent to which the Port Authority revenues and reserves pledged to such bondholders can in the future be applied to the deficits of possible future Port Authority passenger railroad facilities beyond the original Hudson & Manhattan Railroad system.” *Id.*, at 656a. And the trial court found that the 1962 New Jersey Legislature “concluded it was necessary to place a limitation on mass transit deficit operations to be undertaken by the Authority in the future so as to promote continued investor confidence in the Authority.” 134 N.J. Super., at 178, 338 A. 2d, at 863-864.

The statutory covenant of 1962 was the result. The covenant itself was part of the bistate legislation authorizing the Port Authority to acquire, construct, and operate the Hudson & Manhattan Railroad and the World Trade Center. The statute in relevant part read:

“The 2 States covenant and agree with each other and with the holders of any affected bonds, as hereinafter defined, that so long as any of such bonds remain outstanding and unpaid and the holders thereof shall not have given their consent as provided in their contract with the port authority, (a) . . . and (b) neither the States nor the port authority nor any subsidiary corporation incorporated for any of the purposes of this act will apply any of the rentals, tolls, fares, fees, charges, revenues or reserves, which have been or shall be pledged in whole or in part as security for such bonds, for any railroad purposes whatsoever other than permitted purposes hereinafter set forth.” 1962 N.J. Laws, c. 8, §6; 1962 N.Y. Laws, c. 209, §6.

The “permitted purposes” were defined to include (i) the Hudson & Manhattan as then existing, (ii) railroad freight facilities, (iii) tracks and related facilities on Port Authority vehicular bridges, and (iv) a passenger railroad facility if the Port Authority certified that it was “self-supporting” or, if not, that at the end of the preceding calendar year the general reserve fund contained the prescribed statutory amount, and that all the Port Authority’s passenger revenues, including the Hudson & Manhattan, would not produce deficits in excess of “permitted deficits.”

The terms of the covenant were self-evident. Within its conditions the covenant permitted, and perhaps even contemplated, additional Port Authority involvement in deficit rail mass transit as its financial position strengthened, since the limitation of the covenant was linked to, and would expand with, the general reserve fund.

With the legislation embracing the covenant thus effective, the Port Authority on September 1, 1962, assumed the ownership and operating responsibilities of the Hudson & Manhattan through a wholly owned subsidiary, Port Authority Trans-Hudson Corporation (PATH). Funds necessary for this were realized by the successful sale of bonds to private investors accompanied by the certification required by §7 of the Consolidated Bond Resolution that the operation would not materially impair the credit standing of the Port Authority, the investment status of the Consolidated Bonds, or the ability of the Port Authority to fulfill its commitments to bondholders.

The PATH fare in 1962 was 30 cents and has remained at that figure despite recommendations for increase. App. 684a-686a. As a result of the continuation of the low fare, PATH deficits have far exceeded the initial projection. Thus, although the general reserve fund had grown to \$173 million by 1973, substantially increasing the level of permitted deficits to about \$17 million, the PATH deficit had grown to \$24.9 million. In accordance with a stipulation of the parties, *id.*, at 682a-683a, the trial court found that the PATH deficit so exceeded the covenant's level of permitted deficits that the Port Authority was unable to issue bonds for any new passenger railroad facility that was not self-supporting. 134 N.J. Super., at 163 n. 26, 338 A. 2d, at 855 n. 26.

F. Prospective Repeal of the Covenant.

Governor Cahill of New Jersey and Governor Rockefeller of New York in April 1970 jointly sought increased Port Authority participation in mass transit. In November 1972 they agreed upon a plan for expansion of the PATH system. This included the initiation of direct rail service to Kennedy Airport and the construction of a line to Plainfield, N.J., by way of Newark Airport. The plan anticipated a Port Authority investment of something less than \$300 million out of a projected total cost of \$650 million, with the difference to be supplied by federal and state grants. It also proposed to make the covenant inapplicable with respect to bonds issued after the legislation went into effect. This program was enacted, effective May 10, 1973, and the 1962 covenant was thereby rendered inapplicable, or in effect repealed, with respect to bonds issued subsequent to the effective date of the new legislation. 1972 N.J. Laws, c. 208; 1972 N.Y. Laws, c. 1003, as amended by 1973 N.Y. Laws, c. 318.

G. Retroactive Repeal of the Covenant.

It soon developed that the proposed PATH expansion would not take place as contemplated in the Governors' 1972 plan. New Jersey was unwilling to increase its financial commitment in response to a sharp increase in the projected cost of constructing the Plainfield extension.

In early 1974, when bills were pending in the two States' legislatures to repeal the covenant retroactively, a national energy crisis was developing. On November 27, 1973, Congress had enacted the Emergency Petroleum Allocation Act, 87 Stat. 627, as amended, 15

U.S.C. §751 et seq. (1970 ed., Supp. V). In that Act Congress found that the hardships caused by the oil shortage “jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare.” 87 Stat. 628, 15 U.S.C. §751 (a)(3). This time, proposals for retroactive repeal of the 1962 covenant were passed by the legislature and signed by the Governor of each State. 1974 N.J. Laws, c. 25; 1974 N.Y. Laws, c. 993.

II

At the time the Constitution was adopted, and for nearly a century thereafter, the Contract Clause was one of the few express limitations on state power. The many decisions of this Court involving the Contract Clause are evidence of its important place in our constitutional jurisprudence. Over the last century, however, the Fourteenth Amendment has assumed a far larger place in constitutional adjudication concerning the States. We feel that the present role of the Contract Clause is largely illuminated by two of this Court’s decisions. In each, legislation was sustained despite a claim that it had impaired the obligations of contracts.

Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398 (1934), is regarded as the leading case in the modern era of Contract Clause interpretation. At issue was the Minnesota Mortgage Moratorium Law, enacted in 1933, during the depth of the Depression and when that State was under severe economic stress, and appeared to have no effective alternative. The statute was a temporary measure that allowed judicial extension of the time for redemption; a mortgagor who remained in possession during the extension period was required to pay a reasonable income or rental value to the mortgagee. A closely divided Court, in an opinion by Mr. Chief Justice Hughes, observed that “emergency may furnish the occasion for the exercise of power” and that the “constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions.” *Id.*, at 426. It noted that the debates in the Constitutional Convention were of little aid in the construction of the Contract Clause, but that the general purpose of the Clause was clear: to encourage trade and credit by promoting confidence in the stability of contractual obligations. *Id.*, at 427-428. Nevertheless, a State “continues to possess authority to safeguard the vital interests of its people This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.” *Id.*, at 434-435. The great clauses of the Constitution are to be considered in the light of our whole experience, and not merely as they would be interpreted by its Framers in the conditions and with the outlook of their time. *Id.*, at 443.

We therefore must attempt to apply that constitutional provision to the instant case with due respect for its purpose and the prior decisions of this Court.

III

We first examine appellant's general claim that repeal of the 1962 covenant impaired the obligation of the States' contract with the bondholders. It long has been established that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties. *Fletcher v. Peck*, 6 Cranch 87, 137-139 (1810); *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819). Yet the Contract Clause does not prohibit the States from repealing or amending statutes generally, or from enacting legislation with retroactive effects. Thus, as a preliminary matter, appellant's claim requires a determination that the repeal has the effect of impairing a contractual obligation.

In this case the obligation was itself created by a statute, the 1962 legislative covenant. It is unnecessary, however, to dwell on the criteria for determining whether state legislation gives rise to a contractual obligation. The trial court found, 134 N.J. Super., at 183 n. 38, 338 A. 2d, at 866 n. 38, and appellees do not deny, that the 1962 covenant constituted a contract between the two States and the holders of the Consolidated Bonds issued between 1962 and the 1973 prospective repeal. The intent to make a contract is clear from the statutory language: "The 2 States covenant and agree with each other and with the holders of any affected bonds...." 1962 N.J. Laws, c. 8, §6; 1962 N. Y. Laws, c. 209, §6. Moreover, as the chronology set forth above reveals, the purpose of the covenant was to invoke the constitutional protection of the Contract Clause as security against repeal. In return for their promise, the States received the benefit they bargained for: public marketability of Port Authority bonds to finance construction of the World Trade Center and acquisition of the Hudson & Manhattan Railroad. We therefore have no doubt that the 1962 covenant has been properly characterized as a contractual obligation of the two States.

The parties sharply disagree about the value of the 1962 covenant to the bondholders. Appellant claims that after repeal the secondary market for affected bonds became "thin" and the price fell in relation to other formerly comparable bonds. This claim is supported by the trial court's finding that "immediately following repeal and for a number of months thereafter the market price for Port Authority bonds was adversely affected." 134 N.J. Super., at 180, 338 A. 2d, at 865. Appellees respond that the bonds nevertheless retained an "A" rating from the leading evaluating services and that after an initial adverse effect they regained a comparable price position in the market. Findings of the trial court support these claims as well. *Id.*, at 179-182, 338 A.2d, at 864-866. The fact is that no one can be sure precisely how much financial loss the bondholders suffered. Factors unrelated to repeal may have influenced price. In addition, the market may not have reacted fully, even as yet, to the covenant's repeal, because of the pending litigation and the possibility that the repeal would be nullified by the courts.

In any event, the question of valuation need not be resolved in the instant case because the State has made no effort to compensate the bondholders for any loss sustained by the repeal. As a security provision, the covenant was not superfluous; it limited the Port Authority's deficits

and thus protected the general reserve fund from depletion. Nor was the covenant merely modified or replaced by an arguably comparable security provision. Its outright repeal totally eliminated an important security provision and thus impaired the obligation of the States' contract. See *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 300 U.S. 124, 128-129 (1937).

The trial court recognized that there was an impairment in this case: "To the extent that the repeal of the covenant authorizes the Authority to assume greater deficits for such purposes, it permits a diminution of the pledged revenues and reserves and may be said to constitute an impairment of the states' contract with the bondholders." 134 N.J. Super., at 183, 338 A. 2d, at 866.

Having thus established that the repeal impaired a contractual obligation of the States, we turn to the question whether that impairment violated the Contract Clause.

IV

Although the Contract Clause appears literally to proscribe "any" impairment, this Court observed in *Blaisdell* that "the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula." 290 U.S., at 428. Thus, a finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution. In the instant case, as in *Blaisdell*, we must attempt to reconcile the strictures of the Contract Clause with the "essential attributes of sovereign power," *id.*, at 435, necessarily reserved by the States to safeguard the welfare of their citizens. *Id.*, at 434-440.

The trial court concluded that repeal of the 1962 covenant was a valid exercise of New Jersey's police power because repeal served important public interests in mass transportation, energy conservation, and environmental protection. 134 N.J. Super., at 194-195, 338 A. 2d, at 873. Yet the Contract Clause limits otherwise legitimate exercises of state legislative authority, and the existence of an important public interest is not always sufficient to overcome that limitation. "Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power." *Blaisdell*, 290 U.S., at 439. Moreover, the scope of the State's reserved power depends on the nature of the contractual relationship with which the challenged law conflicts.

The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. Otherwise, one would be able to obtain immunity from state regulation by making private contractual arrangements. This principle is summarized in Mr. Justice Holmes' well-known dictum: "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." *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908).

Yet private contracts are not subject to unlimited modification under the police power. The Court in *Blaisdell* recognized that laws intended to regulate existing contractual relationships must serve a legitimate public purpose. 290 U.S., at 444-445. A State could not “adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them.” *Id.*, at 439. Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption. *Id.*, at 445-447. As is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure. *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945).

When a State impairs the obligation of its own contract, the reserved-powers doctrine has a different basis. The initial inquiry concerns the ability of the State to enter into an agreement that limits its power to act in the future. As early as *Fletcher v. Peck*, the Court considered the argument that “one legislature cannot abridge the powers of a succeeding legislature.” 6 Cranch, at 135. It is often stated that “the legislature cannot bargain away the police power of a State.” *Stone v. Mississippi*, 101 U.S. 814, 817 (1880). This doctrine requires a determination of the State’s power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment. In short, the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty.

The Contract Clause is not an absolute bar to subsequent modification of a State’s own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State’s self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

We therefore conclude that repeal of the 1962 covenant cannot be sustained on the basis of this Court’s prior [decisions].

V

Mass transportation, energy conservation, and environmental protection are goals that are important and of legitimate public concern. Appellees contend that these goals are so important that any harm to bondholders from repeal of the 1962 covenant is greatly outweighed by the public benefit. We do not accept this invitation to engage in a utilitarian comparison of public benefit and private loss. Contrary to Mr. Justice Black’s fear, expressed in sole dissent in *El Paso v. Simmons*, 379 U.S., at 517, the Court has not “balanced away” the limitation on state action imposed by the Contract Clause. Thus a State cannot refuse to meet its legitimate

financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors. We can only sustain the repeal of the 1962 covenant if that impairment was both reasonable and necessary to serve the admittedly important purposes claimed by the State.

The more specific justification offered for the repeal of the 1962 covenant was the States' plan for encouraging users of private automobiles to shift to public transportation. The States intended to discourage private automobile use by raising bridge and tunnel tolls and to use the extra revenue from those tolls to subsidize improved commuter railroad service. Appellees contend that repeal of the 1962 covenant was necessary to implement this plan because the new mass transit facilities could not possibly be self-supporting and the covenant's "permitted deficits" level had already been exceeded. We reject this justification because the repeal was neither necessary to achievement of the plan nor reasonable in light of the circumstances.

[W]ithout modifying the covenant at all, the States could have adopted alternative means of achieving their twin goals of discouraging automobile use and improving mass transit. We also cannot conclude that repeal of the covenant was reasonable in light of the surrounding circumstances. In this regard a comparison with *El Paso v. Simmons*, supra, again is instructive. There a 19th century statute had effects that were unforeseen and unintended by the legislature when originally adopted. As a result speculators were placed in a position to obtain windfall benefits. The Court held that adoption of a statute of limitation was a reasonable means to "restrict a party to those gains reasonably to be expected from the contract" when it was adopted. 379 U.S., at 515.

By contrast, in the instant case the need for mass transportation in the New York metropolitan area was not a new development, and the likelihood that publicly owned commuter railroads would produce substantial deficits was well known. As early as 1922, over a half century ago, there were pressures to involve the Port Authority in mass transit. It was with full knowledge of these concerns that the 1962 covenant was adopted. Indeed, the covenant was specifically intended to protect the pledged revenues and reserves against the possibility that such concerns would lead the Port Authority into greater involvement in deficit mass transit.

During the 12-year period between adoption of the covenant and its repeal, public perception of the importance of mass transit undoubtedly grew because of increased general concern with environmental protection and energy conservation. But these concerns were not unknown in 1962, and the subsequent changes were of degree and not of kind. We cannot say that these changes caused the covenant to have a substantially different impact in 1974 than when it was adopted in 1962. And we cannot conclude that the repeal was reasonable in the light of changed circumstances.

We therefore hold that the Contract Clause of the United States Constitution prohibits the retroactive repeal of the 1962 covenant. The judgment of the Supreme Court of New Jersey is reversed.

It is so ordered.

Mr. Justice Brennan, with whom Mr. Justice White and Mr. Justice Marshall join, dissenting.

Decisions of this Court for at least a century have construed the Contract Clause largely to be powerless in binding a State to contracts limiting the authority of successor legislatures to enact laws in furtherance of the health, safety, and similar collective interests of the polity. In short, those decisions established the principle that lawful exercises of a State's police powers stand paramount to private rights held under contract. Today's decision, in invalidating the New Jersey Legislature's 1974 repeal of its predecessor's 1962 covenant, rejects this previous understanding and remolds the Contract Clause into a potent instrument for overseeing important policy determinations of the state legislature. At the same time, by creating a constitutional safe haven for property rights embodied in a contract, the decision substantially distorts modern constitutional jurisprudence governing regulation of private economic interests. I might understand, though I could not accept, this revival of the Contract Clause were it in accordance with some coherent and constructive view of public policy. But elevation of the Clause to the status of regulator of the municipal bond market at the heavy price of frustration of sound legislative policymaking is as demonstrably unwise as it is unnecessary. The justification for today's decision, therefore, remains a mystery to me, and I respectfully dissent.

LIPSCOMB v. COLUMBUS MUNICIPAL SEPARATE SCHOOL DISTRICT
269 F.3d 494 (5thCir. 2001)

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This case requires us to examine a collision between the Contract Clause of the United States Constitution and Mississippi's effort to escape rent and renewal terms of leases of sixteenth section land in Columbus, Mississippi dating back to the early nineteenth century. The Secretary of State of Mississippi and the State maintain that the rental and renewal terms are invalid because their perpetuation of rents that are now nominal violate a provision of the 1890 Mississippi Constitution forbidding the donation of public property to private parties. Lipscomb sues for a declaration that the efforts of the Secretary of State to invalidate these leases violates the Contract Clause. The district court held that invalidating the leases would violate the Contract Clause. We affirm.

Before Mississippi became a state, the United States Congress set aside the sixteenth section of every township in the Mississippi Territory to be used for the benefit of schools. Congress then authorized the leasing of the sixteenth section land to raise funds to finance public schools in the Mississippi Territory. Upon granting statehood to Mississippi in 1817, Congress gave the sixteenth section land to the new state for the benefit of its schools. Thereafter, the Mississippi legislature authorized the leasing of the school lands, the proceeds of which would finance public schools.

During the nineteenth century, various persons leased sixteenth section land from the school board of Columbus, Mississippi. These leases were to last 99 years from February 10, 1821, or thereabouts (regardless of when actually made), and contained "renewable forever" provisions authorized by an 1830 Mississippi statute. Many of the leases—often after being assigned or subdivided—were renewed in 1920 under their renewable forever provisions. The rental rates paid on the Columbus leases have remained unchanged for 180 years. Leaseholders of lots of property in downtown Columbus pay pennies in rent per year, a small fraction of their fair market rent.

In 1890, Mississippi ratified its current constitution. Section 95 of the 1890 constitution prohibits the donation of state lands to private parties. Mississippi courts subsequently interpreted section 95 to prohibit leases or sales of land for grossly inadequate consideration. A lease that violates section 95 is voidable. Following these rulings, the State and individual school boards began asserting that sixteenth section leases for nominal consideration were void and renegotiating the leases.

J. Randolph Lipscomb brought a declaratory judgment action in federal court seeking a declaration that the State's threatened action to void the leases and renegotiate would violate the Contract Clause.

A

The 1890 Mississippi Constitution, section 95, states, “Lands belonging to, or under the control of the state, shall never be donated directly or indirectly, to private corporations or individuals, or to railroad companies.” Mississippi courts have consistently construed this to forbid transactions for consideration so inadequate that they are the equivalent of donations. The Mississippi Supreme Court held that a sale or lease of sixteenth section land that violates section 95 is voidable. However, the Mississippi Supreme Court, in interpreting section 95 to make certain sixteenth section land leases voidable, invoked equity and held that, even when a lease is voided, the leaseholder retains the right of first refusal after the land is appraised for fair rental value.

In sum, the Secretary of State has sought, under section 95, the invalidation of leases of sixteenth section lands throughout Mississippi. The sixteenth section land leases in Columbus, Mississippi, however, are renewals of leases signed before the ratification of section 95 of the 1890 Mississippi Constitution. Thus, Lipscomb argues for a declaration that this effort to invalidate the leases in Columbus violates the Contract Clause of the United States Constitution.

B

Article I, section 10 of the Constitution states, “No State shall . . . pass any . . . Law impairing the Obligation of Contracts...” The Supreme Court has emphasized, however, that the absolute language of the Contract Clause does not create an absolute prohibition; a State must be given some accommodation in passing laws “to safeguard the vital interests of its people.” The Supreme Court has developed a three-part test to balance the State’s obligation not to impair contracts with the State’s interest in public welfare. This test is applied against the backdrop of legislative power to exercise eminent domain. That a state legislature has by statute given assurance that it would not do so does not mean that the legislature cannot later take the property by eminent domain or paying just compensation. That is, we address a claim of police power to regulate—without compensation. And while impairment of contract analysis has an air of due process about it, our analysis is distinct.

In sum, the court must first determine whether the impairment of the contract is substantial and the degree of that impairment. If the impairment is not substantial, there is no claim under the Contract Clause. The court must next assess the strength of the State’s justification for the impairment. The justification must identify a public purpose that is significant and legitimate. If the State fails to provide such a justification, the impairment violates the Contract Clause. Finally, the court must compare the impairment and the justification to determine whether the impairment is “reasonable and necessary.” The degree of deference shown the legislature’s judgment on this question depends on whether the government has impaired contracts to which it is a party.

C

We begin by asking whether section 95 substantially impairs the contractual rights of the leaseholders. To determine the effect of a law on a contract, we must identify which contractual rights are being affected by the law, and then consider the extent to which the law has contravened the reasonable expectations of the parties. Section 95 affects the renewal rent term. As read by the Mississippi Supreme Court section 95 makes voidable the current lease price, allowing the State to seek a fair market rate, but giving the current leaseholder the right of first refusal. The actual impairment to the leases is the invalidation of the “renewable forever” clauses that guaranteed a continuation of the original price term to the present day. Section 95 thus impairs the contract term that freezes the rents at prices that the State contends have become grossly inadequate with the passage of time.

Given that section 95 affects the renewal price term, we must ask what the reasonable expectations of the contracting parties were with respect to that contract term. The renewable forever clauses are authorized by state statute. Additionally, the leases were made in furtherance of the State’s duty to preserve the value of the school trust lands. The leases in this case were signed in the 1820s, 1830s, and 1840s, against a backdrop of the State’s binding trust obligations.

D

Since its earliest days, Mississippi has held sixteenth section lands in trust for the benefit of the schools of the State. Although courts often refer to “the” trust, there are in fact two trusts—one state, one federal—in which Mississippi holds its sixteenth section lands. Detailing this duality is necessary to understanding Mississippi’s trust obligation. We turn first to the federal trust.

Beginning with the Northwest Territory in 1785, Congress set aside public lands in most of the territories of the United States to be used for the benefit of territorial schools. The lands set aside were composed of the sixteenth section of each township; in later years, additional sections were set aside as well. As states were formed out of territories, Congress, in the enabling act of each new state, granted the school lands to the state. These grants contain language that the land is being given to the state for the benefit of its schools. This is the source of the claim that the states hold the school lands in a federally created trust.

In defining the character of any federal trust, we then first turn to the language of the statute granting the sixteenth section lands to the State and their interpretation. Earlier grants of sixteenth section land did not contain any language creating specific obligations on the part of the states. The Supreme Court long ago held that such grants gave the sixteenth section lands to the states in fee simple; the federal trust was purely honorary.

The grant of sixteenth section land to Mississippi was one of the earliest trusts created, and contained no language establishing a binding trust. We remain convinced then that the federal trust in which Mississippi holds its sixteenth section lands is purely honorary and that Mississippi holds absolute title to the land without federal restriction. We now turn to the matter of trust obligations imposed by the law of Mississippi.

“An overwhelming body of law” in Mississippi holds that the lands are held in a binding trust. The Mississippi Supreme Court has said the trust dates back to the creation of the state. Although the source of this trust obligation is obscure, the Mississippi Supreme Court has declared its existence as a matter of state law, and that is the end of the matter.

The State holds title to the land for the benefit of its schools; the common law rules applicable to private trusts apply to the trust in which Mississippi holds its school lands and any action taken by the State in violation of this trust is voidable. The Mississippi Supreme Court has stated that the State’s trust obligations are the equivalent of its police powers, and cannot be contracted away. The exact requirements of the trust have been narrowed at times by statute and state constitution, but the binding nature of the obligation has existed since 1817.

When the leases were signed more than 100 years ago, the parties did not have the benefit of the body of law on school lands trusts that we have today. The relevant inquiry here is into the trust obligations that were the backdrop to the execution of the leases. We must repair then to the understanding of the trust at that time in order to assess what the parties to the original leases reasonably expected the State’s duties and powers with respect to the land were. While the parties would undoubtedly have understood that the leases were being signed subject to some sort of a binding trust obligation, the source of the trust obligations was far less clear then than now.

With increasing state regulation, regulated private parties’ expectations of being freed from future regulations by contract with the state becomes less reasonable. The Mississippi statutes of the nineteenth century, however, acted to facilitate the transfer of state land to private parties, not to limit the activities of private parties. The statute authorizing the renewable forever leases in Columbus reflects the State’s interest in encouraging the development of land in that township - as we will explain, not in derogation of trust obligations but in their discharge.

E

In discharging its obligations to administer the lands for the benefit of education, Mississippi faced certain realities. Unsettled land generates no revenue for the State; yields no agricultural bounty; supports no population; and generates no commerce. Both sales and long-term leases at low rates encourage settlement and private investment in new lands.

But a lease that is renewable forever is here superior to a land sale. By retaining title to the land, the State protects itself against default. A lease ensures a perpetual stream of income,

however small, that guarantees that misfortune or mismanagement of sales proceeds cannot completely dissipate the income from the lease. Selling land for a lump-sum risks such a loss. Such a judgment is born out in Mississippi's history. In 1856, Mississippi sold land and invested the proceeds in 8 percent loans to Mississippi's railroads. Within ten years, this entire investment was rendered worthless when Mississippi's railroads were destroyed during the Civil War.

Thus, to this day Mississippi continues to receive its bargained-for benefit from these leases, just as the leaseholders reap the benefit of (now) extremely favorable rental rates. The leases have generated a constant stream of revenue that is secured by the State's continuing ownership in the land. For the first 50 years or so this rental income sustained the schools. The guarantee of perpetual low lease rates attracted settlement in Columbus, and the leaseholders improved the land they held, increasing the general wealth of the community and enlarging the tax base for later property taxes to support schools. Upsetting this balance by invalidating the renewal lease rates would substantially impair the contracts.

The State identifies a significant, legitimate, public interest in the leased sixteenth section lands. The Mississippi courts have stated that preservation of the trust lands for the benefit of the schools is a central governmental power and duty, comparable to the police powers. As we have explained, Mississippi case law has repeatedly emphasized the significance of the State's interest in preserving the value of the sixteenth section lands.

Of course, this interest in protecting the school lands trust is a valid reason for the State's action. Funding schools and avoiding the dissipation of state assets are classic police functions, and section 95 of the Mississippi Constitution is a law of "broad and general" application that does not single out any subset of leaseholders. All this is a given—but it does not respond to the reality that the original structure of the leases has not frustrated the state's obligation. To the contrary, it has rather done the opposite.

We now turn to the final step of the analysis. The State is a party to the contracts, so we cannot defer in the manner of due process to the State's judgment of the reasonableness of its threatened action. Instead, we first ask whether the contracts surrender "an essential attribute of [the State's] sovereignty." If not, we judge the reasonableness and necessity of the impairment.

The leases do not surrender any essential attribute of the State's sovereignty. The leases do not limit the ability of the State to exercise its jurisdiction or police powers over the land. Mississippi courts have stated that the State's duty to the school lands trust is like a police power that cannot be contracted away. But the State has not contracted away its stewardship over the school lands. As we explained, the leases themselves represent the State's fulfillment of its obligation to ensure the funding of schools.

The leases exercise the State's power to serve the trust, they do not limit that power. The State seeks to escape a purely financial obligation—its agreement to accept fixed rent terms for the Columbus school lands while reaping the benefits of the land's development - an

arrangement that proved to be a hedge against inflationary erosions of rental income, inevitably attended by increasing land “values.”

In sum, invalidating the renewal rental rates of the leases is not reasonable and necessary to protect the State’s interest in its school lands. Mississippi might have followed the familiar path of granting fee title to land in exchange for its development—a common practice in the American West and the Mississippi Territory. It is fair to ask whether in such circumstances the state could now exercise its police power to alter an incident of fee ownership to charge market rents in addition to school taxes without compensating the landowner. In actual fact, the state constructed a hedge.

As we have explained, in this case the leasing arrangements guaranteed Mississippi a steady stream of income, which in fact supported the public school in Columbus for many years. The renewable forever provisions created incentives for substantial investment in the development of leased lands and a growing tax base to further sustain the schools. Moreover, the state was left with remedies should the lessee default. The state got exactly what it needed, and the purpose of the contract was fulfilled, not frustrated.

To summarize: The current leases are renewals of the original leases executed before the ratification of the 1890 Constitution. Thus, section 95 of the 1890 Constitution impairs the renewal terms of the lease contracts. Because voiding the current lease rates on the school lands substantially impairs the contract rights of the leaseholders, and the State’s threatened action is not reasonable and necessary, we affirm the entry of summary judgment against the Secretary declaring that voiding the Columbus school land leases would violate the Contract Clause, a declaration that may be enforced by injunctive relief.

We AFFIRM and REMAND to the district court for further proceedings including any necessary resolution of disputes over the entitlement to the relief declared by the district court and today affirmed by this court. We do not suggest that there will be such disputes.

AFFIRMED and REMANDED.

DISCUSSION QUESTION:

The Maryland General Assembly has legalized slot machines. Assume that the Cordish Company builds a slots parlor spending \$10,000,000. What steps can Cordish take to protect itself against subsequent repeal of the legalization legislation?

Session 18. Invidious Discrimination

The Equal Protection Clause of the Fourteenth Amendment directs that all persons similarly situated should be treated alike. Most exercises of land use regulations discriminate in one way or another. Hence the question arises as to when and whether land-use classifications deny equal protection.

YICK WO v. HOPKINS 118 U.S. 356 (1886)

Mr. Justice Matthews delivered the opinion of the court.

In the case of the petitioner, brought here by writ of error to the Supreme Court of California, our jurisdiction is limited to the question, whether the plaintiff in error has been denied a right in violation of the Constitution, laws, or treaties of the United States.

We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinances in question. That court considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation of the power conferred upon the supervisors.

There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus, to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.

The ordinance drawn in question in the present case does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings

themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature.

The rights of the petitioners, as affected by the proceedings of which they complain, are not less, because they are aliens and subjects of the Emperor of China. By the third article of the treaty between this Government and that of China, concluded November 17, 1880, 22 Stat. 827, it is stipulated: "If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands any other persons, the Government of the United States will exert all its powers to devise measures for their protection, and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty."

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by §1977 of the Revised Statutes, that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed,

quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth “may be a government of laws and not of men.”

There are many illustrations that might be given of this truth, which would make manifest that it was self-evident in the light of our system of jurisprudence. And a similar question, very pertinent to the one in the present cases, was decided by the Court of Appeals of Maryland, in the cases of the City of Baltimore v. Radecke, 49 Maryland, 217. In that case the defendant had erected and used a steam engine, in the prosecution of his business as a carpenter and box-maker in the city of Baltimore, under a permit from the mayor and city council, which contained a condition that the engine was “to be removed after six months’ notice to that effect from the mayor.” After such notice and refusal to conform to it, a suit was instituted to recover the penalty provided by the ordinance, to restrain the prosecution of which a bill in equity was filed. The court holding the opinion that “there may be a case in which an ordinance, passed under grants of power like those we have cited, is so clearly unreasonable, so arbitrary, oppressive, or partial, as to raise the presumption that the legislature never intended to confer the power to pass it, and to justify the courts in interfering and setting it aside as a plain abuse of authority,” it proceeds to speak, with regard to the ordinance in question, in relation to the use of steam engines, as follows:

“It does not profess to prescribe regulations for their construction, location, or use, nor require such precautions and safeguards to be provided by those who own and use them as are best calculated to render them less dangerous to life and property, nor does it restrain their use in box factories and other similar establishments within certain defined limits, nor in any other way attempt to promote their safety and security without destroying their usefulness. But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the city of Baltimore, to cease to do so. And, when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being brought under cover of such a power, for that becomes apparent to everyone who gives to the subject a moment’s consideration. In fact, an ordinance which clothes a single individual

with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void.”

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged. To this end, the judgment of the Supreme Court of California in the case of *Yick Wo* is . . . reversed, and the cases remanded, each to the proper court, with directions to discharge the petitioners from custody and imprisonment.

BUCHANAN v. WARLEY
245 U.S. 60 (1917)

JUDGES: White, McKenna, Holmes, Day, Van Devanter, Pitney, McReynolds, Brandeis, Clarke

Mr. Justice Day delivered the opinion of the court.

Buchanan, plaintiff in error, brought an action in the Chancery Branch of Jefferson Circuit Court of Kentucky for the specific performance of a contract for the sale of certain real estate situated in the City of Louisville at the corner of 37th Street and Pflanz Avenue. The offer in writing to purchase the property contained a proviso:

“It is understood that I am purchasing the above property for the purpose of having erected thereon a house which I propose to make my residence, and it is a distinct part of this agreement that I shall not be required to accept a deed to the above property or to pay for said property unless I have the right under the laws of the State of Kentucky and the City of Louisville to occupy said property as a residence.”

This offer was accepted by the plaintiff.

To the action for specific performance the defendant by way of answer set up the condition above set forth, that he is a colored person, and that on the block of which the lot in controversy is a part there are ten residences, eight of which at the time of the making of the contract were occupied by white people, and only two (those nearest the lot in question) were occupied by colored people, and that under and by virtue of the ordinance of the City of Louisville, approved May 11, 1914, he would not be allowed to occupy the lot as a place of residence.

In reply to this answer the plaintiff set up, among other things, that the ordinance was in conflict with the Fourteenth Amendment to the Constitution of the United States, and hence no defense to the action for specific performance of the contract.

In the court of original jurisdiction in Kentucky, and in the Court of Appeals of that State, the case was made to turn upon the constitutional validity of the ordinance. The Court of Appeals of Kentucky, 165 Kentucky, 559, held the ordinance valid and of itself a complete defense to the action.

The title of the ordinance is: “An ordinance to prevent conflict and ill-feeling between the white and colored races in the City of Louisville, and to preserve the public peace and promote the general welfare by making reasonable provisions requiring, as far as practicable, the use of separate blocks for residences, places of abode and places of assembly by white and colored people respectively.”

By the first section of the ordinance it is made unlawful for any colored person to move into and occupy as a residence, place of abode, or to establish and maintain as a place of public assembly any house upon any block upon which a greater number of houses are occupied as residences, places of abode, or places of public assembly by white people than are occupied as residences, places of abode, or places of public assembly by colored people.

Section 2 provides that it shall be unlawful for any white person to move into and occupy as a residence, place of abode, or to establish and maintain as a place of public assembly any house upon any block upon which a greater number of houses are occupied as residences, places of abode or places of public assembly by colored people than are occupied as residences, places of abode or places of public assembly by white people.

The ordinance contains other sections and a violation of its provisions in made an offense.

The assignments of error in this court attack the ordinance upon the ground that it violates the Fourteenth Amendment of the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the United States to acquire and enjoy property, takes property without due process of law, and denies equal protection of the laws.

The objection is made that this writ of error should be dismissed because the alleged denial of constitutional rights involves only the rights of colored persons, and the plaintiff in error is a white person. This court has frequently held that while an unconstitutional act is no law, attacks upon the validity of laws can only be entertained when made by those whose rights are directly affected by the law or ordinance in question. Only such persons, it has been settled, can be heard to attack the constitutionality of the law or ordinance. But this case does not run counter to that principle.

The property here involved was sold by the plaintiff in error, a white man, on the terms stated, to a colored man; the action for specific performance was entertained in the court below, and in both courts the plaintiff's right to have the contract enforced was denied solely because of the effect of the ordinance making it illegal for a colored person to occupy the lot sold. But for the ordinance the state courts would have enforced the contract, and the defendant would have been compelled to pay the purchase price and take a conveyance of the premises. The right of the plaintiff in error to sell his property was directly involved and necessarily impaired because it was held in effect that he could not sell the lot to a person of color who was willing and ready to acquire the property, and had obligated himself to take it. This case does not come within the class wherein this court has held that where one seeks to avoid the enforcement of a law or ordinance he must present a grievance of his own, and not rest the attack upon the alleged violation of another's rights. In this case the property rights of the plaintiff in error are directly and necessarily involved. See *Truax v. Raich*, 239 U.S. 33, 38.

We pass then to a consideration of the case upon its merits. This ordinance prevents the occupancy of a lot in the City of Louisville by a person of color in a block where the greater number of residences are occupied by white persons; where such a majority exists colored persons are excluded. This interdiction is based wholly upon color; simply that and nothing more. In effect, premises situated as are those in question in the so-called white block are effectively debarred from sale to persons of color, because if sold they cannot be occupied by the purchaser nor by him sold to another of the same color.

This drastic measure is sought to be justified under the authority of the State in the exercise of the police power. It is said such legislation tends to promote the public peace by preventing racial conflicts; that it tends to maintain racial purity; that it prevents the deterioration of property owned and occupied by white people, which deterioration, it is contended, is sure to follow the occupancy of adjacent premises by persons of color.

The authority of the State to pass laws in the exercise of the police power, having for their object the promotion of the public health, safety and welfare is very broad as has been affirmed in numerous and recent decisions of this court. Furthermore, the exercise of this power, embracing nearly all legislation of a local character, is not to be interfered with by the courts where it is within the scope of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose. But it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution; that principle has been so frequently affirmed in this court that we need not stop to cite the cases.

The Federal Constitution and laws passed within its authority are by the express terms of that instrument made the supreme law of the land. The Fourteenth Amendment protects life, liberty, and property from invasion by the States without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. *Holden v. Hardy*, 169 U.S. 366, 391. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land. 1 Blackstone's Commentaries (Cooley's Ed.), 127.

True it is that dominion over property springing from ownership is not absolute and unqualified. The disposition and use of property may be controlled in the exercise of the police power in the interest of the public health, convenience, or welfare. Harmful occupations may be controlled and regulated. Legitimate business may also be regulated in the interest of the public. Certain uses of property may be confined to portions of the municipality other than the resident district, such as livery stables, brickyards and the like, because of the impairment of the health and comfort of the occupants of neighboring property. Many illustrations might be given from the decisions of this court, and other courts, of this principle, but these cases do not touch the one at bar.

The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the States, or by one of its municipalities, solely because of the color of the proposed occupant of the premises? That one may dispose of his property, subject only to the control of lawful enactments curtailing that right in the public interest, must be conceded. The question now presented makes it pertinent to enquire into the constitutional right of the white man to sell his property to a colored man, having in view the legal status of the purchaser and occupant.

Following the Civil War certain amendments to the Federal Constitution were adopted, which have become an integral part of that instrument, equally binding upon all the States and fixing certain fundamental rights which all are bound to respect. The Thirteenth Amendment abolished slavery in the United States and in all places subject to their jurisdiction, and gave Congress power to enforce the Amendment by appropriate legislation. The Fourteenth Amendment made all persons born or naturalized in the United States citizens of the United States and of the States in which they reside, and provided that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person the equal protection of the laws.

The effect of these Amendments was first dealt with by this court in *The Slaughter House Cases*, 16 Wall. 36. The reasons for the adoption of the Amendments were elaborately considered by a court familiar with the times in which the necessity for the Amendments arose and with the circumstances which impelled their adoption. In that case Mr. Justice Miller, who spoke for the majority, pointed out that the colored race, having been freed from slavery by the Thirteenth Amendment, was raised to the dignity of citizenship and equality of civil rights by the Fourteenth Amendment, and the States were prohibited from abridging the privileges and immunities of such citizens, or depriving any person of life, liberty, or property without due process of law. While a principal purpose of the latter Amendment was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminatory legislation by the States. This is now the settled law. In many of the cases since arising the question of color has not been involved and the cases have been decided upon alleged violations of civil or property rights irrespective of the race or color of the complainant. In *The Slaughter House Cases* it was recognized that the chief inducement to the passage of the Amendment was the desire to extend federal protection to the recently emancipated race from unfriendly and discriminating legislation by the States.

In giving legislative aid to these constitutional provisions Congress enacted in 1866, c. 31, §1, 14 Stat. 27, [Rev. Stats., §1978] that:

“All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”

And in 1870, by c. 114, §16, 16 Stat. 144 [Rev. Stats., §1977] that:

“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and no other.”

In the face of these constitutional and statutory provisions, can a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence?

The defendant in error insists that *Plessy v. Ferguson*, 163 U.S. 537, is controlling in principle in favor of the judgment of the court below. In that case this court held that a provision of a statute of Louisiana requiring railway companies carrying passengers to provide in their coaches equal but separate accommodations for the white and colored races did not run counter to the provisions of the Fourteenth Amendment. It is to be observed that in that case there was no attempt to deprive persons of color of transportation in the coaches of the public carrier, and the express requirements were for equal though separate accommodations for the white and colored races. In *Plessy v. Ferguson*, classification of accommodation was permitted upon the basis of equality for both races.

As we have seen, this court has held laws valid which separated the races on the basis of equal accommodations in public conveyances, and courts of high authority have held enactments lawful which provide for separation in the public schools of white and colored pupils where equal privileges are given. But in view of the rights secured by the Fourteenth Amendment to the Federal Constitution such legislation must have its limitations, and cannot be sustained where the exercise of authority exceeds the restraints of the Constitution. We think these limitations are exceeded in laws and ordinances of the character now before us. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.

We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law. That being the case the ordinance cannot stand.

Reaching this conclusion it follows that the judgment of the Kentucky Court of Appeals must be reversed, and the cause remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

SHELLEY v. KRAEMER
334 U.S. 1 (1948)

Mr. Chief Justice Vinson delivered the opinion of the Court.

These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. Basic constitutional issues of obvious importance have been raised.

The first of these cases comes to this Court on certiorari to the Supreme Court of Missouri. On February 16, 1911, thirty out of a total of thirty-nine owners of property fronting both sides of Labadie Avenue between Taylor Avenue and Cora Avenue in the city of St. Louis, signed an agreement, which was subsequently recorded, providing in part:

“ . . . the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to as [sic] not in subsequent conveyances and shall attach to the land as a condition precedent to the sale of the same, that hereafter no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.”

The entire district described in the agreement included fifty-seven parcels of land. The thirty owners who signed the agreement held title to forty-seven parcels, including the particular parcel involved in this case. At the time the agreement was signed, five of the parcels in the district were owned by Negroes. One of those had been occupied by Negro families since 1882, nearly thirty years before the restrictive agreement was executed. The trial court found that owners of seven out of nine homes on the south side of Labadie Avenue, within the restricted district and “in the immediate vicinity” of the premises in question, had failed to sign the restrictive agreement in 1911. At the time this action was brought, four of the premises were occupied by Negroes, and had been so occupied for periods ranging from twenty-three to sixty-three years. A fifth parcel had been occupied by Negroes until a year before this suit was instituted.

On August 11, 1945, pursuant to a contract of sale, petitioners Shelley, who are Negroes, for valuable consideration received from one Fitzgerald a warranty deed to the parcel in

question.⁶⁸ The trial court found that petitioners had no actual knowledge of the restrictive agreement at the time of the purchase.

On October 9, 1945, respondents, as owners of other property subject to the terms of the restrictive covenant, brought suit in the Circuit Court of the city of St. Louis praying that petitioners Shelley be restrained from taking possession of the property and that judgment be entered divesting title out of petitioners Shelley and revesting title in the immediate grantor or in such other person as the court should direct. The trial court denied the requested relief on the ground that the restrictive agreement, upon which respondents based their action, had never become final and complete because it was the intention of the parties to that agreement that it was not to become effective until signed by all property owners in the district, and signatures of all the owners had never been obtained.

The Supreme Court of Missouri sitting en banc reversed and directed the trial court to grant the relief for which respondents had prayed. That court held the agreement effective and concluded that enforcement of its provisions violated no rights guaranteed to petitioners by the Federal Constitution. At the time the court rendered its decision, petitioners were occupying the property in question.

Petitioners have placed primary reliance on their contentions, first raised in the state courts, that judicial enforcement of the restrictive agreements in these cases has violated rights guaranteed to petitioners by the Fourteenth Amendment of the Federal Constitution and Acts of Congress passed pursuant to that Amendment.⁶⁹ Specifically, petitioners urge that they have been denied the equal protection of the laws, deprived of property without due process of law, and have been denied privileges and immunities of citizens of the United States. We pass to a consideration of those issues.

I

Whether the equal protection clause of the Fourteenth Amendment inhibits judicial enforcement by state courts of restrictive covenants based on race or color is a question which this Court has not heretofore been called upon to consider.

⁶⁸ The trial court found that title to the property which petitioners Shelley sought to purchase was held by one Bishop, a real estate dealer, who placed the property in the name of Josephine Fitzgerald. Bishop, who acted as agent for petitioners in the purchase, concealed the fact of his ownership.

⁶⁹ The first section of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is well, at the outset, to scrutinize the terms of the restrictive agreements involved in these cases. In the Missouri case, the covenant declares that no part of the affected property shall be “occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property . . . against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.” Not only does the restriction seek to proscribe use and occupancy of the affected properties by members of the excluded class, but as construed by the Missouri courts, the agreement requires that title of any person who uses his property in violation of the restriction shall be divested.

It should be observed that these covenants do not seek to proscribe any particular use of the affected properties. Use of the properties for residential occupancy, as such, is not forbidden. The restrictions of these agreements, rather, are directed toward a designated class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color; “simply that and nothing more.”⁷⁰

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. Thus, §1978 of the Revised Statutes, derived from §1 of the Civil Rights Act of 1866 which was enacted by Congress while the Fourteenth Amendment was also under consideration, provides:

“All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”

This Court has given specific recognition to the same principle. *Buchanan v. Warley*, 245 U.S. 60 (1917).

It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance.

But the present cases do not involve action by state legislatures or city councils. Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. The crucial

⁷⁰ *Buchanan v. Warley*, 245 U.S. 60, 73 (1917).

issue with which we are here confronted is whether this distinction removes these cases from the operation of the prohibitory provisions of the Fourteenth Amendment.

Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.

But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action; or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment. Finally, it is suggested, even if the States in these cases may be deemed to have acted in the constitutional sense, their action did not deprive petitioners of rights guaranteed by the Fourteenth Amendment. We move to a consideration of these matters.

III

We are called upon to consider whether enforcement by state courts of the restrictive agreements in these cases may be deemed to be the acts of those States; and, if so, whether that action has denied these petitioners the equal protection of the laws which the Amendment was intended to insure.

We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand.

VILLAGE OF BELLE TERRE v. BORAAS
416 U.S. 1 (1974)

Mr. Justice Douglas delivered the opinion of the Court.

Belle Terre is a village on Long Island's north shore of about 220 homes inhabited by 700 people. Its total land area is less than one square mile. It has restricted and use to one-family dwellings excluding lodging houses, boarding houses, fraternity houses, or multiple-dwelling houses. The word "family" as used in the ordinance means, "one or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family."

Appellees, the Dickmans are owners of a house in the village and leased it in December 1971 for a term of 18 months to Michael Truman. Later Bruce Boraas became a co-lessee. Then Anne Parish moved into the house along with three others. These six are students at nearby State University at Stony Brook and none is related to the other by blood, adoption, or marriage. When the village served the Dickmans with an "Order to Remedy Violations" of the ordinance, the owners plus three tenants thereupon brought this action under 42 U. S. C. §1983 for an injunction and a judgment declaring the ordinance unconstitutional. The District Court held the ordinance constitutional, 367 F.Supp. 136, and the Court of Appeals reversed, one judge dissenting, 476 F.2d 806. The case is here by appeal, 28 U. S. C. §1254 (2); and we noted probable jurisdiction, 414 U.S. 907.

The present ordinance is challenged on several grounds: that it interferes with a person's right to travel; that it interferes with the right to migrate to and settle within a State; that it bars people who are uncongenial to the present residents; that it expresses the social preferences of the residents for groups that will be congenial to them; that social homogeneity is not a legitimate interest of government; that the restriction of those whom the neighbors do not like trenches on the newcomers' rights of privacy; that it is of no rightful concern to villagers whether the residents are married or unmarried; that the ordinance is antithetical to the Nation's experience, ideology, and self-perception as an open, egalitarian, and integrated society.

We find none of these reasons in the record before us. It is not aimed at transients. Cf. *Shapiro v. Thompson*, 394 U.S. 618. It involves no procedural disparity inflicted on some but not on others such as was presented by *Griffin v. Illinois*, 351 U.S. 12. It involves no "fundamental" right guaranteed by the Constitution, such as voting, *Harper v. Virginia Board*, 383 U.S. 663; the right of association, *NAACP v. Alabama*, 357 U.S. 449; the right of access to the courts, *NAACP v. Button*, 371 U.S. 415; or any rights of privacy, cf. *Griswold v. Connecticut*, 381 U.S. 479; *Eisenstadt v. Baird*, 405 U.S. 438, 453-454. We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be "reasonable, not arbitrary" (quoting *Royster Guano*

Co. v. Virginia, 253 U.S. 412, 415) and bears “a rational relationship to a [permissible] state objective.” Reed v. Reed, 404 U.S. 71, 76.

It is said, however, that if two unmarried people can constitute a “family,” there is no reason why three or four may not. But every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function.

It is said that the Belle Terre ordinance reeks with an animosity to unmarried couples who live together. There is no evidence to support it; and the provision of the ordinance bringing within the definition of a “family” two unmarried people belies the charge. The ordinance places no ban on other forms of association, for a “family” may, so far as the ordinance is concerned, entertain whomever it likes. The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Reversed.

Mr. Justice Marshall, dissenting.

This case draws into question the constitutionality of a zoning ordinance of the incorporated village of Belle Terre, New York, which prohibits groups of more than two unrelated persons, as distinguished from groups consisting of any number of persons related by blood, adoption, or marriage, from occupying a residence within the confines of the township. Lessor-appellees, the two owners of a Belle Terre residence, and three unrelated student tenants challenged the ordinance on the ground that it establishes a classification between households of related and unrelated individuals, which deprives them of equal protection of the laws. In my view, the disputed classification burdens the students’ fundamental rights of association and privacy guaranteed by the First and Fourteenth Amendments. Because the application of strict equal protection scrutiny is therefore required, I am at odds with my Brethren’s conclusion that the ordinance may be sustained on a showing that it bears a rational relationship to the accomplishment of legitimate governmental objectives.

My disagreement with the Court today is based upon my view that the ordinance in this case unnecessarily burdens appellees’ First Amendment freedom of association and their constitutionally guaranteed right to privacy. Our decisions establish that the First and Fourteenth Amendments protect the freedom to choose one’s associates. NAACP v. Button, 371 U.S. 415,

430 (1963). Constitutional protection is extended, not only to modes of association that are political in the usual sense, but also to those that pertain to the social and economic benefit of the members. *Id.*, at 430-431; *Brotherhood of Railroad Trainmen v. Virginia Bar*, 377 U.S. 1 (1964). See *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971); *Mine Workers v. Illinois State Bar Assn.*, 389 U.S. 217 (1967). The selection of one's living companions involves similar choices as to the emotional, social, or economic benefits to be derived from alternative living arrangements.

The freedom of association is often inextricably entwined with the constitutionally guaranteed right of privacy. The right to "establish a home" is an essential part of the liberty guaranteed by the Fourteenth Amendment. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring). And the Constitution secures to an individual a freedom "to satisfy his intellectual and emotional needs in the privacy of his own home." *Stanley v. Georgia*, 394 U.S. 557, 565 (1969); see *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66-67 (1973). Constitutionally protected privacy is, in Mr. Justice Brandeis' words, "as against the Government, the right to be let alone . . . the right most valued by civilized man." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion). The choice of household companions—of whether a person's "intellectual and emotional needs" are best met by living with family, friends, professional associates, or others—involves deeply personal considerations as to the kind and quality of intimate relationships within the home. That decision surely falls within the ambit of the right to privacy protected by the Constitution. See *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Stanley v. Georgia*, *supra*, at 564-565; *Griswold v. Connecticut*, *supra*, at 483, 486; *Olmstead v. United States*, *supra*, at 478 (Brandeis, J., dissenting); *Moreno v. Department of Agriculture*, 345 F.Supp. 310, 315 (DC 1972), *aff'd*, 413 U.S. 528 (1973).

The instant ordinance discriminates on the basis of just such a personal lifestyle choice as to household companions. It permits any number of persons related by blood or marriage, be it two or twenty, to live in a single household, but it limits to two the number of unrelated persons bound by profession, love, friendship, religious or political affiliation, or mere economics who can occupy a single home. Belle Terre imposes upon those who deviate from the community norm in their choice of living companions significantly greater restrictions than are applied to residential groups who are related by blood or marriage, and compose the established order within the community. The village has, in effect, acted to fence out those individuals whose choice of lifestyle differs from that of its current residents.

I respectfully dissent.

MOORE v. CITY OF EAST CLEVELAND
431 U.S. 494 (1977)

Mr. Justice Powell announced the judgment of the Court, and delivered an opinion in which Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Blackmun joined.

East Cleveland's housing ordinance, like many throughout the country, limits occupancy of a dwelling unit to members of a single family. But the ordinance contains an unusual and complicated definitional section that recognizes as a "family" only a few categories of related individuals. Because her family, living together in her home, fits none of those categories, appellant stands convicted of a criminal offense. The question in this case is whether the ordinance violates the Due Process Clause of the Fourteenth Amendment.

I

Appellant, Mrs. Inez Moore, lives in her East Cleveland home together with her son, Dale Moore, Sr., and her two grandsons, Dale, Jr., and John Moore, Jr. The two boys are first cousins rather than brothers; we are told that John came to live with his grandmother and with the elder and younger Dale Moores after his mother's death.

In early 1973, Mrs. Moore received a notice of violation from the city, stating that John was an "illegal occupant" and directing her to comply with the ordinance. When she failed to remove him from her home, the city filed a criminal charge. Mrs. Moore moved to dismiss, claiming that the ordinance was constitutionally invalid on its face. Her motion was overruled, and upon conviction she was sentenced to five days in jail and a \$25 fine. The Ohio Court of Appeals affirmed after giving full consideration to her constitutional claims, and the Ohio Supreme Court denied review. We noted probable jurisdiction of her appeal, 425 U.S. 949 (1976).

II

The city argues that our decision in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), requires us to sustain the ordinance attacked here. Belle Terre, like East Cleveland, imposed limits on the types of groups that could occupy a single dwelling unit. Applying the constitutional standard announced in this Court's leading land-use case, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), we sustained the Belle Terre ordinance on the ground that it bore a rational relationship to permissible state objectives.

But one overriding factor sets this case apart from Belle Terre. The ordinance there affected only unrelated individuals. It expressly allowed all who were related by "blood, adoption, or marriage" to live together, and in sustaining the ordinance we were careful to note that it promoted "family needs" and "family values." 416 U.S., at 9. East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. This is no mere incidental result of the ordinance. On its face it selects certain categories of relatives

who may live together and declares that others may not. In particular, it makes a crime of a grandmother's choice to live with her grandson in circumstances like those presented here.

When a city undertakes such intrusive regulation of the family, neither Belle Terre nor Euclid governs; the usual judicial deference to the legislature is inappropriate. "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974). A host of cases, tracing their lineage to *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925), have consistently acknowledged a "private realm of family life which the state cannot enter."

Of course, the family is not beyond regulation. But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.

When thus examined, this ordinance cannot survive. The city seeks to justify it as a means of preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on East Cleveland's school system. Although these are legitimate goals, the ordinance before us serves them marginally, at best. For example, the ordinance permits any family consisting only of husband, wife, and unmarried children to live together, even if the family contains a half dozen licensed drivers, each with his or her own car. At the same time it forbids an adult brother and sister to share a household, even if both faithfully use public transportation. The ordinance would permit a grandmother to live with a single dependent son and children, even if his school-age children number a dozen, yet it forces Mrs. Moore to find another dwelling for her grandson John, simply because of the presence of his uncle and cousin in the same household. We need not labor the point. Section 1341.08 has but a tenuous relation to alleviation of the conditions mentioned by the city.

Mr. Justice Harlan described [this Court's function under the Due Process Clause] eloquently:

"Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is

a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This ‘liberty’ is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.” *Poe v. Ullman*, supra, at 542-543 (dissenting opinion).

Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment, nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary—the boundary of the nuclear family.

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family. Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life. This is apparently what happened here.

Whether or not such a household is established because of personal tragedy, the choice of relatives in this degree of kinship to live together may not lightly be denied by the State. *Pierce* struck down on Oregon law requiring all children to attend the State’s public schools, holding that the Constitution “excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.” 268 U.S., at 535. By the same

token the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns.

Reversed.

CITY OF CLEBURNE v. CLEBURNE LIVING CENTER
473 U.S. 432 (1985)

Justice White delivered the opinion of the Court.

A Texas city denied a special use permit for the operation of a group home for the mentally retarded, acting pursuant to a municipal zoning ordinance requiring permits for such homes. The Court of Appeals for the Fifth Circuit held that mental retardation is a “quasi-suspect” classification and that the ordinance violated the Equal Protection Clause because it did not substantially further an important governmental purpose. We hold that a lesser standard of scrutiny is appropriate, but conclude that under that standard the ordinance is invalid as applied in this case.

I

In July 1980, respondent Jan Hannah purchased a building at 201 Featherston Street in the city of Cleburne, Texas, with the intention of leasing it to Cleburne Living Center, Inc. (CLC), for the operation of a group home for the mentally retarded. It was anticipated that the home would house 13 retarded men and women, who would be under the constant supervision of CLC staff members. The house had four bedrooms and two baths, with a half bath to be added. CLC planned to comply with all applicable state and federal regulations.

The city informed CLC that a special use permit would be required for the operation of a group home at the site, and CLC accordingly submitted a permit application. In response to a subsequent inquiry from CLC, the city explained that under the zoning regulations applicable to the site, a special use permit, renewable annually, was required for the construction of “[hospitals] for the insane or feeble-minded, or alcoholic [sic] or drug addicts, or penal or correctional institutions.” The city had determined that the proposed group home should be classified as a “hospital for the feeble-minded.” After holding a public hearing on CLC’s application, the City Council voted 3 to 1 to deny a special use permit.

CLC then filed suit in Federal District Court against the city and a number of its officials, alleging, *inter alia*, that the zoning ordinance was invalid on its face and as applied because it discriminated against the mentally retarded in violation of the equal protection rights of CLC and its potential residents. The District Court found that “[if] the potential residents of the Featherston Street home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city’s zoning ordinance,” and that the City Council’s decision “was motivated primarily by the fact that the residents of the home would be persons who are mentally retarded.” App. 93, 94. Even so, the District Court held the ordinance and its application constitutional. Concluding that no fundamental right was implicated and that mental retardation was neither a suspect nor a quasi-suspect classification, the court employed the minimum level of judicial scrutiny applicable to equal protection claims. The court deemed the ordinance, as written and applied, to be rationally related to the city’s legitimate interests in

“the legal responsibility of CLC and its residents, . . . the safety and fears of residents in the adjoining neighborhood,” and the number of people to be housed in the home. *Id.*, at 103.

The Court of Appeals for the Fifth Circuit reversed, determining that mental retardation was a quasi-suspect classification and that it should assess the validity of the ordinance under intermediate-level scrutiny. 726 F.2d 191 (1984). Because mental retardation was in fact relevant to many legislative actions, strict scrutiny was not appropriate. But in light of the history of “unfair and often grotesque mistreatment” of the retarded, discrimination against them was “likely to reflect deep-seated prejudice.” *Id.*, at 197. In addition, the mentally retarded lacked political power, and their condition was immutable. The court considered heightened scrutiny to be particularly appropriate in this case, because the city’s ordinance withheld a benefit which, although not fundamental, was very important to the mentally retarded. Without group homes, the court stated, the retarded could never hope to integrate themselves into the community. Applying the test that it considered appropriate, the court held that the ordinance was invalid on its face because it did not substantially further any important governmental interests. The Court of Appeals went on to hold that the ordinance was also invalid as applied. Rehearing en banc was denied with six judges dissenting in an opinion urging en banc consideration of the panel’s adoption of a heightened standard of review. We granted certiorari, 469 U.S. 1016 (1984).

II

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall “deny to any person within its jurisdiction the equal protection of the laws,” which is essentially a direction that all persons similarly situated should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Section 5 of the Amendment empowers Congress to enforce this mandate, but absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174-175 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, *United States Railroad Retirement Board v. Fritz*, *supra*, at 174; *New Orleans v. Dukes*, *supra*, at 303, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.

The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these

reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Graham v. Richardson*, 403 U.S. 365 (1971). Similar oversight by the courts is due when state laws impinge on personal rights protected by the Constitution. *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment. “[What] differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.” *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women. A gender classification fails unless it is substantially related to a sufficiently important governmental interest. *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976). Because illegitimacy is beyond the individual’s control and bears “no relation to the individual’s ability to participate in and contribute to society,” *Mathews v. Lucas*, 427 U.S. 495, 505 (1976), official discriminations resting on that characteristic are also subject to somewhat heightened review. Those restrictions “will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest.” *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982).

We have declined, however, to extend heightened review to differential treatment based on age:

“While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a ‘history of purposeful unequal treatment’ or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.” *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

The lesson of *Murgia* is that where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

III

Against this background, we conclude for several reasons that the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation.

Doubtless, there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms. But the appropriate method of reaching such instances is not to create a new quasi-suspect classification and subject all governmental action based on that classification to more searching evaluation. Rather, we should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us. Because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.

Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination. To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. This standard, we believe, affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner. The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. See *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973). Furthermore, some objectives—such as “a bare . . . desire to harm a politically unpopular group,” *id.*, at 534—are not legitimate state interests. See also *Zobel*, *supra*, at 63. Beyond that, the mentally retarded, like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law.

IV

We turn to the issue of the validity of the zoning ordinance insofar as it requires a special use permit for homes for the mentally retarded. We inquire first whether requiring a special use permit for the Featherston home in the circumstances here deprives respondents of the equal protection of the laws. If it does, there will be no occasion to decide whether the special use permit provision is facially invalid where the mentally retarded are involved, or to put it another way, whether the city may never insist on a special use permit for a home for the mentally retarded in an R-3 zone. This is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments. *Brockett v. Spokane Arcades, Inc.*,

472 U.S. 491, 501-502 (1985); *United States v. Grace*, 461 U.S. 171 (1983); *NAACP v. Button*, 371 U.S. 415 (1963).

The constitutional issue is clearly posed. The city does not require a special use permit in an R-3 zone for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged (other than for the insane or feebleminded or alcoholics or drug addicts), private clubs or fraternal orders, and other specified uses. It does, however, insist on a special permit for the Featherston home, and it does so, as the District Court found, because it would be a facility for the mentally retarded. May the city require the permit for this facility when other care and multiple-dwelling facilities are freely permitted?

It is true, as already pointed out, that the mentally retarded as a group are indeed different from others not sharing their misfortune, and in this respect they may be different from those who would occupy other facilities that would be permitted in an R-3 zone without a special permit. But this difference is largely irrelevant unless the Featherston home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not. Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case.

The District Court found that the City Council's insistence on the permit rested on several factors. First, the Council was concerned with the negative attitude of the majority of property owners located within 200 feet of the Featherston facility, as well as with the fears of elderly residents of the neighborhood. But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 736-737 (1964), and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

Second, the Council had two objections to the location of the facility. It was concerned that the facility was across the street from a junior high school, and it feared that the students might harass the occupants of the Featherston home. But the school itself is attended by about 30 mentally retarded students, and denying a permit based on such vague, undifferentiated fears is again permitting some portion of the community to validate what would otherwise be an equal protection violation. The other objection to the home's location was that it was located on "a five hundred year flood plain." This concern with the possibility of a flood, however, can hardly

be based on a distinction between the Featherston home and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the Featherston site without obtaining a special use permit. The same may be said of another concern of the Council—doubts about the legal responsibility for actions which the mentally retarded might take. If there is no concern about legal responsibility with respect to other uses that would be permitted in the area, such as boarding and fraternity houses, it is difficult to believe that the groups of mildly or moderately mentally retarded individuals who would live at 201 Featherston would present any different or special hazard.

Fourth, the Council was concerned with the size of the home and the number of people that would occupy it. The District Court found, and the Court of Appeals repeated, that “[if] the potential residents of the Featherston Street home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city’s zoning ordinance.” App. 93; 726 F.2d, at 200. Given this finding, there would be no restrictions on the number of people who could occupy this home as a boarding house, nursing home, family dwelling, fraternity house, or dormitory. The question is whether it is rational to treat the mentally retarded differently. It is true that they suffer disability not shared by others; but why this difference warrants a density regulation that others need not observe is not at all apparent. At least this record does not clarify how, in this connection, the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes. Those who would live in the Featherston home are the type of individuals who, with supporting staff, satisfy federal and state standards for group housing in the community; and there is no dispute that the home would meet the federal square-footage-per-resident requirement for facilities of this type. See 42 CFR §442.447 (1984). In the words of the Court of Appeals, “[the] City never justifies its apparent view that other people can live under such ‘crowded’ conditions when mentally retarded persons cannot.” 726 F.2d, at 202.

In the courts below the city also urged that the ordinance is aimed at avoiding concentration of population and at lessening congestion of the streets. These concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit. So, too, the expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents fail rationally to justify singling out a home such as 201 Featherston for the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood.

The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded, including those who would occupy the Featherston facility and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law.

The judgment of the Court of Appeals is affirmed insofar as it invalidates the zoning ordinance as applied to the Featherston home. The judgment is otherwise vacated, and the case is remanded.

It is so ordered.

DISCUSSION QUESTION:

Legislative classifications based on race, alienage, or national origin, or those impinging upon fundamental rights are categorically presumed to be unconstitutional. The reasonableness of other legislative choices is considered on an ad hoc basis. From a legal process point of view what are the respective advantages and disadvantages of per se rules and ad hoc choices?

Session 19. Plebiscites & Quasi-Judicial Actions

“Specialists in the practice of zoning law are unhappily familiar with the potential for abuse which exists when inadequate procedural safeguards apply to the dispensation of special grants.” Mr. Justice Stevens dissenting in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976)

JAMES v. VALTIERRA 402 U.S. 137 (1971)

MR. JUSTICE BLACK delivered the opinion of the Court.

These cases raise but a single issue. It grows out of the United States Housing Act of 1937, 50 Stat. 888, as amended, 42 U. S. C. §1401 et seq., which established a federal housing agency authorized to make loans and grants to state agencies for slum clearance and low-rent housing projects. In response, the California Legislature created in each county and city a public housing authority to take advantage of the financing made available by the federal Housing Act. See Cal. Health & Safety Code §34240.

At the time the federal legislation was passed the California Constitution had for many years reserved to the State's people the power to initiate legislation and to reject or approve by referendum any Act passed by the state legislature. Cal. Const., Art. IV, §1. The same section reserved to the electors of counties and cities the power of initiative and referendum over acts of local government bodies. In 1950, however, the State Supreme Court held that local authorities' decisions on seeking federal aid for public housing projects were "executive" and "administrative," not "legislative," and therefore the state constitution's referendum provisions did not apply to these actions. Within six months of that decision the California voters adopted Article XXXIV of the state constitution to bring public housing decisions under the State's referendum policy. The Article provided that no low-rent housing project should be developed, constructed, or acquired in any manner by a state public body until the project was approved by a majority of those voting at a community election.

The present suits were brought by citizens of San Jose, California, and San Mateo County, localities where housing authorities could not apply for federal funds because low-cost housing proposals had been defeated in referendums. The plaintiffs, who are eligible for low-cost public housing, sought a declaration that Article XXXIV was unconstitutional because its referendum requirement violated: (1) the Supremacy Clause of the United States Constitution; (2) the Privileges and Immunities Clause; and (3) the Equal Protection Clause. A three-judge court held that Article XXXIV denied the plaintiff's equal protection of the laws and it enjoined its enforcement. 313 F.Supp. 1 (ND Cal. 1970).... For the reasons that follow, we reverse. The three-judge court found the Supremacy Clause argument unpersuasive, and we agree. By the Housing Act of 1937 the Federal Government has offered aid to state and local governments for the creation of low-rent public housing. However, the federal legislation does not purport to

require that local governments accept this or to outlaw local referendums on whether the aid should be accepted. We also find the privileges and immunities argument without merit.

While the District Court cited several cases of this Court, its chief reliance plainly rested on *Hunter v. Erickson*, 393 U.S. 385 (1969). The first paragraph in the District Court's decision stated simply: "We hold Article XXXIV to be unconstitutional. See *Hunter v. Erickson*" The court below erred in relying on *Hunter* to invalidate Article XXXIV. Unlike the case before us, *Hunter* rested on the conclusion that Akron's referendum law denied equal protection by placing "special burdens on racial minorities within the governmental process." *Id.*, at 391. In *Hunter* the citizens of Akron had amended the city charter to require that any ordinance regulating real estate on the basis of race, color, religion, or national origin could not take effect without approval by a majority of those voting in a city election. The Court held that the amendment created a classification based upon race because it required that laws dealing with racial housing matters could take effect only if they survived a mandatory referendum while other housing ordinances took effect without any such special election....The Court concluded that Akron had advanced no sufficient reasons to justify this racial classification and hence that it was unconstitutional under the Fourteenth Amendment.

Unlike the Akron referendum provision, it cannot be said that California's Article XXXIV rests on "distinctions based on race." *Id.*, at 391. The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority. Cf. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). The present case could be affirmed only by extending *Hunter*, and this we decline to do.

California's entire history demonstrates the repeated use of referendums to give citizens a voice on questions of public policy. A referendum provision was included in the first state constitution, Cal. Const. of 1849, Art. VIII, and referendums have been a commonplace occurrence in the State's active political life. Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice....

The people of California have also decided by their own vote to require referendum approval of low-rent public housing projects. This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community. This procedure for democratic decision-making does not violate the constitutional command that no State shall deny to any person "the equal protection of the laws." The judgment of the three-judge court is reversed and the cases are remanded for dismissal of the complaint.

Reversed and remanded.

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

DISSENT: MR. JUSTICE MARSHALL, whom MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN join, dissenting.

By its very terms, the mandatory prior referendum provision of Art. XXXIV applies solely to

"any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise."

Persons of low income are defined as:

"persons or families who lack the amount of income which is necessary . . . to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding."

The article explicitly singles out low-income persons to bear its burden. Publicly assisted housing developments designed to accommodate the aged, veterans, state employees, persons of moderate income, or any class of citizens other than the poor, need not be approved by prior referenda. In my view, Art. XXXIV on its face constitutes invidious discrimination which the Equal Protection Clause of the Fourteenth Amendment plainly prohibits. "The States, of course, are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' as such in the formulation and application of their laws." *Douglas v. California*, 372 U.S. 353, 361 (1963) (HARLAN, J., dissenting). Article XXXIV is neither "a law of general applicability that may affect the poor more harshly than it does the rich," *ibid.*, nor an "effort to redress economic imbalances," *ibid.* It is rather an explicit classification on the basis of poverty -- a suspect classification which demands exacting judicial scrutiny, see *McDonald v. Board of Election*, 394 U.S. 802, 807 (1969); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Douglas v. California*, *supra*. The Court, however, chooses to subject the article to no scrutiny whatsoever and treats the provision as if it contained a totally benign, technical economic classification. Both the appellees and the Solicitor General of the United States as *amicus curiae* have strenuously argued, and the court below found, that Art. XXXIV, by imposing a substantial burden solely on the poor, violates the Fourteenth Amendment. Yet after observing that the article does not discriminate on the basis of race, the Court's only response to the real question in these cases is the unresponsive assertion that "referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination; and to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect.

I respectfully dissent.

FASANO v. BOARD OF COUNTY COMMISSIONERS OF WASHINGTON COUNTY
264 Ore. 574, 507 P.2d 23 (1972)

The plaintiffs, homeowners in Washington County, unsuccessfully opposed a zone change before the Board of County Commissioners of Washington County. Plaintiffs applied for and received a writ of review of the action of the commissioners allowing the change. The trial court found in favor of plaintiffs, disallowed the zone change, and reversed the commissioners' order. The Court of Appeals affirmed, 7 Or. App. 176, 489 P.2d 693 (1971), and this court granted review.

The defendants are the Board of County Commissioners and A.G.S. Development Company. A.G.S., the owner of 32 acres which had been zoned R-7 (Single Family Residential), applied for a zone change to P-R (Planned Residential), which allows for the construction of a mobile home park. The change failed to receive a majority vote of the Planning Commission. The Board of County Commissioners approved the change and found, among other matters, that the change allows for "increased densities and different types of housing to meet the needs of urbanization over that allowed by the existing zoning."

The trial court, relying on its interpretation of *Roseta v. County of Washington*, 254 Or. 161, 458 P.2d 405, 40 ALR3d 364 (1969), reversed the order of the commissioners because the commissioners had not shown any change in the character of the neighborhood which would justify the rezoning. The Court of Appeals affirmed for the same reason, but added the additional ground that the defendants failed to show that the change was consistent with the comprehensive plan for Washington County.

According to the briefs, the comprehensive plan of development for Washington County was adopted in 1959 and included classifications in the county for residential, neighborhood commercial, retail commercial, general commercial, industrial park and light industry, general and heavy industry, and agricultural areas.

The land in question, which was designated "residential" by the comprehensive plan, was zoned R-7, Single Family Residential.

Subsequent to the time the comprehensive plan was adopted, Washington County established a Planned Residential (P-R) zoning classification in 1963. The P-R classification was adopted by ordinance and provided that a planned residential unit development could be established and should include open space for utilities, access, and recreation; should not be less than 10 acres in size; and should be located in or adjacent to a residential zone. The P-R zone adopted by the 1963 ordinance is of the type known as a "floating zone," so-called because the ordinance creates a zone classification authorized for future use but not placed on the zoning map until its use at a particular location is approved by the governing body. The R-7 classification for the 32 acres continued until April 1970 when the classification was changed to P-R to permit the defendant A.G.S. to construct the mobile home park on the 32 acres involved.

The defendants argue that (1) the action of the county commissioners approving the change is presumptively valid, requiring plaintiffs to show that the commissioners acted arbitrarily in approving the zone change; (2) it was not necessary to show a change of conditions in the area before a zone change could be accomplished; and (3) the change from R-7 to P-R was in accordance with the Washington County comprehensive plan.

We granted review in this case to consider the questions--by what standards does a county commission exercise its authority in zoning matters; who has the burden of meeting those standards when a request for change of zone is made; and what is the scope of court review of such actions?

Any meaningful decision as to the proper scope of judicial review of a zoning decision must start with a characterization of the nature of that decision. The majority of jurisdictions state that a zoning ordinance is a legislative act and is thereby entitled to presumptive validity.

At this juncture we feel we would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers. Local and small decision groups are simply not the equivalent in all respects of state and national legislatures. There is a growing judicial recognition of this fact of life:

“It is not a part of the legislative function to grant permits, make special exceptions, or decide particular cases. Such activities are not legislative but administrative, quasi-judicial, or judicial in character. To place them in the hands of legislative bodies, whose acts as such are not judicially reviewable, is to open the door completely to arbitrary government.” *Ward v. Village of Skokie*, 26 Ill.2d 415, 186 NE 2d 529, 533 (1962) (Klingbiel, J., specially concurring).

The Supreme Court of Washington, in reviewing a rezoning decision, recently stated:

“Whatever descriptive characterization may be otherwise attached to the role or function of the planning commission in zoning procedures, e.g., advisory, recommendatory, investigatory, administrative or legislative, it is manifest . . . that it is a public agency, . . . a principle [sic] and statutory duty of which is to conduct public hearings in specified planning and zoning matters, enter findings of fact- often on the basis of disputed facts- and make recommendations with reasons assigned thereto. Certainly, in its role as a hearing and fact-finding tribunal, the planning commission’s function more nearly than not partakes of the nature of an administrative, quasi-judicial proceeding,” *Chrobuck v. Snohomish County*, 78 Wash. 2d 884, 480 P.2d 489, 495-96 (1971).

Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be

attacked upon constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority and its propriety is subject to an altogether different test. An illustration of an exercise of legislative authority is the passage of the ordinance by the Washington County Commission in 1963 which provided for the formation of a planned residential classification to be located in or adjacent to any residential zone. An exercise of judicial authority is the county commissioners' determination in this particular matter to change the classification of A.G.S. Development Company's specific piece of property.

We reject the proposition that judicial review of the county commissioners' determination to change the zoning of the particular property in question is limited to a determination whether the change was arbitrary and capricious. In order to establish a standard of review, it is necessary to delineate certain basic principles relating to land use regulation.

The basic instrument for county or municipal land use planning is the "comprehensive plan." Haar, "In Accordance with a Comprehensive Plan," 68 Harv. L. Rev. 1154 (1955); 1 Yokley, *Zoning Law and Practice*, §3-2 (1965); 1 Rathkopf, *The Law of Zoning and Planning*, §9-1 (3d ed. 1969). The plan has been described as a general plan to control and direct the use and development of property in a municipality. *Nowicki v. Planning and Zoning Board*, 148 Conn. 492, 172 A.2d 386, 389 (1961).

In Oregon the county planning commission is required by ORS 215.050 to adopt a comprehensive plan for the use of some or all of the land in the county. Under ORS 215.110(1), after the comprehensive plan has been adopted, the planning commission recommends to the governing body of the county the ordinances necessary to "carry out" the comprehensive plan. The purpose of the zoning ordinances, both under our statute and the general law of land use regulation, is to "carry out" or implement the comprehensive plan. 1 Anderson, *American Law of Zoning*, §1.12 (1968). Although we are aware of the analytical distinction between zoning and planning, it is clear that under our statutes the plan adopted by the planning commission and the zoning ordinances enacted by the county governing body are closely related; both are intended to be parts of a single integrated procedure for land use control. The plan embodies policy determinations and guiding principles; the zoning ordinances provide the detailed means of giving effect to those principles.

We believe that the state legislature has conditioned the county's power to zone upon the prerequisite that the zoning attempt to further the general welfare of the community through consciousness, in a prospective sense, of the factors mentioned above. In other words, except as noted later in this opinion, it must be proved that the change is in conformance with the comprehensive plan.

In proving that the change is in conformance with the comprehensive plan in this case, the proof, at a minimum, should show (1) there is a public need for a change of the kind in

question, and (2) that need will be best served by changing the classification of the particular piece of property in question as compared with other available property.

In the instant case the trial court and the Court of Appeals interpreted prior decisions of this court as requiring the county commissions to show a change of conditions within the immediate neighborhood in which the change was sought since the enactment of the comprehensive plan, or a mistake in the comprehensive plan as a condition precedent to the zone change.

In *Roseta v. Washington County*, *supra*, the land in question was classified as residential under the comprehensive plan and had been originally zoned as R-10, Single Family Residential. The county commissioners granted a zone change to A-1, Duplex Residential. We held that the commissioners had not sustained the burden of proving that the change was consistent with the comprehensive plan and reversed the order allowing the zone change. In regard to defendants' argument that the change was consistent with the comprehensive plan because the plan designated the areas as "residential" and the term included both single family dwellings and duplex residences, we stated:

" . . . [H]owever, the ordinance established a distinction between the two types of use by classifying one area as R-10 and another area as A-1. It must be assumed that the Board had some purpose in making a distinction between these two classifications. It was for defendant to prove that this distinction was not valid or that the change in the character of the use of the . . . parcel was not inconsistent with the comprehensive plan." 254 Or. at 169.

The instant case could be distinguished from *Roseta* on the basis that we are involved with a floating zone which was not before the court in *Roseta*.

However, *Roseta* should not be interpreted as establishing a rule that a physical change of circumstances within the rezoned neighborhood is the only justification for rezoning. The county governing body is directed by ORS 215.055 to consider a number of other factors when enacting zoning ordinances, and the list there does not purport to be exclusive. The important issues, as *Roseta* recognized, are compliance with the statutory directive and consideration of the proposed change in light of the comprehensive plan.

Because the action of the commission in this instance is an exercise of judicial authority, the burden of proof should be placed, as is usual in judicial proceedings, upon the one seeking change. The more drastic the change, the greater will be the burden of showing that it is in conformance with the comprehensive plan as implemented by the ordinance, that there is a public need for the kind of change in question, and that the need is best met by the proposal under consideration. As the degree of change increases, the burden of showing that the potential impact upon the area in question was carefully considered and weighed will also increase. If other areas have previously been designated for the particular type of development, it must be

shown why it is necessary to introduce it into an area not previously contemplated and why the property owners there should bear the burden of the departure.

Although we have said in *Roseta* that zoning changes may be justified without a showing of a mistake in the original plan or ordinance, or of changes in the physical characteristics of an affected area, any of these factors which are present in a particular case would, of course, be relevant. Their importance would depend upon the nature of the precise change under consideration.

By treating the exercise of authority by the commission in this case as the exercise of judicial rather than of legislative authority and thus enlarging the scope of review on appeal, and by placing the burden of the above level of proof upon the one seeking change, we may lay the court open to criticism by legal scholars who think it desirable that planning authorities be vested with the ability to adjust more freely to changed conditions. However, having weighed the dangers of making desirable change more difficult against the dangers of the almost irresistible pressures that can be asserted by private economic interests on local government, we believe that the latter dangers are more to be feared.

What we have said above is necessarily general, as the approach we adopt contains no absolute standards or mechanical tests. We believe, however, that it is adequate to provide meaningful guidance for local governments making zoning decisions and for trial courts called upon to review them.

When we apply the standards we have adopted to the present case, we find that the burden was not sustained before the commission. The record now before us is insufficient to ascertain whether there was a justifiable basis for the decision. The only evidence in the record, that of the staff report of the Washington County Planning Department, is too conclusory and superficial to support the zoning change. Such . . . conclusions, without any statement of the facts on which they are based, are insufficient to justify a change of use. Moreover, no portions of the comprehensive plan of Washington County are before us, and we feel it would be improper for us to take judicial notice of the plan without at least some reference to its specifics by counsel.

As there has not been an adequate showing that the change was in accord with the plan, or that the factors listed in ORS 215.055 were given proper consideration, the judgment is affirmed.

CITY OF EASTLAKE v. FOREST CITY ENTERPRISES, INC.
426 U.S. 668 (1976)

Mr. Chief Justice Burger delivered the opinion of the Court.

The question in this case is whether a city charter provision requiring proposed land use changes to be ratified by 55% of the votes cast violates the due process rights of a landowner who applies for a zoning change.

The city of Eastlake, Ohio, a suburb of Cleveland, has a comprehensive zoning plan codified in a municipal ordinance. Respondent, a real estate developer, acquired an eight-acre parcel of real estate in Eastlake zoned for “light industrial” uses at the time of purchase.

In May 1971, respondent applied to the City Planning Commission for a zoning change to permit construction of a multifamily, high-rise apartment building. The Planning Commission recommended the proposed change to the City Council, which under Eastlake’s procedures could either accept or reject the Planning Commission’s recommendation. Meanwhile, by popular vote, the voters of Eastlake amended the city charter to require that any changes in land use agreed to by the Council be approved by a 55% vote in a referendum. The City Council approved the Planning Commission’s recommendation for reclassification of respondent’s property to permit the proposed project. Respondent then applied to the Planning Commission for “parking and yard” approval for the proposed building. The Commission rejected the application, on the ground that the City Council’s rezoning action had not yet been submitted to the voters for ratification.

Respondent then filed an action in state court, seeking a judgment declaring the charter provision invalid as an unconstitutional delegation of legislative power to the people. While the case was pending, the City Council’s action was submitted to a referendum, but the proposed zoning change was not approved by the requisite 55% margin. Following the election, the Court of Common Pleas and the Ohio Court of Appeals sustained the charter provision.

The Ohio Supreme Court reversed. 41 Ohio St. 2d 187, 324 N.E. 2d 740 (1975). Concluding that enactment of zoning and rezoning provisions is a legislative function, the court held that a popular referendum requirement, lacking standards to guide the decision of the voters, permitted the police power to be exercised in a standardless, hence arbitrary and capricious manner. Relying on this Court’s decisions in *Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928), *Thomas Cusack Co. v. Chicago*, 242 U.S. 526 (1917), and *Eubank v. Richmond*, 226 U.S. 137 (1912), but distinguishing *James v. Valtierra*, 402 U.S. 137 (1971), the court concluded that the referendum provision constituted an unlawful delegation of legislative power. We reverse.

The conclusion that Eastlake's procedure violates federal constitutional guarantees rests upon the proposition that a zoning referendum involves a delegation of legislative power. A referendum cannot, however, be characterized as a delegation of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. See, e.g., *The Federalist*, No. 39 (J. Madison). In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature. *Hunter v. Erickson*, 393 U.S. 385, 392 (1969).

The reservation of such power is the basis for the town meeting, a tradition which continues to this day in some States as both a practical and symbolic part of our democratic processes. The referendum, similarly, is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to "give citizens a voice on questions of public policy." *James v. Valtierra*, *supra*, at 141.

In framing a state constitution, the people of Ohio specifically reserved the power of referendum to the people of each municipality within the State.

"The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action" Ohio Const., Art. II, §f.I. To be subject to Ohio's referendum procedure, the question must be one within the scope of legislative power. The Ohio Supreme Court expressly found that the City Council's action in rezoning respondent's eight acres from light industrial to high-density residential use was legislative in nature. Distinguishing between administrative and legislative acts, the court separated the power to zone or rezone, by passage or amendment of a zoning ordinance, from the power to grant relief from unnecessary hardship. The former function was found to be legislative in nature.

II

The Ohio Supreme Court further concluded that the amendment to the city charter constituted a "delegation" of power violative of federal constitutional guarantees because the voters were given no standards to guide their decision. Under Eastlake's procedure, the Ohio Supreme Court reasoned, no mechanism existed, nor indeed could exist, to assure that the voters would act rationally in passing upon a proposed zoning change. This meant that "appropriate legislative action [would] be made dependent upon the potentially arbitrary and unreasonable whims of the voting public." 41 Ohio St. 2d, at 195, 324 N.E. 2d, at 746. The potential for arbitrariness in the process, the court concluded, violated due process.

In basing its claim on federal due process requirements, respondent . . . invokes *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), but it does not rely on the direct teaching of that case. Under *Euclid*, a property owner can challenge a zoning restriction if the measure is "clearly

arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” *Id.*, at 395. If the substantive result of the referendum is arbitrary and capricious, bearing no relation to the police power, then the fact that the voters of Eastlake wish it so would not save the restriction. As this Court held in invalidating a charter amendment enacted by referendum: “The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed.” *Hunter v. Erickson*, 393 U.S., at 392.

But no challenge of the sort contemplated in *Euclid v. Ambler Realty* is before us. The Ohio Supreme Court did not hold, and respondent does not argue, that the present zoning classification under Eastlake’s comprehensive ordinance violates the principles established in *Euclid v. Ambler Realty*. If respondent considers the referendum result itself to be unreasonable, the zoning restriction is open to challenge in state court, where the scope of the state remedy available to respondent would be determined as a matter of state law, as well as under Fourteenth Amendment standards. That being so, nothing more is required by the Constitution.

The judgment of the Ohio Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice Powell, dissenting.

There can be no doubt as to the propriety and legality of submitting generally applicable legislative questions, including zoning provisions, to a popular referendum. But here the only issue concerned the status of a single small parcel owned by a single “person.” This procedure, affording no realistic opportunity for the affected person to be heard, even by the electorate, is fundamentally unfair. The “spot” referendum technique appears to open disquieting opportunities for local government bodies to bypass normal protective procedures for resolving issues affecting individual rights.

Mr. Justice Stevens, with whom Mr. Justice Brennan joins, dissenting.

The city’s reliance on the town meeting process of decision-making tends to obfuscate the two critical issues in this case. These issues are (1) whether the procedure which a city employs in deciding to grant or to deny a property owner’s request for a change in the zoning of his property must comply with the Due Process Clause of the Fourteenth Amendment; and (2) if so, whether the procedure employed by the city of Eastlake is fundamentally fair?

I

We might rule in favor of the city on the theory that the referendum requirement did not deprive respondent of any interest in property and therefore the Due Process Clause is wholly inapplicable. After all, when respondent bought this parcel, it was zoned for light industrial use

and it still retains that classification. The Court does not adopt any such rationale; nor, indeed, does the city even advance that argument. On the contrary, throughout this litigation everyone has assumed, without discussing the problem, that the Due Process Clause does apply. Both reason and authority support that assumption.

Subject to limitations imposed by the common law of nuisance and zoning restrictions, the owner of real property has the right to develop his land to his own economic advantage. As land continues to become more scarce, and as land use planning constantly becomes more sophisticated, the needs and the opportunities for unforeseen uses of specific parcels of real estate continually increase. For that reason, no matter how comprehensive a zoning plan may be, it regularly contains some mechanism for granting variances, amendments, or exemptions for specific uses of specific pieces of property. No responsibly prepared plan could wholly deny the need for presently unforeseeable future change.

A zoning code is unlike other legislation affecting the use of property. The deprivation caused by a zoning code is customarily qualified by recognizing the property owner's right to apply for an amendment or variance to accommodate his individual needs. The expectancy that particular changes consistent with the basic zoning plan will be allowed frequently and on their merits is a normal incident of property ownership. When the governing body offers the owner the opportunity to seek such a change—whether that opportunity is denominated a privilege or a right—it is affording protection to the owner's interest in making legitimate use of his property.

The fact that an individual owner (like any other petitioner or plaintiff) may not have a legal right to the relief he seeks does not mean that he has no right to fair procedure in the consideration of the merits of his application. The fact that codes regularly provide a procedure for granting individual exceptions or changes, the fact that such changes are granted in individual cases with great frequency, and the fact that the particular code in the record before us contemplates that changes consistent with the basic plan will be allowed, all support my opinion that the opportunity to apply for an amendment is an aspect of property ownership protected by the Due Process Clause of the Fourteenth Amendment.

Although this Court has decided only a handful of zoning cases, literally thousands of zoning disputes have been resolved by state courts. Those courts have repeatedly identified the obvious difference between the adoption of a comprehensive citywide plan by legislative action and the decision of particular issues involving specific uses of specific parcels. In the former situation there is generally great deference to the judgment of the legislature; in the latter situation state courts have not hesitated to correct manifest injustice.

The distinction was plainly drawn by the Supreme Court of Oregon:

“Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary

abuse of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority and its propriety is subject to an altogether different test.” *Fasano v. Board of County Comm’rs*, 264 Ore. 574, 580-581, 507 P. 2d 23, 26 (1973).

Specialists in the practice of zoning law are unhappily familiar with the potential for abuse which exists when inadequate procedural safeguards apply to the dispensation of special grants. The power to deny arbitrarily may give rise to the power to exact intolerable conditions. The insistence on fair procedure in this area of the law falls squarely within the purpose of the Due Process Clause of the Fourteenth Amendment.

II

When we examine a state procedure for the purpose of deciding whether it comports with the constitutional standard of due process, the fact that a State may give it a “legislative” label should not save an otherwise invalid procedure. In this case the Ohio Supreme Court characterized the Council’s approval of respondent’s proposal as “legislative.” I think many state courts would have characterized it as “administrative.” The courts thus may well differ in their selection of the label to apply to this action, but I find substantial agreement among state tribunals on the proposition that requiring a citywide referendum for approval of a particular proposal like this is manifestly unreasonable. Surely that is my view.

The essence of fair procedure is that the interested parties be given a reasonable opportunity to have their dispute resolved on the merits by reference to articulable rules. If a dispute involves only the conflicting rights of private litigants, it is elementary that the decisionmaker must be impartial and qualified to understand and to apply the controlling rules.

I have no doubt about the validity of the initiative or the referendum as an appropriate method of deciding questions of community policy. I think it is equally clear that the popular vote is not an acceptable method of adjudicating the rights of individual litigants. The problem presented by this case is unique, because it may involve a three-sided controversy, in which there is at least potential conflict between the rights of the property owner and the rights of his neighbors, and also potential conflict with the public interest in preserving the city’s basic zoning plan. If the latter aspect of the controversy were predominant, the referendum would be an acceptable procedure. On the other hand, when the record indicates without contradiction that there is no threat to the general public interest in preserving the city’s plan—as it does in this case, since respondent’s proposal was approved by both the Planning Commission and the City Council and there has been no allegation that the use of this eight-acre parcel for apartments rather than light industry would adversely affect the community or raise any policy issue of citywide concern – I think the case should be treated as one in which it is essential that the private property owner be given a fair opportunity to have his claim determined on its merits.

As Justice Stern points out in his concurring opinion, it would be absurd to use a referendum to decide whether a gasoline station could be operated on a particular corner in the city of Cleveland. The case before us is not that clear because we are told that there are only 20,000 people in the city of Eastlake. Conceivably, an eight-acre development could be sufficiently dramatic to arouse the legitimate interest of the entire community; it is also conceivable that most of the voters would be indifferent and uninformed about the wisdom of building apartments rather than a warehouse or factory on these eight acres. The record is silent on which of these alternatives is the more probable. Since the ordinance places a manifestly unreasonable obstacle in the path of every property owner seeking any zoning change, since it provides no standards or procedures for exempting particular parcels or claims from the referendum requirement, and since the record contains no justification for the use of the procedure in this case, I am persuaded that we should respect the state judiciary's appraisal of the fundamental fairness of this decision-making process in this case.

I therefore conclude that the Ohio Supreme Court correctly held that Art. VIII, §3, of the Eastlake charter violates the Due Process Clause of the Fourteenth Amendment, and that its judgment should be affirmed.

**VILLAGE OF ARLINGTON HEIGHTS v. METROPOLITAN HOUSING
DEVELOPMENT CORP.**
429 U.S. 252 (1976)

MR. JUSTICE POWELL delivered the opinion of the Court.

In 1971 respondent Metropolitan Housing Development Corporation (MHDC) applied to petitioner, the Village of Arlington Heights, Ill., for the rezoning of a 15-acre parcel from single-family to multiple-family classification. Using federal financial assistance, MHDC planned to build 190 clustered townhouse units for low- and moderate-income tenants. The Village denied the rezoning request. MHDC, joined by other plaintiffs who are also respondents here, brought suit in the United States District Court for the Northern District of Illinois. They alleged that the denial was racially discriminatory and that it violated, *inter alia*, the Fourteenth Amendment and the Fair Housing Act of 1968, 82 Stat. 81, 42 U.S.C. §3601 *et seq.* Following a bench trial, the District Court entered judgment for the Village, 373 F. Supp. 208 (1974), and respondents appealed. The Court of Appeals for the Seventh Circuit reversed, finding that the "ultimate effect" of the denial was racially discriminatory, and that the refusal to rezone therefore violated the Fourteenth Amendment. 517 F. 2d 409 (1975). We granted the Village's petition for certiorari, 423 U.S. 1030 (1975), and now reverse.

I

Arlington Heights is a suburb of Chicago, located about 26 miles northwest of the downtown Loop area. Most of the land in Arlington Heights is zoned for detached single-family homes, and this is in fact the prevailing land use. The Village experienced substantial growth during the 1960's, but, like other communities in northwest Cook County, its population of racial minority groups remained quite low. According to the 1970 census, only 27 of the Village's 64,000 residents were black.

The Clerics of St. Viator, a religious order (Order), own an 80-acre parcel just east of the center of Arlington Heights. Part of the site is occupied by the Viatorian high school, and part by the Order's three-story novitiate building, which houses dormitories and a Montessori school. Much of the site, however, remains vacant. Since 1959, when the Village first adopted a zoning ordinance, all the land surrounding the Viatorian property has been zoned R-3, a single-family specification with relatively small minimum lot-size requirements. On three sides of the Viatorian land there are single-family homes just across a street; to the east the Viatorian property directly adjoins the backyards of other single-family homes.

The Order decided in 1970 to devote some of its land to low- and moderate-income housing. Investigation revealed that the most expeditious way to build such housing was to work through a nonprofit developer experienced in the use of federal housing subsidies under §236 of the National Housing Act, 48 Stat. 1246, as added and amended, 12 U.S.C. §1715z-1.

MHDC is such a developer. It was organized in 1968 by several prominent Chicago citizens for the purpose of building low- and moderate-income housing throughout the Chicago area. In 1970 MHDC was in the process of building one §236 development near Arlington Heights and already had provided some federally assisted housing on a smaller scale in other parts of the Chicago area.

After some negotiation, MHDC and the Order entered into a 99-year lease and an accompanying agreement of sale covering a 15-acre site in the southeast corner of the Viatorian property. MHDC became the lessee immediately, but the sale agreement was contingent upon MHDC's securing zoning clearances from the Village and §236 housing assistance from the Federal Government. If MHDC proved unsuccessful in securing either, both the lease and the contract of sale would lapse. The agreement established a bargain purchase price of \$300,000, low enough to comply with federal limitations governing land-acquisition costs for §236 housing.

MHDC engaged an architect and proceeded with the project, to be known as Lincoln Green. The plans called for 20 two-story buildings with a total of 190 units, each unit having its own private entrance from the outside. One hundred of the units would have a single bedroom, thought likely to attract elderly citizens. The remainder would have two, three, or four bedrooms. A large portion of the site would remain open, with shrubs and trees to screen the homes abutting the property to the east.

The planned development did not conform to the Village's zoning ordinance and could not be built unless Arlington Heights rezoned the parcel to R-5, its multiple-family housing classification. Accordingly, MHDC filed with the Village Plan Commission a petition for rezoning, accompanied by supporting materials describing the development and specifying that it would be subsidized under §236. The materials made clear that one requirement under §236 is an affirmative marketing plan designed to assure that a subsidized development is racially integrated. MHDC also submitted studies demonstrating the need for housing of this type and analyzing the probable impact of the development. To prepare for the hearings before the Plan Commission and to assure compliance with the Village building code, fire regulations, and related requirements, MHDC consulted with the Village staff for preliminary review of the development. The parties have stipulated that every change recommended during such consultations was incorporated into the plans.

During the spring of 1971, the Plan Commission considered the proposal at a series of three public meetings, which drew large crowds. Although many of those attending were quite vocal and demonstrative in opposition to Lincoln Green, a number of individuals and representatives of community groups spoke in support of rezoning. Some of the comments, both from opponents and supporters, addressed what was referred to as the "social issue" - the desirability or undesirability of introducing at this location in Arlington Heights low- and moderate-income housing, housing that would probably be racially integrated.

Many of the opponents, however, focused on the zoning aspects of the petition, stressing two arguments. First, the area always had been zoned single-family, and the neighboring citizens had built or purchased there in reliance on that classification. Rezoning threatened to cause a measurable drop in property value for neighboring sites. Second, the Village's apartment policy, adopted by the Village Board in 1962 and amended in 1970, called for R-5 zoning primarily to serve as a buffer between single-family development and land uses thought incompatible, such as commercial or manufacturing districts. Lincoln Green did not meet this requirement, as it adjoined no commercial or manufacturing district.

At the close of the third meeting, the Plan Commission adopted a motion to recommend to the Village's Board of Trustees that it deny the request. The motion stated: "While the need for low and moderate income housing may exist in Arlington Heights or its environs, the Plan Commission would be derelict in recommending it at the proposed location." Two members voted against the motion and submitted a minority report, stressing that in their view the change to accommodate Lincoln Green represented "good zoning." The Village Board met on September 28, 1971, to consider MHDC's request and the recommendation of the Plan Commission. After a public hearing, the Board denied the rezoning by a 6-1 vote.

The following June MHDC and three Negro individuals filed this lawsuit against the Village, seeking declaratory and injunctive relief. A second nonprofit corporation and an individual of Mexican-American descent intervened as plaintiffs. The trial resulted in a judgment for petitioners. Assuming that MHDC had standing to bring the suit, the District Court held that the petitioners were not motivated by racial discrimination or intent to discriminate against low-income groups when they denied rezoning, but rather by a desire "to protect property values and the integrity of the Village's zoning plan." 373 F. Supp., at 211. The District Court concluded also that the denial would not have a racially discriminatory effect.

A divided Court of Appeals reversed. It first approved the District Court's finding that the defendants were motivated by a concern for the integrity of the zoning plan, rather than by racial discrimination. Deciding whether their refusal to rezone would have discriminatory effects was more complex. The court observed that the refusal would have a disproportionate impact on blacks. Based upon family income, blacks constituted 40% of those Chicago area residents who were eligible to become tenants of Lincoln Green, although they composed a far lower percentage of total area population. The court reasoned, however, that under our decision in *James v. Valtierra*, 402 U.S. 137 (1971), such a disparity in racial impact alone does not call for strict scrutiny of a municipality's decision that prevents the construction of the low-cost housing.

There was another level to the court's analysis of allegedly discriminatory results. Invoking language from *Kennedy Park Homes Assn. v. City of Lackawanna*, 436 F. 2d 108, 112 (CA2 1970), cert. denied, 401 U.S. 1010 (1971), the Court of Appeals ruled that the denial of rezoning must be examined in light of its "historical context and ultimate effect." 517 F. 2d, at

413. Northwest Cook County was enjoying rapid growth in employment opportunities and population, but it continued to exhibit a high degree of residential segregation. The court held that Arlington Heights could not simply ignore this problem. Indeed, it found that the Village had been "exploiting" the situation by allowing itself to become a nearly all-white community. *Id.*, at 414. The Village had no other current plans for building low- and moderate-income housing, and no other R-5 parcels in the Village were available to MHDC at an economically feasible price.

Against this background, the Court of Appeals ruled that the denial of the Lincoln Green proposal had racially discriminatory effects and could be tolerated only if it served compelling interests. Neither the buffer policy nor the desire to protect property values met this exacting standard. The court therefore concluded that the denial violated the Equal Protection Clause of the Fourteenth Amendment.

II

MHDC's right [is] to be free of arbitrary or irrational zoning actions. See *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). But the heart of this litigation has never been the claim that the Village's decision fails the generous *Euclid* test, recently reaffirmed in *Belle Terre*. Instead it has been the claim that the Village's refusal to rezone discriminates against racial minorities in violation of the Fourteenth Amendment. As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners' alleged discrimination. In the ordinary case, a party is denied standing to assert the rights of third persons. *Warth v. Seldin*, 422 U.S., at 499. But we need not decide whether the circumstances of this case would justify departure from that prudential limitation and permit MHDC to assert the constitutional rights of its prospective minority tenants. See *Barrows v. Jackson*, 346 U.S. 249 (1953); cf. *Sullivan v. Little Hunting Park*, 396 U.S. 229, 237 (1969); *Buchanan v. Warley*, 245 U.S. 60, 72-73 (1917). For we have at least one individual plaintiff who has demonstrated standing to assert these rights as his own.

Respondent Ransom, a Negro, works at the Honeywell factory in Arlington Heights and lives approximately 20 miles away in Evanston in a 5-room house with his mother and his son. The complaint alleged that he seeks and would qualify for the housing MHDC wants to build in Arlington Heights. Ransom testified at trial that if Lincoln Green were built he would probably move there, since it is closer to his job.

The injury Ransom asserts is that his quest for housing nearer his employment has been thwarted by official action that is racially discriminatory. If a court grants the relief he seeks, there is at least a "substantial probability," *Warth v. Seldin*, *supra*, at 504, that the Lincoln Green project will materialize, affording Ransom the housing opportunity he desires in Arlington Heights. His is not a generalized grievance. Instead, as we suggested in *Warth*, *supra*, at 507, 508 n. 18, it focuses on a particular project and is not dependent on speculation about the

possible actions of third parties not before the court. See *id.*, at 505; *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S., at 41-42. Unlike the individual plaintiffs in *Warth*, Ransom has adequately averred an "actionable causal relationship" between Arlington Heights' zoning practices and his asserted injury. *Warth v. Seldin*, *supra*, at 507. We therefore proceed to the merits.

III

Our decision last Term in *Washington v. Davis*, 426 U.S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Id.*, at 242. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. Although some contrary indications may be drawn from some of our cases, the holding in *Davis* reaffirmed a principle well established in a variety of contexts. E.g., *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 208 (1973) (schools); *Wright v. Rockefeller*, 376 U.S. 52, 56-57 (1964) (election districting); *Akins v. Texas*, 325 U.S. 398, 403-404 (1945) (jury selection).

Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action - whether it "bears more heavily on one race than another," *Washington v. Davis*, *supra*, at 242 - may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Guinn v. United States*, 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence.

The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. See *Lane v. Wilson*, *supra*; *Griffin v. School Board*, 377 U.S. 218 (1964); *Davis v. Schnell*, 81 F. Supp. 872 (SD Ala.), *aff'd per curiam*, 336 U.S. 933 (1949); cf. *Keyes v. School Dist. No. 1, Denver Colo.*, *supra*, at 207.

The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. *Reitman v. Mulkey*, 387 U.S. 369, 373-376 (1967); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). For example, if the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC's plans to erect integrated housing, we would have a far different case. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached.

The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege. See *Tenney v. Brandhove*, 341 U.S. 367 (1951); *United States v. Nixon*, 418 U.S. 683, 705 (1974); 8 J. Wigmore, *Evidence* §2371 (McNaughton rev. ed. 1961). The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed. With these in mind, we now address the case before us.

IV

This case was tried in the District Court and reviewed in the Court of Appeals before our decision in *Washington v. Davis*, *supra*. The respondents proceeded on the erroneous theory that the Village's refusal to rezone carried a racially discriminatory effect and was, without more, unconstitutional. But both courts below understood that at least part of their function was to examine the purpose underlying the decision. In making its findings on this issue, the District Court noted that some of the opponents of Lincoln Green who spoke at the various hearings might have been motivated by opposition to minority groups. The court held, however, that the evidence "does not warrant the conclusion that this motivated the defendants." 373 F. Supp., at 211.

On appeal the Court of Appeals focused primarily on respondents' claim that the Village's buffer policy had not been consistently applied and was being invoked with a strictness here that could only demonstrate some other underlying motive. The court concluded that the buffer policy, though not always applied with perfect consistency, had on several occasions formed the basis for the Board's decision to deny other rezoning proposals. "The evidence does not necessitate a finding that Arlington Heights administered this policy in a discriminatory manner." 517 F. 2d, at 412. The Court of Appeals therefore approved the District Court's findings concerning the Village's purposes in denying rezoning to MHDC.

We also have reviewed the evidence. The impact of the Village's decision does arguably bear more heavily on racial minorities. Minorities constitute 18% of the Chicago area population, and 40% of the income groups said to be eligible for Lincoln Green. But there is

little about the sequence of events leading up to the decision that would spark suspicion. The area around the Viatorian property has been zoned R-3 since 1959, the year when Arlington Heights first adopted a zoning map. Single-family homes surround the 80-acre site, and the Village is undeniably committed to single-family homes as its dominant residential land use. The rezoning request progressed according to the usual procedures. The Plan Commission even scheduled two additional hearings, at least in part to accommodate MHDC and permit it to supplement its presentation with answers to questions generated at the first hearing.

The statements by the Plan Commission and Village Board members, as reflected in the official minutes, focused almost exclusively on the zoning aspects of the MHDC petition, and the zoning factors on which they relied are not novel criteria in the Village's rezoning decisions. There is no reason to doubt that there has been reliance by some neighboring property owners on the maintenance of single-family zoning in the vicinity. The Village originally adopted its buffer policy long before MHDC entered the picture and has applied the policy too consistently for us to infer discriminatory purpose from its application in this case. Finally, MHDC called one member of the Village Board to the stand at trial. Nothing in her testimony supports an inference of invidious purpose.

In sum, the evidence does not warrant overturning the concurrent findings of both courts below. Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision. This conclusion ends the constitutional inquiry. The Court of Appeals' further finding that the Village's decision carried a discriminatory "ultimate effect" is without independent constitutional significance.

V

Respondents' complaint also alleged that the refusal to rezone violated the Fair Housing Act, 42 U.S.C. §3601 et seq. They continue to urge here that a zoning decision made by a public body may, and that petitioners' action did, violate §3604 or §3617. The Court of Appeals, however, proceeding in a somewhat (unorthodox) fashion, did not decide the statutory question. We remand the case for further consideration of respondents' statutory claims.

Reversed and remanded.

CITY OF CUYAHOGA FALLS v. BUCKEYE COMMUNITY HOPE FOUNDATION
538 U.S. 188 (2003)

JUSTICE O'CONNOR delivered the opinion of the Court.

In 1995, the city of Cuyahoga Falls, Ohio (hereinafter City), submitted to voters a facially neutral referendum petition that called for the repeal of a municipal housing ordinance authorizing construction of a low-income housing complex. The United States Court of Appeals for the Sixth Circuit found genuine issues of material fact with regard to whether the City violated the Equal Protection Clause, the Due Process Clause, and the Fair Housing Act by placing the petition on the ballot. We granted certiorari to determine whether the Sixth Circuit erred in ruling that respondents' suit against the City could proceed to trial.

I

A

In June 1995, respondents Buckeye Community Hope Foundation, a nonprofit corporation dedicated to developing affordable housing through the use of low-income tax credits, and others (hereinafter Buckeye or respondents), purchased land zoned for apartments in Cuyahoga Falls, Ohio. In February 1996, Buckeye submitted a site plan for Pleasant Meadows, a multifamily, low-income housing complex, to the city planning commission. Residents of Cuyahoga Falls immediately expressed opposition to the proposal. After respondents agreed to various conditions, including that it build an earthen wall surrounded by a fence on one side of the complex, the commission unanimously approved the site plan and submitted it to the city council for final authorization.

As the final approval process unfolded, public opposition to the plan resurfaced and eventually coalesced into a referendum petition drive. At city council meetings and independent gatherings, some of which the mayor attended to express his personal opposition to the site plan, citizens of Cuyahoga Falls voiced various concerns: that the development would cause crime and drug activity to escalate, that families with children would move in, and that the complex would attract a population similar to the one on Prange Drive, the City's only African-American neighborhood. Nevertheless, because the plan met all municipal zoning requirements, the city council approved the project on April 1, 1996, through City Ordinance No. 48-1996.

On April 29, a group of citizens filed a formal petition with the City requesting that the ordinance be repealed or submitted to a popular vote. Pursuant to the City Charter, which provides that an ordinance challenged by a petition "shall [not] go into effect until approved by a majority" of voters, the filing stayed the implementation of the site plan. On April 30, respondents sought an injunction against the petition in state court, arguing that the Ohio Constitution does not authorize popular referendums on administrative matters. On May 31, the Court of Common Pleas denied the injunction. A month later, respondents nonetheless requested

building permits from the City in order to begin construction. On June 26, the city engineer rejected the request after being advised by the city law director that the permits "could not be issued because the site plan ordinance 'does not take effect' due to the petitions." 263 F.3d at 633.

In November 1996, the voters of Cuyahoga Falls passed the referendum, thus repealing Ordinance No. 48-1996. In a joint stipulation, however, the parties agreed that the results of the election would not be certified until the litigation over the referendum was resolved. See Stipulation and Jointly Agreed upon Preliminary Injunction Order in No. 5:96 CV 1458 (ND Ohio, Nov. 25, 1996). In July 1998, the Ohio Supreme Court, having initially concluded that the referendum was proper, reversed itself and declared the referendum unconstitutional. *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 82 Ohio St. 3d 539, 697 N.E.2d 181 (holding that the Ohio State Constitution authorizes referendums only in relation to legislative acts, not administrative acts, such as the site-plan ordinance). The City subsequently issued the building permits, and Buckeye commenced construction of Pleasant Meadows.

B

In July 1996, with the state-court litigation still pending, respondents filed suit in federal court against the City and several city officials, seeking an injunction ordering the City to issue the building permits, as well as declaratory and monetary relief. Buckeye alleged that "in allowing a site plan approval ordinance to be submitted to the electors of Cuyahoga Falls through a referendum and in rejecting [its] application for building permits," the City and its officials violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment, as well as the Fair Housing Act, 42 U.S.C. §3601. In June 1997, the District Court dismissed the case against the mayor in his individual capacity but denied the City's motion for summary judgment on the equal protection and due process claims, concluding that genuine issues of material fact existed as to both claims. *Buckeye Community Hope Found. v. City of Cuyahoga Falls*, 970 F. Supp. 1289, 1308 (ND Ohio 1997). After the Ohio Supreme Court declared the referendum invalid in 1998, thus reducing respondents' action to a claim for damages for the delay in construction, the City and its officials again moved for summary judgment. On November 19, 1999, the District Court granted the motion on all counts.

The Court of Appeals for the Sixth Circuit reversed. As to respondents' equal protection claim, the court concluded that they had produced sufficient evidence to go to trial on the allegation that the City, by allowing the referendum petition to stay the implementation of the site plan, gave effect to the racial bias reflected in the public's opposition to the project. See 263 F.3d at 639. The court then held that even if respondents failed to prove intentional discrimination, they stated a valid claim under the Fair Housing Act on the theory that the City's actions had a disparate impact based on race and family status. Finally, the court concluded that a genuine issue of material fact existed as to whether the City, by denying respondents the benefit of the lawfully approved site plan, engaged in arbitrary and irrational government conduct in

violation of substantive due process. We granted certiorari, 536 U.S. , 536 U.S. 938, 153 L. Ed. 2d 802, 122 S. Ct. 2618 (2002), and now reverse the constitutional holdings and vacate the Fair Housing Act holding.

II

Respondents allege that by submitting the petition to the voters and refusing to issue building permits while the petition was pending, the City and its officials violated the Equal Protection Clause. Petitioners claim that the Sixth Circuit went astray by ascribing the motivations of a handful of citizens supportive of the referendum to the City. We agree with petitioners that respondents have failed to present sufficient evidence of an equal protection violation to survive summary judgment.

We have made clear that "proof of racially discriminatory intent or purpose is required" to show a violation of the Equal Protection Clause. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977). In deciding the equal protection question, the Sixth Circuit erred in relying on cases in which we have subjected enacted, discretionary measures to equal protection scrutiny and treated decision-makers' statements as evidence of such intent. Because respondents claim injury from the referendum petitioning process and not from the referendum itself -- which never went into effect -- these cases are inapposite. Ultimately, neither of the official acts respondents challenge reflects the intent required to support equal protection liability.

First, in submitting the referendum petition to the voters, the City acted pursuant to the requirements of its charter, which sets out a facially neutral petitioning procedure. See Art. 9, §2. By placing the referendum on the ballot, the City did not enact the referendum and therefore cannot be said to have given effect to voters' allegedly discriminatory motives for supporting the petition. Similarly, the city engineer, in refusing to issue the building permits while the referendum was still pending, performed a nondiscretionary, ministerial act. He acted in response to the city law director's instruction that the building permits "could not . . . issue" because the City Charter prohibited a challenged site-plan ordinance from going into effect until "approved by a majority of those voting thereon," See 263 F.3d at 633. Respondents point to no evidence suggesting that these official acts were themselves motivated by racial animus. Respondents do not, for example, offer evidence that the City followed the obligations set forth in its charter because of the referendum's discriminatory purpose, or that city officials would have selectively refused to follow standard charter procedures in a different case.

Instead, to establish discriminatory intent, respondents and the Sixth Circuit both rely heavily on evidence of allegedly discriminatory voter sentiment. But statements made by private individuals in the course of a citizen-driven petition drive, while sometimes relevant to equal protection analysis, do not, in and of themselves, constitute state action for the purposes of the Fourteenth Amendment. Moreover, respondents put forth no evidence that the "private motives

[that] triggered" the referendum drive "can fairly be attributable to the State." *Blum v. Yaretsky*, 457 U.S. 991 at 1004.

In fact, by adhering to charter procedures, city officials enabled public debate on the referendum to take place, thus advancing significant First Amendment interests. In assessing the referendum as a "basic instrument of democratic government," *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 679, 49 L. Ed. 2d 132, 96 S. Ct. 2358 (1976), we have observed that "provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice," *James v. Valtierra*, 402 U.S. 137, 141, 28 L. Ed. 2d 678, 91 S. Ct. 1331 (1971). And our well established First Amendment admonition that "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," *Texas v. Johnson*, 491 U.S. 397, 414, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989), dovetails with the notion that all citizens, regardless of the content of their ideas, have the right to petition their government. Again, statements made by decision-makers or referendum sponsors during deliberation over a referendum may constitute relevant evidence of discriminatory intent in a challenge to an ultimately enacted initiative. See, e.g., *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 471, 73 L. Ed. 2d 896, 102 S. Ct. 3187 (1982) (considering statements of initiative sponsors in subjecting enacted referendum to equal protection scrutiny); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S., at 268. But respondents do not challenge an enacted referendum.

In their brief to this Court, respondents offer an alternate theory of equal protection liability: that city officials, including the mayor, acted in concert with private citizens to prevent Pleasant Meadows from being built because of the race and family status of its likely residents. Respondents allege, among other things, that the city law director prompted disgruntled voters to file the petition, that the city council intentionally delayed its deliberations to thwart the development, and that the mayor stoked the public opposition. Not only did the courts below not directly address this theory of liability, but respondents also appear to have disavowed this claim at oral argument, focusing instead on the denial of the permits.

What is more, respondents never articulated a cognizable legal claim on these grounds. Respondents fail to show that city officials exercised any power over voters' decision-making during the drive, much less the kind of "coercive power" either "overt or covert" that would render the voters' actions and statements, for all intents and purposes, state action. *Blum v. Yaretsky*, 457 U.S., at 1004. Nor, as noted above, do respondents show that the voters' sentiments can be attributed in any way to the state actors against which it has brought suit. Indeed, in finding a genuine issue of material fact with regard to intent, the Sixth Circuit relied almost entirely on apparently independent statements by private citizens. And in dismissing the claim against the mayor in his individual capacity, the District Court found no evidence that he orchestrated the referendum. Respondents thus fail to present an equal protection claim sufficient to survive summary judgment.

III

In evaluating respondents' substantive due process claim, the Sixth Circuit found, as a threshold matter, that respondents had a legitimate claim of entitlement to the building permits, and therefore a property interest in those permits, in light of the city council's approval of the site plan. See 263 F.3d at 642. The court then held that respondents had presented sufficient evidence to survive summary judgment on their claim that the City engaged in arbitrary conduct by denying respondents the benefit of the plan. *Id.*, at 644. Both in their complaint and before this Court, respondents contend that the City violated substantive due process, not only for the reason articulated by the Sixth Circuit, but also on the grounds that the City's submission of an administrative land-use determination to the charter's referendum procedures constituted *per se* arbitrary conduct. We find no merit in either claim.

We need not decide whether respondents possessed a property interest in the building permits, because the city engineer's refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct. See *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998) (noting that in our evaluations of "abusive executive action," we have held that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense'"). In light of the charter's provision that "no such ordinance [challenged by a petition] shall go into effect until approved by a majority of those voting thereon," Art. 9, §2, App. 15, the law director's instruction to the engineer to not issue the permits represented an eminently rational directive. Indeed, the site plan, by law, could not be implemented until the voters passed on the referendum.

Respondents' second theory of liability has no basis in our precedent. As a matter of federal constitutional law, we have rejected the distinction that respondents ask us to draw, and that the Ohio Supreme Court drew as a matter of state law, between legislative and administrative referendums. In *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S., at 672, 675, we made clear that because all power stems from the people, "[a] referendum cannot . . . be characterized as a delegation of power," unlawful unless accompanied by "discernible standards." The people retain the power to govern through referendum "'with respect to any matter, legislative or administrative, within the realm of local affairs.'" *Id.*, at 674, n. 9. Cf. *James v. Valtierra*, 402 U.S., at 137. Though the "substantive result" of a referendum may be invalid if it is "arbitrary and capricious," *Eastlake v. Forest City Enterprises*, *supra*, at 676, respondents do not challenge the referendum itself. The subjection of the site-plan ordinance to the City's referendum process, regardless of whether that ordinance reflected an administrative or legislative decision, did not constitute *per se* arbitrary government conduct in violation of due process.

IV

For the reasons detailed above, we reverse the Sixth Circuit's judgment with regard to respondents' equal protection and substantive due process claims. The Sixth Circuit also held that

respondents' disparate impact claim under the Fair Housing Act could proceed to trial, 263 F.3d at 641, but respondents have now abandoned the claim.. We therefore vacate the Sixth Circuit's disparate impact holding and remand with instructions to dismiss, with prejudice, the relevant portion of the complaint.

The judgment of the United States Court of Appeals for the Sixth Circuit is, accordingly, reversed in part, and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

I join the Court's opinion, including Part III, which concludes that respondents' assertions of arbitrary government conduct must be rejected. I write separately to observe that, even if there had been arbitrary government conduct, that would not have established the substantive-due-process violation that respondents claim.

It would be absurd to think that all "arbitrary and capricious" government action violates substantive due process -- even, for example, the arbitrary and capricious cancellation of a public employee's parking privileges. The judicially created substantive component of the Due Process Clause protects, we have said, certain "fundamental liberty interests" from deprivation by the government, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 721, 138 L. Ed. 2d 772, 117 S. Ct. 2258, 117 S. Ct. 2302 (1997). Freedom from delay in receiving a building permit is not among these "fundamental liberty interests." To the contrary, the Takings Clause allows government confiscation of private property so long as it is taken for a public use and just compensation is paid; mere regulation of land use need not be "narrowly tailored" to effectuate a "compelling state interest." Those who claim "arbitrary" deprivations of nonfundamental liberty interests must look to the Equal Protection Clause, and *Graham v. Connor*, 490 U.S. 386, 395, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989), precludes the use of "'substantive due process'" analysis when a more specific constitutional provision governs.

As for respondents' assertion that referendums may not be used to decide whether low-income housing may be built on their land: that is not a substantive-due-process claim, but rather a challenge to the procedures by which respondents were deprived of their alleged liberty interest in building on their land. There is nothing procedurally defective about conditioning the right to build low-income housing on the outcome of a popular referendum, cf. *James v. Valtierra*, 402 U.S. 137, 28 L. Ed. 2d 678, 91 S. Ct. 1331 (1971), and the delay in issuing the permit was prescribed by a duly enacted provision of the Cuyahoga Falls City Charter (Art. 9, §2), which surely constitutes "due process of law," see *Connecticut Dept. of Public Safety v. Doe*, ante, p. (SCALIA, J., concurring).

With these observations, I join the Court's opinion.

Session 20. Religious Land Use

LEMON v. KURTZMAN 403 U.S. 602 (1971)

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools. Both statutes are challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

Pennsylvania has adopted a statutory program that provides financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. Rhode Island has adopted a statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary. Under each statute state aid has been given to church-related educational institutions. We hold that both statutes are unconstitutional.

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion." Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else. A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate. The legislatures of Rhode Island and Pennsylvania have concluded that secular and religious education are identifiable and separable. In the abstract we have no quarrel with this conclusion. We conclude [however] that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.

LARKIN v. GRENDEL'S DEN, INC.
459 U.S. 116 (1982)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented by this appeal is whether a Massachusetts statute, which vests in the governing bodies of churches and schools the power effectively to veto applications for liquor licenses within a 500-foot radius of the church or school, violates the Establishment Clause of the First Amendment or the Due Process Clause of the Fourteenth Amendment.

Appellee operates a restaurant located in the Harvard Square area of Cambridge, Mass. The Holy Cross Armenian Catholic Parish is located adjacent to the restaurant; the back walls of the two buildings are 10 feet apart. In 1977, appellee applied to the Cambridge License Commission for approval of an alcoholic beverages license for the restaurant.

Section 16C of Chapter 138 of the Massachusetts General Laws provides: "Premises . . . located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages if the governing body of such church or school files written objection thereto."

Holy Cross Church objected to appellee's application, expressing concern over "having so many licenses so near" (emphasis in original). The License Commission voted to deny the application, citing only the objection of Holy Cross Church and noting that the church "is within 10 feet of the proposed location."

On appeal, the Massachusetts Alcoholic Beverages Control Commission upheld the License Commission's action. The Beverages Control Commission found that "the church's objection under Section 16C was the only basis on which the [license] was denied."

Appellee then sued the License Commission and the Beverages Control Commission in United States District Court. Relief was sought on the grounds that §16C, on its face and as applied, violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the Establishment Clause of the First Amendment, and the Sherman Act.

The District Court held that §16C violated the Due Process Clause and the Establishment Clause and held §16C void on its face, *Grendel's Den, Inc. v. Goodwin*, 495 F.Supp. 761 (Mass. 1980). The District Court rejected appellee's equal protection arguments.... It certified the judgment to the Court of Appeals for the First Circuit pursuant to 28 U. S. C. §1292, and the Court of Appeals accepted certification.

The First Circuit ... in a divided opinion, affirmed the District Court's judgment on Establishment Clause grounds without reaching the due process . . . claims, *Grendel's Den, Inc. v. Goodwin*, 662 F.2d 102 (1981).

The Court of Appeals noted that appellee does not contend that §16C lacks a secular purpose, and turned to the question of "whether the law 'has the direct and immediate effect of advancing religion' as contrasted with 'only a remote and incidental effect advantageous to religious institutions,'" *id.*, at 104 (emphasis in original), quoting *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 783, n. 39 (1973). The court concluded that §16C confers a direct and substantial benefit upon religions by "the grant of a veto power over liquor sales in roughly one million square feet . . . of what may be a city's most commercially valuable sites," 662 F.2d, at 105.

The court acknowledged that §16C "extends its benefits beyond churches to schools," but concluded that the inclusion of schools "does not dilute [the statute's] forbidden religious classification," since §16C does not "encompass all who are otherwise similarly situated to churches in all respects except dedication to 'divine worship.'" *Id.*, at 106-107 (footnote omitted). In the view of the Court of Appeals, this "explicit religious discrimination," *id.*, at 105, provided an additional basis for its holding that §16C violates the Establishment Clause.

The court found nothing in the Twenty-first Amendment to alter its conclusion, and affirmed the District Court's holding that §16C is facially unconstitutional under the Establishment Clause of the First Amendment.

We noted probable jurisdiction, 454 U.S. 1140 (1982), and we affirm.

Appellants contend that the State may, without impinging on the Establishment Clause of the First Amendment, enforce what it describes as a "zoning" law in order to shield schools and places of divine worship from the presence nearby of liquor-dispensing establishments. It is also contended that a zone of protection around churches and schools is essential to protect diverse centers of spiritual, educational, and cultural enrichment. It is to that end that the State has vested in the governing bodies of all schools, public or private, and all churches, the power to prevent the issuance of liquor licenses for any premises within 500 feet of their institutions.

Plainly schools and churches have a valid interest in being insulated from certain kinds of commercial establishments, including those dispensing liquor. Zoning laws have long been employed to this end, and there can be little doubt about the power of a state to regulate the environment in the vicinity of schools, churches, hospitals, and the like by exercise of reasonable zoning laws.

We have upheld reasonable zoning ordinances regulating the location of so-called "adult" theaters, see *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62-63 (1976); and in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), we recognized the legitimate governmental interest in protecting the environment around certain institutions when we sustained an ordinance prohibiting willfully making, on grounds adjacent to a school, noises which are disturbing to the good order of the school sessions.

However, §16C is not simply a legislative exercise of zoning power. As the Massachusetts Supreme Judicial Court concluded, §16C delegates to private, nongovernmental entities power to veto certain liquor license applications, *Arno v. Alcoholic Beverages Control Comm'n*, 377 Mass., at 89, 384 N. E. 2d, at 1227. This is a power ordinarily vested in agencies of government. See, e. g., *California v. LaRue*, *supra*, at 116, commenting that a "state agency . . . is itself the repository of the State's power under the Twenty-first Amendment." We need not decide whether, or upon what conditions, such power may ever be delegated to non-governmental entities; here, of two classes of institutions to which the legislature has delegated this important decision-making power, one is secular, but one is religious. Under these circumstances, the deference normally due a legislative zoning judgment is not merited.

The purposes of the First Amendment guarantees relating to religion were twofold: to foreclose state interference with the practice of religious faiths, and to foreclose the establishment of a state religion familiar in other 18th-century systems. Religion and government, each insulated from the other, could then coexist. Jefferson's idea of a "wall," see *Reynolds v. United States*, 98 U.S. 145, 164 (1879), quoting reply from Thomas Jefferson to an address by a committee of the Danbury Baptist Association (January 1, 1802), reprinted in 8 *Writings of Thomas Jefferson* 113 (H. Washington ed. 1861), was a useful figurative illustration to emphasize the concept of separateness. Some limited and incidental entanglement between church and state authority is inevitable in a complex modern society, see, e. g., *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664, 670 (1970), but the concept of a "wall" of separation is a useful signpost. Here that "wall" is substantially breached by vesting discretionary governmental powers in religious bodies.

This Court has consistently held that a statute must satisfy three criteria to pass muster under the Establishment Clause:

"First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, *supra*, at 612-613, quoting *Walz v. Tax Comm'n*, *supra*, at 674.

The purpose of §16C, as described by the District Court, is to "[protect] spiritual, cultural, and educational centers from the 'hurly-burly' associated with liquor outlets." 495 F.Supp., at 766. There can be little doubt that this embraces valid secular legislative purposes. However, these valid secular objectives can be readily accomplished by other means—either through an absolute legislative ban on liquor outlets within reasonable prescribed distances from churches, schools, hospitals, and like institutions, or by ensuring a hearing for the views of affected institutions at licensing proceedings where, without question, such views would be entitled to substantial weight.

Appellants argue that §16C has only a remote and incidental effect on the advancement of religion. The highest court in Massachusetts, however, has construed the statute as conferring upon

churches a veto power over governmental licensing authority. Section 16C gives churches the right to determine whether a particular applicant will be granted a liquor license, or even which one of several competing applicants will receive a license.

The churches' power under the statute is standard-less, calling for no reasons, findings, or reasoned conclusions. That power may therefore be used by churches to promote goals beyond insulating the church from undesirable neighbors; it could be employed for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith.

Turning to the third phase of the inquiry ... we see that we have not previously had occasion to consider the entanglement implications of a statute vesting significant governmental authority in churches. This statute enmeshes churches in the exercise of substantial governmental powers contrary to our consistent interpretation of the Establishment Clause; "[the] objective is to prevent, as far as possible, the intrusion of either [Church or State] into the precincts of the other." *Lemon v. Kurtzman*, 403 U.S., at 614.

As these and other cases make clear, the core rationale underlying the Establishment Clause is preventing "a fusion of governmental and religious functions," *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963). See, e. g., *Walz v. Tax Comm'n*, 397 U.S., at 674-675; *Everson v. Board of Education*, 330 U.S. 1, 8-13 (1947). The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.

Section 16C substitutes the unilateral and absolute power of a church for the reasoned decision-making of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications. The challenged statute thus enmeshes churches in the processes of government and creates the danger of "[political] fragmentation and divisiveness on religious lines," *Lemon v. Kurtzman*, *supra*, at 623. Ordinary human experience and a long line of cases teach that few entanglements could be more offensive to the spirit of the Constitution.

So ordered.

GRENDDEL'S DEN v. LARKIN
749 F.2d 945 (1st Cir. 1984)

Coffin, Circuit Judge.

Appellants challenge an award of attorney's fees. Arguing that the district court abused its discretion by granting an award which was not "reasonable" within the meaning of the Fees Act, 42 U.S.C. §1988, appellants ask us to modify it. After carefully reviewing the district court's opinion, as well as the evidence submitted to support appellee's original fees application, we conclude that the district court's analysis was in some respects erroneous and the resulting award excessive. In view of the already protracted and expensive proceedings and the adequacy of the existing record for fee decision purposes, we make our own modifications to the award.

Having prevailed on its section 1983 claim, Grendel's applied to the district court for attorney's fees and costs pursuant to the Fees Act, 42 U.S.C. §1988. In support of the application, affidavits were filed by its counsel, Professors Laurence Tribe and David Rosenberg of Harvard Law School, and Mr. Ira Karasick. Each affidavit documented the individual's educational and professional background, summarized the role he played in the litigation, and described the legal services that he had performed and the expenses that he had incurred. Compensation was requested in the amount of \$176,137.50 (640.5 hours at \$275 per hour) for Professor Tribe, \$21,750.00 (174 hours at \$125 per hour) for Professor Rosenberg, and \$15,747.50 (399 hours at hourly rates ranging from \$25 to \$75) for Mr. Karasick. Unfortunately, despite the duration of the litigation and the distinction of counsel, no contemporaneous time records were kept or submitted in support of these requests. The CLC and the ABCC responded by challenging the reasonableness of the time spent and the rates requested.

Although fee litigation as a substantial component of judicial time is a relatively new phenomenon, the general ground rules are well known. District courts have discretion when awarding fees and expenses under 42 U.S.C. §1988, *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983), and appellate courts accord deference to the exercise of that discretion The ultimate goal is to award fees "adequate to attract competent counsel but which do not produce windfalls." *Hensley*, 103 S.Ct. at 1938 (quoting S. Rep. No. 94-1011, p. 6 (1976)).

The difficulty for both fee-setting and fee-reviewing courts, in a field so susceptible to arbitrariness, is the achievement of decision-making that is fair to the parties and understandable to the community at large yet not unnecessarily burdensome to the courts themselves. Thus, we normally prefer to defer to any thoughtful rationale and decision developed by a trial court and to avoid extensive second guessing. Occasionally, however, we feel constrained to examine a fee appeal in greater depth, particularly if it presents novel problems or claims. The absence of contemporary time records, in conjunction with extraordinarily high hourly rates and claims for time spent in the most punctilious appellate research and preparation, makes this such a case.

What concerns us in this case and what we now proceed to review is the district court's analysis of the following critical points: the failure of counsel to keep contemporaneous time records, the reasonableness of hours claimed, the justifiability of the hourly rates requested, the reasonableness of certain of the claimed expenses, and the proper apportionment of the total fees assessed against the two defendants. In reviewing these matters, we find that the evidence which causes us to criticize the district court also suggests the upper limits of what we think is reasonable.

1. Failure to Keep Contemporaneous Time Records

The initial problem confronting the attorneys, parties, trial court and reviewing court stems from the process by which a fee application covering six years of work must be constructed when no contemporaneous time records exist . . .

We now take the same step and serve notice that henceforth, in cases involving fee applications for services rendered after the date of this opinion, the absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction in any award or, in egregious cases, disallowance. In the instant case we feel it would be unfair to apply this standard, but subject the retrospectively created record of time spent to a more exacting scrutiny than we would bring to contemporaneous and detailed records.

2. Reasonableness of Time Spent

We find that on a number of occasions, Professor Tribe spent inordinately large numbers of hours analyzing the briefs of his opponents, researching and drafting briefs for Grendel's, and preparing for oral argument. To set the stage for our analysis, we point to the fact that Professors Tribe and Rosenberg together took only 25 hours to prepare a forty-page response to defendants' initial motion to dismiss. Not only do we find here an economy of effort but also a legal brief sufficiently persuasive that Grendel's subsequently decided to file no new brief after the motion to dismiss was denied and cross-motions for partial summary judgment were filed. Indeed, the district court was so persuaded by the brief that it ruled in Grendel's favor on all issues except the Equal Protection claim. What this demonstrates is that Professors Tribe and Rosenberg clearly had the ability to draft a compelling brief quickly and efficiently.

What followed during the rest of the litigation, however, convinces us that the early economy of effort and careful focus upon only what was necessary was lost in the heat and excitement of litigating an interesting First Amendment case. We reduce Professor Tribe's hours from 640.5 to 468.5 by deducting 171 hours of excessive time spent at the appellate stages of litigation.

3. Reasonableness of Hourly Rates

Attorney fees' under §1988 are to be calculated according to the prevailing market rates in the relevant community," that is "those prevailing in the community for similar services by lawyers

of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, ___ U.S. ___, 104 S.Ct. 1541, 1547 & n. 11, 79 L.Ed.2d 891 (1984). In the instant case, we conclude that the district court's determination of a market rate of \$125 per hour for Professor Rosenberg can be sustained, but not the rate of \$275 per hour for Professor Tribe. We cannot conscientiously allow an overall rate, notwithstanding his academic distinction, of more than \$175 an hour. Accordingly, Professor Tribe's fees award is reduced to \$81,987.50 for 468.5 hours The order of the district court is hereby so modified. No costs.

CITY OF BOERNE v. FLORES
521 U.S. 507 (1997)

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, THOMAS, and GINSBURG, JJ. joined.

A decision by local zoning authorities to deny a church a building permit was challenged under the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. §2000bb et seq. The case calls into question the authority of Congress to enact RFRA. We conclude the statute exceeds Congress' power.

I

Situated on a hill in the city of Boerne, Texas, some 28 miles northwest of San Antonio, is St. Peter Catholic Church. Built in 1923, the church's structure replicates the mission style of the region's earlier history. The church seats about 230 worshippers, a number too small for its growing parish. Some 40 to 60 parishioners cannot be accommodated at some Sunday masses. In order to meet the needs of the congregation the Archbishop of San Antonio gave permission to the parish to plan alterations to enlarge the building.

A few months later, the Boerne City Council passed an ordinance authorizing the city's Historic Landmark Commission to prepare a preservation plan with proposed historic landmarks and districts. Under the ordinance, the Commission must pre-approve construction affecting historic landmarks or buildings in a historic district.

Soon afterwards, the Archbishop applied for a building permit so construction to enlarge the church could proceed. City authorities, relying on the ordinance and the designation of a historic district (which, they argued, included the church), denied the application. The Archbishop brought this suit challenging the permit denial in the United States District Court for the Western District of Texas. 877 F. Supp. 355 (1995).

The complaint contained various claims, but to this point the litigation has centered on RFRA and the question of its constitutionality. The Archbishop relied upon RFRA as one basis for relief from the refusal to issue the permit. The District Court concluded that by enacting RFRA Congress exceeded the scope of its enforcement power under §5 of the Fourteenth Amendment. The court certified its order for interlocutory appeal and the Fifth Circuit reversed, finding RFRA to be constitutional. 73 F. 3d 1352 (1996). We granted certiorari, 519 U.S. (1996), and now reverse.

II

Congress enacted RFRA in direct response to the Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). There we considered a Free Exercise Clause claim brought by members of the Native American Church who were denied

unemployment benefits when they lost their jobs because they had used peyote. Their practice was to ingest peyote for sacramental purposes, and they challenged an Oregon statute of general applicability which made use of the drug criminal. In evaluating the claim, we declined to apply the balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), under which we would have asked whether Oregon's prohibition substantially burdened a religious practice and, if it did, whether the burden was justified by a compelling government interest. We stated:

"Government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' . . . contradicts both constitutional tradition and common sense." 494 U. S., at 885 (internal quotation marks and citation omitted).

The application of the *Sherbert* test, the *Smith* decision explained, would have produced an anomaly in the law, a constitutional right to ignore neutral laws of general applicability. The anomaly would have been accentuated, the Court reasoned, by the difficulty of determining whether a particular practice was central to an individual's religion. We explained, moreover, that it "is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." 494 U. S., at 887 (internal quotation marks and citation omitted).

Many criticized the Court's reasoning, and this disagreement resulted in the passage of RFRA. Congress announced:

"(1) The framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

"(2) laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

"(3) governments should not substantially burden religious exercise without compelling justification;

"(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

"(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. §2000bb (a).

The Act's stated purposes are:

"(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and "(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government." §2000bb (b).

RFRA prohibits "government" from "substantially burdening" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." §2000bb-1. The Act's mandate applies to any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States," as well as to any "State, or . . . subdivision of a State." §2000bb-2(1). The Act's universal coverage is confirmed in §2000bb-3(a), under which RFRA "applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [RFRA's enactment]." In accordance with RFRA's usage of the term, we shall use "state law" to include local and municipal ordinances.

III

A

Under our Constitution, the Federal Government is one of enumerated powers. *McCulloch v. Maryland*, 4 Wheat. 316, 405 (1819); see also *The Federalist* No. 45, p. 292 (C. Rossiter ed. 1961) (J. Madison). The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the "powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 1 Cranch 137, 176 (1803).

Congress relied on its Fourteenth Amendment enforcement power in enacting the most far reaching and substantial of RFRA's provisions, those which impose its requirements on the States. See *Religious Freedom Restoration Act of 1993*, S. Rep. No. 103-111, pp. 13-14 (1993) (Senate Report); H. R. Rep. No. 103-88, p. 9 (1993) (House Report). The Fourteenth Amendment provides, in relevant part:

"Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The parties disagree over whether RFRA is a proper exercise of Congress' §5 power "to enforce" by "appropriate legislation" the constitutional guarantee that no State shall deprive any person of "life, liberty, or property, without due process of law" nor deny any person "equal protection of the laws."

In defense of the Act respondent contends, with support from the United States as amicus, that RFRA is permissible enforcement legislation. Congress, it is said, is only protecting by legislation one of the liberties guaranteed by the Fourteenth Amendment's Due Process Clause, the free exercise of religion, beyond what is necessary under *Smith*. It is said the congressional decision to dispense with proof of deliberate or overt discrimination and instead concentrate on a law's effects accords with the settled understanding that §5 includes the power to enact legislation designed to prevent as well as remedy constitutional violations. It is further contended that Congress' §5 power is not limited to remedial or preventive legislation.

While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment.

The design of the Fourteenth Amendment has proved significant also in maintaining the traditional separation of powers between Congress and the Judiciary. The first eight Amendments to the Constitution set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those prohibitions. As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing. The power to interpret the Constitution in a case or controversy remains in the Judiciary.

Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law. If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts . . . alterable when the legislature shall please to alter it." *Marbury v. Madison*, 1 Cranch, at 177. . . . Under this approach, it is difficult to conceive of a principle that would limit congressional power. See Van Alstyne, "The Failure of the Religious Freedom Restoration Act under Section 5 of the Fourteenth Amendment," 46 *Duke L. J.* 291, 292-303 (1996). Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

We now turn to consider whether RFRA can be considered enforcement legislation under §5 of the Fourteenth Amendment.

B

Respondent contends that RFRA is a proper exercise of Congress' remedial or preventive power. The Act, it is said, is a reasonable means of protecting the free exercise of religion as defined by Smith. It prevents and remedies laws which are enacted with the unconstitutional object of targeting religious beliefs and practices. See *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993) ("[A] law targeting religious beliefs as such is never permissible"). To avoid the difficulty of proving such violations, it is said, Congress can simply invalidate any law which imposes a substantial burden on a religious practice unless it is justified by a compelling interest and is the least restrictive means of accomplishing that interest. If Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause, see *Fullilove v. Klutznick*, 448 U.S. 448, 477 (1980) (plurality opinion); *City of Rome*, 446 U. S., at 177, then it can do the same, respondent argues, to promote religious liberty.

While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional. See *City of Rome*, 446 U. S., at 177 (since "jurisdictions with a demonstrable history of intentional racial discrimination . . . create the risk of purposeful discrimination" Congress could "prohibit changes that have a discriminatory impact" in those jurisdictions). Remedial legislation under §5 "should be adapted to the mischief and wrong which the [Fourteenth] Amendment was intended to provide against." *Civil Rights Cases*, 109 U. S., at 13.

RFRA is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments. 42 U.S.C. §2000bb-2(1). RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment. §2000bb-3(a). RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. If an objector can show a substantial burden on his free exercise, the State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. Claims that a law substantially burdens someone's exercise of religion will often be difficult to

contest. Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. If "'compelling interest' really means what it says . . . many laws will not meet the test. Even assuming RFRA would be interpreted in effect to mandate some lesser test, say one equivalent to intermediate scrutiny, the statute nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.

It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.

When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution. Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*, 1 Cranch, at 177. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance. The judgment of the Court of Appeals sustaining the Act's constitutionality is reversed.

It is so ordered.

JUSTICE STEVENS, concurring.

In my opinion, the Religious Freedom Restoration Act of 1993 (RFRA) is a "law respecting an establishment of religion" that violates the First Amendment to the Constitution.

JUSTICE SCALIA, with whom JUSTICE STEVENS joins, concurring in part. [Omitted]

JUSTICE O'CONNOR, JUSTICE SOUTER, and JUSTICE BREYER dissenting. [Omitted]

RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000
42 USCS §2000

SECTION 1. SHORT TITLE.

This Act may be cited as the “Religious Land Use and Institutionalized Persons Act of 2000.”

SECTION 2. PROTECTION OF LAND USE AS RELIGIOUS EXERCISE.

Substantial Burdens.

General rule. No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

is in furtherance of a compelling governmental interest; and

is the least restrictive means of furthering that compelling governmental interest.

Scope of application. This subsection applies in any case in which--

the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

Discrimination and Exclusion.

Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

Exclusions and limits. No government shall impose or implement a land use regulation that--

totally excludes religious assemblies from a jurisdiction; or

unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

SECTION 3. PROTECTION OF RELIGIOUS EXERCISE OF INSTITUTIONALIZED PERSONS.

General Rule. No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

is in furtherance of a compelling governmental interest; and

is the least restrictive means of furthering that compelling governmental interest.

Scope of Application. This section applies in any case in which—

the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

SECTION 4. JUDICIAL RELIEF.

(a) Cause of Action. A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

Burden of Persuasion. If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

Full Faith and Credit. Adjudication of a claim of a violation of section 2 in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

Attorneys' Fees. Section 722(b) of the Revised Statutes (42 U.S.C. 1988(b)) is amended-

by inserting “the Religious Land Use and Institutionalized Persons Act of 2000,” after “Religious Freedom Restoration Act of 1993”; and

by striking the comma that follows a comma.

Prisoners. Nothing in this Act shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

Authority of United States To Enforce This Act. The United States may bring an action for injunctive or declaratory relief to enforce compliance with this Act. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

Limitation. If the only jurisdictional basis for applying a provision of this Act is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

SECTION 5. RULES OF CONSTRUCTION.

(a) Religious Belief Unaffected. Nothing in this Act shall be construed to authorize any government to burden any religious belief.

Religious Exercise Not Regulated. Nothing in this Act shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

Claims to Funding Unaffected. Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this Act may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

Other Authority To Impose Conditions on Funding Unaffected. Nothing in this Act shall—

authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.

Governmental Discretion in Alleviating Burdens on Religious Exercise. A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

Effect on Other Law. With respect to a claim brought under this Act, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this Act.

Broad Construction. This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.

No Preemption or Repeal. Nothing in this Act shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this Act.

Severability. If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

SECTION 6. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address portions of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. In this section, the term "granting," used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

SECTION 7. AMENDMENTS TO RELIGIOUS FREEDOM RESTORATION ACT.

Definitions. Section 5 of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-2) is amended--

in paragraph (1), by striking "a State, or a subdivision of a State" and inserting "or of a covered entity";

in paragraph (2), by striking "term" and all that follows through "includes" and inserting "term 'covered entity' means"; and

in paragraph (4), by striking all after “means” and inserting “religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000.”

Conforming Amendment. Section 6(a) of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-3(a)) is amended by striking “and State.”

SECTION 8. DEFINITIONS.

In this Act:

Claimant. The term “claimant” means a person raising a claim or defense under this Act.

Demonstrates. The term “demonstrates” means meets the burdens of going forward with the evidence and of persuasion.

Free exercise clause. The term “Free Exercise Clause” means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

Government. The term “government” means -

a State, county, municipality, or other governmental entity created under the authority of a State;

any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

any other person acting under color of State law; and

for the purposes of sections 4(b) and 5, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

Land use regulation. The term “land use regulation” means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant’s use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

Program or activity. The term “program or activity” means all of the operations of any entity as described in paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964. (42 U.S.C. 2000d-4a).

Religious exercise. In general. The term “religious exercise” includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

Rule. The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

REACHING HEARTS INTERNATIONAL v. PRINCE GEORGE'S COUNTY
368 Fed. Appx. 370 (4th Cir.)

PER CURIAM:

Reaching Hearts International, Inc. ("Reaching Hearts"), a Seventh Day Adventist congregation, purchased property in Prince George's County, Maryland ("the County") on which it intended to build a church and related facilities. The property's zoning permitted churches as a matter of right. However, Reaching Hearts was unable to obtain a change in the sewer and water classification for portions of the property. The denial of reclassification effectively prohibited the church's planned development of a worship center. Many other properties received approval for sewer and water reclassifications in 2003 and 2005, but Reaching Hearts -- the only church property -- was denied such a reclassification.

After multiple unsuccessful administrative applications and appeals, Reaching Hearts filed suit in the United States District Court for the District of Maryland, alleging that the County had violated its rights under the Equal Protection Clause and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). See 42 U.S.C. §§2000cc et seq. Reaching Hearts prevailed on both claims in a seven-day jury trial, obtaining an award of \$3,714,822.36 in damages and an injunction against the County as to future discriminatory treatment. The County filed a timely appeal and our jurisdiction arises under 28 U.S.C. §1291.

On appeal, the County argues that the district court should have granted its request for judgment as a matter of law on both the Equal Protection and RLUIPA claims, or -- in the alternative -- that multiple deficiencies in the proceedings below necessitate a new trial. Because our review of the record reveals no error requiring reversal, we affirm the judgment of the district court.

I

The County's initial argument that the district court erred in denying it judgment as a matter of law against Reaching Hearts is reviewed *de novo*. Our analysis of this issue is, however, greatly circumscribed by the applicable standard of review. See *Dotson v. Pfizer, Inc.*, 558 F.3d 284, 292 (4th Cir. 2009). Judgment as a matter of law is only appropriate if any reasonable jury, "viewing the evidence in the light most favorable to" Reaching Hearts, would necessarily find in the County's favor. *Id.* In determining whether the evidence supports "only one reasonable verdict," *id.* (quotation omitted), we refrain from making "credibility determinations or weigh[ing] the evidence," as these are "jury functions, not those of a judge." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

We have reviewed the record, disregarded "all evidence favorable" to the County that the jury was "not required to believe," and cannot say that the district court erred in denying the County's motion for judgment as a matter of law. Viewed in the light most favorable to Reaching

Hearts, the evidence presented at trial of the County's anti-church animus was very strong. The evidence thus supports the jury's conclusion that (1) the County intentionally discriminated against Reaching Hearts on a prohibited ground, and (2) the County imposed or implemented a land use regulation in a manner that imposed a substantial burden on Reaching Heart's religious exercise, without satisfying the standard of strict scrutiny.

The County, in the alternative, contends that multiple evidentiary and instructional errors by the district court necessitate a new trial. We disagree. Our review of these claims, at least to the extent the County's arguments were preserved below, is for an abuse of discretion. See *Buckley v. Mukasey*, 538 F.3d 306, 317, 322 (4th Cir. 2008); *United States v. Jeffers*, 570 F.3d 557, 564 n.4 (4th Cir. 2009). Even if we were to conclude the district court erred on any of the evidentiary claims the County now argues, reversal is appropriate only if the County demonstrates sufficient resulting prejudice. See *Buckley*, 538 F.3d at 317, 322. Given the strength of Reaching Hearts' evidence, the County has failed to show that any plausible error committed by the district court was sufficiently prejudicial to warrant a new trial, i.e., that an error-free trial was likely to result in a different outcome in this case. See *Muhammad v. Kelly*, 575 F.3d 359, 375 (4th Cir. 2009).

The County's arguments relating to the scope of damages and injunctive relief awarded by the district court are also reviewed for an abuse of discretion. See *Robles v. Prince George's County*, 302 F.3d 262, 271 (4th Cir. 2002); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 703 (4th Cir. 1995). We thus "give the benefit of every doubt to the judgment of the trial judge." *Robles*, 302 F.3d at 271 (quotation omitted). After considering the evidence and the arguments presented below, we cannot say that the district court's remedial rulings were "outside the range of choices permitted." *Evans v. Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 322 (4th Cir. 2008) (quotation omitted).

Thus, having found no reversible error in any of the challenged actions of the district court, we affirm the judgment of the district court.

AFFIRMED

PART VII. REGULATORY TAKINGS

“[T]he just compensation requirement... is designed to bar the government from forcing some individuals to bear burdens which, in all fairness, should be borne by the public as a whole. When one person is asked to assume more than a fair share of the public burden, the payment of just compensation operates to redistribute that economic cost from the individual to the public at large.” JUSTICE BRENNAN, dissenting in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1980)

Session 21. Challenges in State Courts

A disappointed land owner faces a number of questions when deciding where and when to litigate a regulatory taking claim. The complainant must make strategic choices as to whether to sue in state court or in federal court, and whether to attack the government action on its face or “as applied.”

AGINS v. CITY OF TIBURON 447 U.S. 255 (1980)

Mr. Justice Powell delivered the opinion of the Court.

The question in this case is whether a municipal zoning ordinance 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.⁷¹

⁷¹ Shortly after it enacted the ordinances, the city began eminent domain proceedings against the appellants' land. The following year, however, the city abandoned those proceedings, and its complaint was dismissed. The appellants were reimbursed for costs incurred in connection with the action.

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.⁷² 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 ridgeland 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 7.⁷³

The city demurred, claiming that the complaint failed to state a cause of action. The Superior Court sustained the demurrer,⁷⁴ and the California Supreme Court affirmed. 24 Cal. 3d 266, 598 P. 2d 25 (1979). The State Supreme Court 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.⁷⁵

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.⁷⁶

⁷² 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.

⁷³ 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.

⁷⁴ 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.

⁷⁵ 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.

⁷⁶ The appellants also contend that the state courts erred by sustaining the demurrer despite their uncontroverted allegations that the zoning ordinances would "forever [prevent.] . . . development for residential use,"

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 determines 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.

id., at 5, and "completely [destroy] 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 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).

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).⁷⁷ 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.⁷⁸ 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. 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

⁷⁷ 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).

⁷⁸ The City Council of Tiburon found that "[it] 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 related to geology, fire and flood, and other demonstrated consequences of urban sprawl." *Id.*, §1 (c).

fairness" guaranteed by the Fifth and Fourteenth Amendments. See *Penn Central Transp. Co. v. New York City*, 438 U.S., at 124.⁷⁹

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.

⁷⁹ 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 decision-making, 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).

MacDONALD, SOMMER & FRATES v. COUNTY OF YOLO
477 U.S. 340 (1986)

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., joined and in Parts I, II, and III of which POWELL and REHNQUIST, JJ., joined, post, p. 353. REHNQUIST, J., filed a dissenting opinion in which POWELL, J., joined.

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether rejection of a subdivision proposal deprived appellant of its property without just compensation contrary to the Fifth and Fourteenth Amendments to the United States Constitution.

This appeal is taken from a judgment sustaining a demurrer to a property owner's complaint for money damages for an alleged "taking" of its property. In 1975, appellant submitted a tentative subdivision map to the Yolo County Planning Commission. Under appellant's proposal, the subject property, at least part of which was planted with corn, would be subdivided into 159 single-family and multifamily residential lots.

The Yolo County Planning Commission rejected the subdivision plan, however, and the Board of Supervisors of the county affirmed that determination. The Board found numerous reasons why appellant's tentative subdivision map was neither "consistent with the General Plan of the County of Yolo, nor with the specific plan of the County of Yolo embodied in the Zoning Regulations for the County." Appellant focuses our attention on four of those reasons. First, the Board criticized the plan because it failed to provide for access to the proposed subdivision by a public street: the city of Davis, to which the subdivision would adjoin, refused to permit the extension of Cowell Boulevard into the development. Even ignoring this obstacle, "[the] map presented [made] no provision for any other means of access to the subdivision," and the Board calculated that relying on an extension of Cowell Boulevard alone would "[constitute] a real and substantial danger to the public health in the event of fire, earthquake, flood, or other natural disaster."

Second, the Board found that appellant's "Tentative Map as presented [did] not provide for sewer service by any governmental entity":

"The only means for provision of sewer services by the El Macero interceptor sewer require that the proposed subdivision [annex] to the existing Community Services Area. Said annexation is subject to Local Agency Formation Commission jurisdiction. The Board finds that no proceedings currently are pending before LAFCO for the annexation of the proposed subdivision."

Third, the Board rejected the development plan because "[the] level of [police] protection capable of being afforded to the proposed site by the [Yolo County] Sheriff's Department is not

intense enough to meet the needs of the proposed subdivision." Fourth, the Board found inadequate the provision for water service for the reason that there was "no provision made in the proposed subdivision for the provision of water or maintenance of a water system for the subdivision by any governmental entity."

After this rebuff, appellant filed the present action and, on the same day, a petition for a writ of mandate. The mandate action, which is still pending, seeks to set aside the Board's decision and to direct the Board to reconsider appellant's subdivision proposal. This action, in contrast, seeks declaratory and monetary relief. In it, appellant accuses appellees County of Yolo and city of Davis of "restricting the Property to an open-space agricultural use by denying all permit applications, subdivision maps, and other requests to implement any other use," and thereby of appropriating the "entire economic use" of appellant's property "for the sole purpose of [providing] . . . a public, open-space buffer." In particular, the fourth amended complaint challenges the Board's decision with respect to the adequacy of public access, sanitation services, water supplies, and fire and police protection. Because appellees denied these services, according to the complaint, "none of the beneficial uses" allowed even for agricultural land would be suitable for appellant's property. The complaint alleged, in capital letters and "WITHOUT LIMITATION BY THE FOREGOING ENUMERATION," that "ANY APPLICATION FOR A ZONE CHANGE, VARIANCE OR OTHER RELIEF WOULD BE FUTILE." The complaint also alleged that appellant had "exhausted all of its administrative remedies" and that its seven causes of action were "ripe" for adjudication.

In response to these charges appellees demurred. Pointing to "its earlier Order Sustaining Demurrers and Granting Leave to Amend," the California Superior Court contended that "the property had obvious other uses than agriculture under the Yolo County Code," and referenced sections permitting such uses, among others, as ranch and farm dwellings and agricultural storage facilities, see Yolo County Code §§8-2.502, 8-2.503. The court rejected appellant's "[attempt] to overcome that defect by alleging as conclusionary fact that each and every principal use and each and every multiple accessory use is no longer possible so that the property does have no value as zoned." It concluded that, irrespective of the insufficiency of appellant's factual allegations, monetary damages for inverse condemnation are foreclosed by the California Supreme Court's decision in *Agins v. City of Tiburon*, 24 Cal. 3d 266, 274-277, 598 P. 2d 25, 29-31 (1979), *aff'd*, 447 U.S. 255 (1980).

The California Court of Appeal affirmed. It "[accepted] as true all the properly pled factual allegations of the complaint," and did "not consider whether the complaint was barred by the failure to exhaust administrative remedies or by *res judicata*," *id.*, at 125-126. But it "[found] the decision in *Agins* to be controlling herein,"

"In that case the [California] Supreme Court specifically and clearly established, for policy reasons, a rule of law which precludes a landowner from recovering in inverse condemnation based upon land use regulation. We emphasize that the

Court did not hold that regulation cannot amount to a taking without compensation, it simply held that in such event the remedy is not inverse condemnation. The remedy instead is an action to have the regulation set aside as unconstitutional. Plaintiff has filed a mandate action in the trial court which is currently pending. That is its proper remedy. The claim for inverse condemnation cannot be maintained."

In the alternative, the California Court of Appeal determined that appellant would not be entitled to monetary relief even if California law provided for this remedy:

"In any event, even if an inverse condemnation action were available in a land use regulation situation, we would be constrained to hold that plaintiff has failed to state a cause of action. Pared to their essence, the allegations are that plaintiff purchased property for residential development, the property is zoned for residential development, plaintiff submitted an application for approval of development of the property into 159 residential units, and, in part at the urging of the City, the County denied approval of the application. In these allegations plaintiff is not unlike the plaintiffs in *Agins* . . . [a case in which] both the California Supreme Court and the United States Supreme Court held that the plaintiffs had failed to allege facts which would establish an unconstitutional taking of private property.

"The plaintiff's claim here must fail for the same reasons the claims in *Agins* failed. Here plaintiff applied for approval of a particular and relatively intensive residential development and the application was denied. The denial of that particular plan cannot be equated with a refusal to permit any development, and plaintiff concedes that the property is zoned for residential purposes in the County general plan and zoning ordinance. Land use planning is not an all-or-nothing proposition. A governmental entity is not required to permit a landowner to develop property to [the] full extent he might desire or be charged with an unconstitutional taking of the property. Here, as in *Agins*, the refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development. Accordingly, the complaint fails to state a cause of action." *Id.*, at 132-133 (citation omitted).

The California Supreme Court denied appellant's petition for hearing, and appellant perfected an appeal to this Court. Because of the importance of the question whether a monetary remedy in inverse condemnation is constitutionally required in appropriate cases involving regulatory takings, we noted probable jurisdiction. 474 U.S. 917 (1985). On further consideration of our jurisdiction to hear this appeal, aided by briefing and oral argument, we find ourselves unable to address the merits of this question.

II

The regulatory takings claim advanced by appellant has two components. First, appellant must establish that the regulation has in substance "taken" his property -- that is, that the regulation "goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). See *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979). Second, appellant must demonstrate that any proffered compensation is not "just."

It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes. As Justice Holmes emphasized throughout his opinion for the Court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 416, "this is a question of degree -- and therefore cannot be disposed of by general propositions." To this day we have no "set formula to determine where regulation ends and taking begins." *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). Instead, we rely "as much [on] the exercise of judgment as [on] the application of logic." *Andrus v. Allard*, 444 U.S. 51, 65 (1979). Our cases have accordingly "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." *Kaiser Aetna v. United States*, 444 U.S., at 175. See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) ("ad hoc, factual inquiries"); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958) ("question properly turning upon the particular circumstances of each case"). Until a property owner has "obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property," "it is impossible to tell whether the land [retains] any reasonable beneficial use or whether [existing] expectation interests [have] been destroyed." *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 190 (1985). As we explained last Term:

"[The] difficult problem [is] how to define "too far," that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. . . . [Resolution] of that question depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectation. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property." (footnote omitted).

For similar reasons, a court cannot determine whether a municipality has failed to provide "just compensation" until it knows what, if any, compensation the responsible administrative

body intends to provide. ("[The] State's action here is not 'complete' until the State fails to provide adequate compensation for the taking" (footnote omitted)). The local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other. In *Penn Central Transportation Co. v. New York City*, for example, we recognized that the Landmarks Preservation Commission, the administrative body primarily responsible for administering New York City's Landmarks Preservation Law, had authority in appropriate circumstances to authorize alterations, remit taxes, and transfer development rights to ensure the landmark owner a reasonable return on its property. . Because the railroad had "not sought approval for the construction of a smaller structure" than its proposed 50-plus story office building, and because its development rights in the airspace above its Grand Central Station Terminal were transferable "to at least eight parcels in the vicinity of the Terminal, one or two of which [had] been found suitable for the construction of a new office building," *id.*, at 137, we concluded that "the application of New York City's Landmarks Law [had] not effected a 'taking' of [the railroad's] property," Whether the inquiry asks if a regulation has "gone too far," or whether it seeks to determine if proffered compensation is "just," no answer is possible until a court knows what use, if any, may be made of the affected property.

Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it. Thus, in *Agins v. Tiburon*, 447 U.S. 255 (1980), we held that zoning ordinances which authorized the development of between one and five single-family residences on appellants' 5-acre tract did not effect a taking of their property on their face, and, because appellants had not made application for any improvements to their property, the constitutionality of any particular application of the ordinances was not properly before us. Most recently, in *Williamson Planning Comm'n v. Hamilton Bank*, we held that the developer's failure either to seek variances that would have allowed it to develop the property in accordance with its proposed plat, or to avail itself of an available and facially adequate state procedure by which it might obtain "just compensation," meant that its regulatory taking claim was premature.

Here, in comparison to the situations of the property owners in the preceding cases, appellant has submitted one subdivision proposal and has received the Board's response thereto. Nevertheless, appellant still has yet to receive the Board's "final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S., at 191. In *Agins*, and *Williamson Planning Comm'n*, we declined to reach the question whether the Constitution requires a monetary remedy to redress some regulatory takings because the records in those cases left us uncertain whether the property at issue had in fact been taken. Likewise, in this case, the holdings of both courts below leave open the possibility that some development will be permitted, and thus again leave us in doubt regarding the antecedent question whether appellant's property has been taken. The judgment is therefore.

Affirmed.

PENNELL v. CITY OF SAN JOSE
485 U.S. 1 (1987)

Chief Justice Rehnquist delivered the opinion of the Court.

The case involves a challenge to a rent control ordinance enacted by the City of San Jose, California, that allows a hearing officer to consider, among other factors, the “hardship to a tenant” when determining whether to approve a rent increase proposed by a landlord. Appellants Richard Pennell and the Tri-County Apartment House Owners Association sued in the Superior Court of Santa Clara County seeking a declaration that the ordinance, in particular the “tenant hardship” provisions, are “facially unconstitutional and therefore . . . illegal and void.” The Superior Court entered judgment on the pleadings in favor of appellants, sustaining their claim that the tenant hardship provisions violated the Takings Clause of the 5th and 14th Amendments. The California Court of Appeal affirmed this judgment, 201 Cal. Rptr. 728 (1984), but the Supreme Court of California reversed, 42 Cal. 3d 365, 721 P. 2d, 1111 (1986), each by a divided vote. The majority of the Supreme Court rejected appellants’ arguments under the Takings Clause of the 5th and 14th Amendments and the Equal Protection and Due Process Clauses of the 14th Amendment; the dissenters in that court thought that the tenant hardship provisions were a “forced subsidy imposed on the landlord” in violation of the Takings Clause. *Id.* at 377, 721 P. 2d, at 1119. On appellants’ appeal to this Court we postponed consideration of the question of jurisdiction, 480 U. S. 905 (1987), and now having heard oral argument we affirm the judgment of the Supreme Court of California.

The City of San Jose enacted its rent control ordinance (Ordinance) in 1979 with the stated purpose of

“alleviating some of the more immediate needs created by San Jose’s housing situation. These needs include but are not limited to the prevention of excessive and unreasonable rent increases, the alleviation of undue hardships upon individual tenants, and the assurance to landlords of a fair and reasonable return on the value of their property.” San Jose Municipal Ordinance 19696, §5701.2.

At the heart of the Ordinance is a mechanism for determining the amount by which landlords subject to its provisions may increase the annual rent which they charge their tenants. A landlord is automatically entitled to raise the rent of a tenant in possession by as much as eight percent; if a tenant objects to an increase greater than eight percent, a hearing is required before a “Mediation Hearing Officer” to determine whether the landlord’s proposed increase is “reasonable under the circumstances.” The Ordinance sets forth a number of factors to be considered by the hearing officer in making this determination, including “the hardship to a tenant.” §5703.28(c)(7). Because appellants concentrate their attack on the consideration of this factor, we set forth the relevant provision of the Ordinance in full:

“5703.29 Hardship to Tenants. In the case of a rent increase or any portion thereof which exceeds the standard set in Section 5703.28(a) or (b), then with respect to such excess and whether or not to allow same to be part of the increase allowed under this Chapter, the Hearing Officer shall consider the economic and financial hardship imposed on the present tenant or tenants of the unit or units to which such increases apply. If, on balance, the Hearing Officer determines that the proposed increase constitutes an unreasonably severe financial or economic hardship on a particular tenant, he may order that the excess of the increase which is subject to consideration under subparagraph (c) of Section 5703.28, or any portion thereof, be disallowed. Any tenant whose household income and monthly housing expense meets [certain income requirements] shall be deemed to be suffering under financial and economic hardship which must be weighed in the Hearing Officer’s determination. The burden of proof in establishing any other economic hardship shall be on the tenant.”

If either a tenant or a landlord is dissatisfied with the decision of the hearing officer, the Ordinance provides for binding arbitration. A landlord who attempts to charge or who receives rent in excess of the maximum rent established as provided in the Ordinance is subject to criminal and civil penalties.

We first address appellants’ contention that application of the Ordinance’s tenant hardship provisions violates the Fifth and Fourteenth Amendments’ prohibition against taking of private property for public use without just compensation. In essence, appellants’ claim is as follows: §5703.28 of the Ordinance establishes the seven factors that a Hearing Officer is to take into account in determining the reasonable rent increase. The first six of these factors are all objective, and are related either to the landlord’s costs of providing an adequate rental unit, or to the condition of the rental market. Application of these six standards results in a rent that is “reasonable” by reference to what appellants’ contend is the only legitimate purpose of rent control: the elimination of “excessive” rents caused by San Jose’s housing shortage. When the Hearing Officer then takes into account “hardship to a tenant” pursuant to §5703.28(c)(7) and reduces the rent below the objectively “reasonable” amount established by the first six factors, this additional reduction in the rent increase constitutes a “taking.” This taking is impermissible because it does not serve the purpose of eliminating excessive rents – that objective has already been accomplished by considering the first six factors – instead, it serves only the purpose of providing assistance to “hardship tenants.” In short, appellants contend, the additional reduction of rent on grounds of hardship accomplishes a transfer of the landlord’s property to individual hardship tenants; the Ordinance forces private individuals to shoulder the “public” burden of subsidizing their poor tenants’ housing. As appellants’ point out, “it is axiomatic that the Fifth Amendment’s just compensation provision is ‘designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’” *First English Evangelical Lutheran Church of Glendale v. County of Los*

Angeles, 482 U. S. 304, 318-319 (1987) (quoting *Armstrong v. United States*, 364 U. S. 40, 49 (1960)).

We think it would be premature to consider this contention on the present record. As things stand, there simply is no evidence that the “tenant hardship clause” has in fact ever been relied upon by a Hearing Officer to reduce a rent below the figure it would have been set at on the basis of the other factors set forth in the Ordinance. In addition, there is nothing in the Ordinance requiring that a Hearing Officer in fact reduce a proposed rent increase on grounds of tenant hardship. Section 5703.29 does make it mandatory that hardship be considered--it states that “the Hearing Officer shall consider the economic hardship imposed on the present tenant”-but it then goes on to state that if “the proposed increase constitutes an unreasonably severe financial or economic hardship . . . he may order that the excess of the increase” be disallowed. §5703.29 (emphasis added). Given the “essentially ad hoc, factual inquiry” involved in the takings analysis, *Kaiser Aetna v. United States*, 444 U. S. 164, 175 (1979), we have found it particularly important in takings cases to adhere to our admonition that “the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary.” *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 294-295 (1981). In this case we find that the mere fact that a Hearing Officer is enjoined to consider hardship to the tenant in fixing a landlord’s rent, without any showing in a particular case as to the consequences of that injunction in the ultimate determination of the rent, does not present a sufficiently concrete factual setting for the adjudication of the takings claim appellants raise here. Cf. *Congress of Industrial Organizations v. McAdory*, 325 U. S. 472, 475-476 (1945) (declining to consider the validity of a state statute when the record did not show that the statute would ever be applied to any of the petitioner’s members).

Appellants also urge that the mere provision in the Ordinance that a Hearing Officer may consider the hardship of the tenant in finally fixing a reasonable rent renders the Ordinance “facially invalid” under the Due Process and Equal Protection Clauses, even though no landlord ever has its rent diminished by as much as one dollar because of the application of this provision. The standard for determining whether a state price-control regulation is constitutional under the Due Process Clause is well established: “Price control is unconstitutional . . . if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. . . .” *Permian Basin Area Rate Cases*, 390 U. S. 747, 769-770 (1968). Accordingly, appellants do not dispute that the Ordinance’s asserted purpose of “preventing excessive and unreasonable rent increases” caused by the “growing shortage of and increasing demand for housing in the City of San Jose,” §5701.2, is a legitimate exercise of appellees’ police powers.⁸⁰ They do argue,

⁸⁰ Appellants do not claim, as do some amici, that rent control is per se a taking. We stated in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982), that we have “consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.” *Id.* at 440 (citing, *inter alia*, *Bowles v. Willingham*, 321 U. S. 503, 517-518 (1944)). And in *FCC v. Florida Power Corp.*, 480 U. S. 245 (1987), we stated

however, that it is “arbitrary, discriminatory, or demonstrably irrelevant,” *Permain Basin Area Rate Cases*, supra, at 769-770, for appellees to attempt to accomplish the additional goal of reducing the burden of housing costs on low-income tenants by requiring that “hardship to a tenant” be considered in determining the amount of excess rent increase that is “reasonable under the circumstances” pursuant to §5703.28. As appellants put it, “The objective of alleviating individual tenant hardship is . . . not a ‘policy the legislature is free to adopt’ in a rent control ordinance.” Reply Brief for Appellants 16.

We reject this contention, however, because we have long recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare. Indeed, a primary purpose of rent control is the protection of tenants. We accordingly find that the Ordinance, which so carefully considers both the individual circumstances of the landlord and the tenant before determining whether to allow an additional increase in rent over and above certain amounts that are deemed reasonable, does not on its face violate the Fourteenth Amendment’s Due Process Clause.⁸¹

We also find that the Ordinance does not violate the Amendment’s Equal Protection Clause. Here again, the standard is deferential; appellees need only show that the classification scheme embodied in the Ordinance is “rationally related to a legitimate state interest.” *New Orleans v. Dukes*, 427 U. S. 297, 303 (1976). In light of our conclusion above that the Ordinance’s tenant hardship provisions are designed to serve the legitimate purpose of protecting tenants, we can hardly conclude that it is irrational for the Ordinance to treat certain landlords differently on the basis of whether or not they have hardship tenants.

For the foregoing reasons, we hold that it is premature to consider appellants’ claim under the Takings Clause and we reject their facial challenge to the Ordinance under the Due Process and Equal Protection Clauses of the 14th Amendment. The judgment of the Supreme Court of California is accordingly Affirmed.

Justice Kennedy took no part in the consideration or decision of this case.

Dissent: Justice Scalia, with whom Justice O’Connor joins, concurring in part and dissenting in part.

that “statutes regulating the economic relations of landlords and tenants are not per se takings.” *Id.* at 252. Despite amici’s urgings, we see no need to reconsider the constitutionality of rent control per se.

⁸¹ The consideration of tenant hardship also serves the additional purpose, not stated on the face of the Ordinance, of reducing the costs of dislocation that might otherwise result if landlords were to charge rents to tenants that they could not afford. Particularly during a housing shortage, the social costs of the dislocation of low-income tenants can be severe. By allowing tenant hardship to be considered under §5703.28(c), the Ordinance enables appellees to “fine tune” their rent control to take into account the risk that a particular tenant will be forced to relocate as a result of a proposed rent increase.

I agree that the tenant hardship provision of the Ordinance does not, on its face, violate either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. I disagree, however, with the Court's conclusion that appellants' takings claim is premature. I would decide that claim on the merits, and would hold that the tenant hardship provision of the Ordinance effects a taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments.

The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities—a problem caused by the society at large—has been the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps). Unless we are to abandon the guiding principle of the Takings Clause that “public burdens should be borne by the public as a whole,” *Armstrong, supra*, at 49, this is the only manner that our Constitution permits. The fact that government acts through the landlord-tenant relationship does not magically transform general public welfare, which must be supported by all the public, into mere “economic regulation,” which can disproportionately burden particular individuals. Here the City is not “regulating” rents in the relevant sense of preventing rents that are excessive; rather, it is using the occasion of rent regulation (accomplished by the rest of the Ordinance) to establish a welfare program privately funded by those landlords who happen to have “hardship” tenants.”

Of course all economic regulation effects wealth transfer. When excessive rents are forbidden, for example, landlords as a class become poorer and tenants as a class (or at least incumbent tenants as a class) become richer. Singling out landlords to be the transferors may be within our traditional constitutional notions of fairness, because they can plausibly be regarded as the source or the beneficiary of the high-rent problem. Once such a connection is no longer required, however, there is no end to the social transformations that can be accomplished by so-called “regulation,” at great expense to the democratic process.

The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved “off budget,” with relative invisibility and thus relative immunity from normal democratic processes. San Jose might, for example, have accomplished something like the result here by simply raising the real estate tax upon rental properties and using the additional revenues thus acquired to pay part of the rents of “hardship” tenants. It seems to me doubtful, however, whether the citizens of San Jose would allow funds in the municipal treasury, from wherever derived, to be distributed to a family of four with income as high as \$32,400 a year—the generous maximum necessary to qualify automatically as a “hardship” tenant under the rental ordinance.⁸² The voters might well

⁸² Under the San Jose Ordinance, “hardship” tenants include (though are not limited to) those whose “household income and monthly housing expense meets [sic] the criteria” for assistance under the existing housing provisions of §8 of the Housing and Community Development Act of 1974, 42 U. S. C. §1437f (1982 ed. and Supp.

see other, more pressing, social priorities. And of course what \$32,400-a-year renters can acquire through spurious “regulation,” other groups can acquire as well. Once the door is opened it is not unreasonable to expect price regulations requiring private businesses to give special discounts to senior citizens (no matter how affluent), or to students, the handicapped, or war veterans. Subsidies for these groups may well be a good idea, but because of the operation of the Takings Clause our governmental system has required them to be applied, in general, through the process of taxing and spending, where both economic effects and competing priorities are more evident.

That fostering of an intelligent democratic process is one of the happy effects of the constitutional prescription I would hold that the seventh factor in §5703.28(c) of the San Jose Ordinance effects a taking of property without just compensation.

III). The United States Department of Housing and Urban Development currently limits assistance under these provisions for families of four in the San Jose area to those who earn \$32,400 or less per year. Memorandum from U. S. Dept. of Housing and Urban Development, Assist. Secretary for Housing – Federal Housing Comm’r, Income Limits for Lower Income and Very Low-Income Families Under the Housing Act of 1937 (Jan. 15, 1988).

YEE v. CITY OF ESCONDIDO
503 U.S. 519 (1992)

Justice O'Connor delivered the opinion of the Court.

The Takings Clause of the Fifth Amendment provides: “Nor shall private property be taken for public use, without just compensation.” Most of our cases interpreting the Clause fall within two distinct classes. Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation. See, e. g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. See, e. g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-125 (1978). The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions.

Petitioners own mobile home parks in Escondido, California. They contend that a local rent control ordinance, when viewed against the backdrop of California’s Mobilehome Residency Law, amounts to a physical occupation of their property entitling them to compensation under the first category of cases discussed above.

I

The term “mobile home” is somewhat misleading. Mobile homes are largely immobile as a practical matter, because the cost of moving one is often a significant fraction of the value of the mobile home itself. They are generally placed permanently in parks; once in place, only about one in every hundred mobile homes is ever moved. Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 *UCLA L. Rev.* 399, 405 (1988). A mobile home owner typically rents a plot of land, called a “pad,” from the owner of a mobile home park. The park owner provides private roads within the park, common facilities such as washing machines or a swimming pool, and often utilities. The mobile home owner often invests in site-specific improvements such as a driveway, steps, walkways, porches, or landscaping. When the mobile home owner wishes to move, the mobile home is usually sold in place, and the purchaser continues to rent the pad on which the mobile home is located.

In 1978, California enacted its Mobilehome Residency Law, Cal. Civ. Code Ann. §798 (West 1982 and Supp. 1991). The Legislature found “that, because of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique

protection from actual or constructive eviction afforded by the provisions of this chapter.” §798.55(a).

The Mobilehome Residency Law limits the bases upon which a park owner may terminate a mobile home owner’s tenancy. These include the nonpayment of rent, the mobile home owner’s violation of law or park rules, and the park owner’s desire to change the use of his land. §798.56. While a rental agreement is in effect, however, the park owner generally may not require the removal of a mobilehome when it is sold. §798.73. The park owner may neither charge a transfer fee for the sale, §798.72, nor disapprove of the purchaser, provided that the purchaser has the ability to pay the rent, §798.74. The Mobilehome Residency Law contains a number of other detailed provisions, but none limit the rent the park owner may charge.

In the wake of the Mobilehome Residency Law, various communities in California adopted mobilehome rent control ordinances. See Hirsch & Hirsch, *supra*, at 408-411. The voters of Escondido did the same in 1988 by approving Proposition K, the rent control ordinance challenged here. The ordinance sets rents back to their 1986 levels, and prohibits rent increases without the approval of the City Council. Park owners may apply to the Council for rent increases at any time. The Council must approve any increases it determines to be “just, fair and reasonable,” after considering the following nonexclusive list of factors: (1) changes in the Consumer Price Index; (2) the rent charged for comparable mobile home pads in Escondido; (3) the length of time since the last rent increase; (4) the cost of any capital improvements related to the pad or pads at issue; (5) changes in property taxes; (6) changes in any rent paid by the park owner for the land; (7) changes in utility charges; (8) changes in operating and maintenance expenses; (9) the need for repairs other than for ordinary wear and tear; (10) the amount and quality of services provided to the affected tenant; and (11) any lawful existing lease. Ordinance §4(g), App. 11-12.

Petitioners John and Irene Yee own the Friendly Hills and Sunset Terrace Mobile Home Parks, both of which are located in the city of Escondido. A few months after the adoption of Escondido’s rent control ordinance, they filed suit in San Diego County Superior Court. According to the complaint, “the rent control law has had the effect of depriving the plaintiffs of all use and occupancy of [their] real property and granting to the tenants of mobilehomes presently in The Park, as well as the successors in interest of such tenants, the right to physically permanently occupy and use the real property of Plaintiff.” *Id.* at 3, para. 6. The Yees requested damages of six million dollars, a declaration that the rent control ordinance is unconstitutional, and an injunction barring the ordinance’s enforcement. *Id.* at 5-6.

In their opposition to the city’s demurrer, the Yees relied almost entirely on *Hall v. City of Santa Barbara*, 833 F. 2d 1270 (CA9 1987), cert. denied, 485 U.S. 940 (1988), which had held that a similar mobile home rent control ordinance effected a physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Yees candidly admitted that “in fact, the Hall decision was used [as] a guide in drafting the present Complaint.” 2 Tr. 318,

Points & Authorities in Opposition to Demurrer 4. The Superior Court nevertheless sustained the city's demurrer and dismissed the Yees' complaint. App. to Pet. for Cert. C-42.

The Yees were not alone. Eleven other park owners filed similar suits against the city shortly afterwards, and all were dismissed. By stipulation, all 12 cases were consolidated for appeal; the parties agreed that all would be submitted for decision by the California Court of Appeal on the briefs and oral argument in the Yee case.

The Court of Appeal affirmed, in an opinion primarily devoted to expressing the court's disagreement with the reasoning of Hall. The court concluded: "Loretto in no way suggests that the Escondido ordinance authorizes a permanent physical occupation of the landlord's property and therefore constitutes a per se taking." 224 Cal. App. 3d 1349, 1358 (1990). The California Supreme Court denied review. App. to Pet. for Cert. B-41.

Eight of the twelve park owners, including the Yees, joined in a petition for certiorari. We granted certiorari, 502 U.S. (1991), to resolve the conflict between the decision below and those of two of the federal Courts of Appeals, in Hall, supra, and Pinewood Estates of Michigan v. Barnegat Township Leveling Board, 898 F. 2d 347 (CA3 1990).

II

Petitioners do not claim that the ordinary rent control statutes regulating housing throughout the country violate the Takings Clause. Brief for Petitioners 7, 10. Cf. Pennell v. San Jose, 485 U.S. 1, 12, n.6 (1988); Loretto, supra, at 440. Instead, their argument is predicated on the unusual economic relationship between park owners and mobile home owners. Park owners may no longer set rents or decide who their tenants will be. As a result, according to petitioners, any reduction in the rent for a mobile home pad causes a corresponding increase in the value of a mobile home, because the mobilehome owner now owns, in addition to a mobile home, the right to occupy a pad at a rent below the value that would be set by the free market. Cf. Hirsch & Hirsch, 35 UCLA L. Rev., at 425. Because under the California Mobilehome Residency Law the park owner cannot evict a mobile home owner or easily convert the property to other uses, the argument goes, the mobile home owner is effectively a perpetual tenant of the park, and the increase in the mobile home's value thus represents the right to occupy a pad at below-market rent indefinitely. And because the Mobilehome Residency Law permits the mobile home owner to sell the mobile home in place, the mobile home owner can receive a premium from the purchaser corresponding to this increase in value. The amount of this premium is not limited by the Mobilehome Residency Law or the Escondido ordinance. As a result, petitioners conclude, the rent control ordinance has transferred a discrete interest in land—the right to occupy the land indefinitely at a sub-market rent—from the park owner to the mobile home owner. Petitioners contend that what has been transferred from park owner to mobile home owner is no less than a right of physical occupation of the park owner's land.

This argument, while perhaps within the scope of our regulatory taking cases, cannot be squared easily with our cases on physical takings. The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land. “This element of required acquiescence is at the heart of the concept of occupation.” *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987). Thus whether the government floods a landowner’s property, *Pumpelly v. Green Bay Co.*, 13 Wall. 166 (1872), or does no more than require the landowner to suffer the installation of a cable, *Loretto*, *supra*, the Takings Clause requires compensation if the government authorizes a compelled physical invasion of property.

But the Escondido rent control ordinance, even when considered in conjunction with the California Mobilehome Residency Law, authorizes no such thing. Petitioners voluntarily rented their land to mobile home owners. At least on the face of the regulatory scheme, neither the City nor the State compels petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, the Mobilehome Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants, albeit with six or twelve months notice. Cal. Civ. Code Ann. §798.56(g). Put bluntly, no government has required any physical invasion of petitioners’ property. Petitioners’ tenants were invited by petitioners, not forced upon them by the government. See *Florida Power*, *supra*, at 252-253. While the “right to exclude” is doubtless, as petitioners assert, “one of the most essential sticks in the bundle of rights that are commonly characterized as property,” *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979), we do not find that right to have been taken from petitioners on the mere face of the Escondido ordinance.

On their face, the state and local laws at issue here merely regulate petitioners’ use of their land by regulating the relationship between landlord and tenant. “This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.” *Loretto*, 458 U. S., at 440. See also *Florida Power*, *supra*, at 252 (“statutes regulating the economic relations of landlords and tenants are not per se takings”). When a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge, see, e. g., *Pennell*, *supra*, at 12, n.6, or require the landowner to accept tenants he does not like, see, e. g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964), without automatically having to pay compensation. See also *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82-84 (1980). Such forms of regulation are analyzed by engaging in the “essentially ad hoc, factual inquiries” necessary to determine whether a regulatory taking has occurred. *Kaiser Aetna*, *supra*, at 175. In the words of Justice Holmes, “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Petitioners emphasize that the ordinance transfers wealth from park owners to incumbent mobile home owners. Other forms of land use regulation, however, can also be said to transfer wealth from the one who is regulated to another. Ordinary rent control often transfers wealth

from landlords to tenants by reducing the landlords' income and the tenants' monthly payments, although it does not cause a one-time transfer of value as occurs with mobile homes. Traditional zoning regulations can transfer wealth from those whose activities are prohibited to their neighbors; when a property owner is barred from mining coal on his land, for example, the value of his property may decline but the value of his neighbor's property may rise. The mobile home owner's ability to sell the mobile home at a premium may make this wealth transfer more visible than in the ordinary case, see Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 *Brooklyn L. Rev.* 741, 758-759 (1988), but the existence of the transfer in itself does not convert regulation into physical invasion.

Petitioners also rely heavily on their allegation that the ordinance benefits incumbent mobile home owners without benefiting future mobile home owners, who will be forced to purchase mobile homes at premiums. Mobile homes, like motor vehicles, ordinarily decline in value with age. But the effect of the rent control ordinance, coupled with the restrictions on the park owner's freedom to reject new tenants, is to increase significantly the value of the mobile home. This increased value normally benefits only the tenant in possession at the time the rent control is imposed. See Hirsch & Hirsch, 35 *UCLA L. Rev.*, at 430-431. Petitioners are correct in citing the existence of this premium as a difference between the alleged effect of the Escondido ordinance and that of an ordinary apartment rent control statute. Most apartment tenants do not sell anything to their successors (and are often prohibited from charging "key money"), so a typical rent control statute will transfer wealth from the landlord to the incumbent tenant and all future tenants. By contrast, petitioners contend that the Escondido ordinance transfers wealth only to the incumbent mobile home owner. This effect might have some bearing on whether the ordinance causes a regulatory taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance. But it has nothing to do with whether the ordinance causes a physical taking. Whether the ordinance benefits only current mobile home owners or all mobile home owners, it does not require petitioners to submit to the physical occupation of their land.

The same may be said of petitioners' contention that the ordinance amounts to compelled physical occupation because it deprives petitioners of the ability to choose their incoming tenants. Again, this effect may be relevant to a regulatory taking argument, as it may be one factor a reviewing court would wish to consider in determining whether the ordinance unjustly imposes a burden on petitioners that should "be compensated by the government, rather than remaining disproportionately concentrated on a few persons." *Penn Central Transp. Co. v. New York City*, 438 U. S., at 124. But it does not convert regulation into the unwanted physical occupation of land. Because they voluntarily open their property to occupation by others, petitioners cannot assert a per se right to compensation based on their inability to exclude particular individuals. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S., at 261; see also *id.*, at 259 ("appellant has no 'right' to select its guests as it sees fit, free from governmental regulation"); *PruneYard Shopping Center v. Robins*, 447 U. S., at 82-84.

Petitioners' final line of argument rests on a footnote in *Loretto*, in which we rejected the contention that "the landlord could avoid the requirements of [the statute forcing her to permit cable to be permanently placed on her property] by ceasing to rent the building to tenants." We found this possibility insufficient to defeat a physical taking claim, because "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Loretto*, 458 U. S., at 439, n. 17. Petitioners argue that if they have to leave the mobile home park business in order to avoid the strictures of the Escondido ordinance, their ability to rent their property has in fact been conditioned on such a forfeiture. This argument fails at its base, however, because there has simply been no compelled physical occupation giving rise to a right to compensation that petitioners could have forfeited. Had the city required such an occupation, of course, petitioners would have a right to compensation, and the city might then lack the power to condition petitioners' ability to run mobile home parks on their waiver of this right. Cf. *Nollan*, 483 U. S., at 837. But because the ordinance does not effect a physical taking in the first place, this footnote in *Loretto* does not help petitioners.

The Escondido rent control ordinance, even considered against the backdrop of California's Mobilehome Residency Law, does not authorize an unwanted physical occupation of petitioners' property. It is a regulation of petitioners' use of their property, and thus does not amount to a per se taking.

III

In this Court, petitioners attempt to challenge the ordinance on two additional grounds: They argue that it constitutes a denial of substantive due process and a regulatory taking. Neither of these claims is properly before us. The first was not raised or addressed below, and the second is not fairly included in the question on which we granted certiorari.

A

The Yees did not include a due process claim in their complaint. Nor did petitioners raise a due process claim in the Court of Appeal. It was not until their petition for review in the California Supreme Court that petitioners finally raised a substantive due process claim. But the California Supreme Court denied discretionary review. Such a denial, as in this Court, expresses no view as to the merits. See *People v. Triggs*, 8 Cal. 3d 884, 890-891, 506 P. 2d 232, 236 (1973). In short, petitioners did not raise a substantive due process claim in the state courts, and no state court has addressed such a claim.

In reviewing the judgments of state courts under the jurisdictional grant of 28 U.S.C. §1257, the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below. *Illinois v. Gates*, 462 U.S. 213, 218-220 (1983). While we have expressed inconsistent views as to whether this rule is jurisdictional or prudential in cases arising from state courts, see *ibid.*, we need not resolve the question here. (In cases arising from federal courts, the rule is prudential only. See, e.g., *Carlson v. Green*, 446 U.S. 14, 17, n. 2 (1980)).

Even if the rule were prudential, we would adhere to it in this case. Because petitioners did not raise their substantive due process claim below, and because the state courts did not address it, we will not consider it here.

B

Petitioners unquestionably raised a taking claim in the state courts. The question whether the rent control ordinance took their property without compensation, in violation of the Fifth Amendment's Takings Clause, is thus properly before us. Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate claims. They are rather separate arguments in support of a single claim—that the ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here.

A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below. While we have on occasion rephrased the question presented by a petitioner, see, e.g., *Ankenbrandt v. Richards*, 502 U.S. ____ (1992), or requested the parties to address an important question of law not raised in the petition for certiorari, see, e.g., *Payne v. Tennessee*, 498 U.S. ____ (1991), by and large it is the petitioner himself who controls the scope of the question presented. The petitioner can generally frame the question as broadly or as narrowly as he sees fit.

The framing of the question presented has significant consequences, however, because under this Court's Rule 14.1(a), "only the questions set forth in the petition, or fairly included therein, will be considered by the Court." While "the statement of any question presented will be deemed to comprise every subsidiary question fairly included therein," *ibid.*, we ordinarily do not consider questions outside those presented in the petition for certiorari. See, e.g., *Berkemer v. McCarty*, 468 U.S. 420, 443, n.38 (1984). This rule is prudential in nature, but we disregard it "only in the most exceptional cases," *Stone v. Powell*, 428 U.S. 465, 481, n.15 (1976), where reasons of urgency or of economy suggest the need to address the unrepresented question in the case under consideration.

Rule 14.1(a) serves two important and related purposes. First, it provides the respondent with notice of the grounds upon which the petitioner is seeking certiorari, and enables the respondent to sharpen the arguments as to why certiorari should not be granted. Were we routinely to consider questions beyond those raised in the petition, the respondent would lack any opportunity in advance of litigation on the merits to argue that such questions are not worthy of review. Where, as is not unusual, the decision below involves issues on which the petitioner does not seek certiorari, the respondent would face the formidable task of opposing certiorari on every issue the Court might conceivably find present in the case. By forcing the petitioner to

choose his questions at the outset, Rule 14.1(a) relieves the respondent of the expense of unnecessary litigation on the merits and the burden of opposing certiorari on unrepresented questions.

Second, Rule 14.1(a) assists the Court in selecting the cases in which certiorari will be granted. Last Term alone we received over 5,000 petitions for certiorari, but we have the capacity to decide only a small fraction of these cases on the merits. To use our resources most efficiently, we must grant certiorari only in those cases that will enable us to resolve particularly important questions. Were we routinely to entertain questions not presented in the petition for certiorari, much of this efficiency would vanish, as parties who feared an inability to prevail on the question presented would be encouraged to fill their limited briefing space and argument time with discussion of issues other than the one on which certiorari was granted. Rule 14.1(a) forces the parties to focus on the questions the Court has viewed as particularly important, thus enabling us to make efficient use of our resources.

We granted certiorari on a single question pertaining to the Takings Clause: “Two federal courts of appeal have held that the transfer of a premium value to a departing mobilehome tenant, representing the value of the right to occupy at a reduced rate under local mobilehome rent control ordinances, constitutes an impermissible taking. Was it error for the state appellate court to disregard the rulings and hold that there was no taking under the fifth and fourteenth amendments?” This was the question presented by petitioners. Pet. for Cert. i. It asks whether the court below erred in disagreeing with the holdings of the Courts of Appeals for the Third and Ninth Circuits in *Pinewood Estates of Michigan v. Barnegat Township Leveling Board*, 898 F. 2d 347 (CA3 1990), and *Hall v. City of Santa Barbara*, 833 F. 2d 1270 (CA9 1987), cert. denied, 485 U.S. 940 (1988). These cases, in turn, held that mobile home ordinances effected physical takings, not regulatory takings. Fairly construed, then, petitioners’ question presented is the equivalent of the question “Did the court below err in finding no physical taking?”

Whether or not the ordinance effects a regulatory taking is a question related to the one petitioners presented, and perhaps complementary to the one petitioners presented, but it is not “fairly included therein.” Consideration of whether a regulatory taking occurred would not assist in resolving whether a physical taking occurred as well; neither of the two questions is subsidiary to the other. Rule 14.1(a) accordingly creates a heavy presumption against our consideration of petitioners’ claim that the ordinance causes a regulatory taking. Petitioners have not overcome that presumption. While the regulatory taking question is no doubt important, from an institutional perspective it is not as important as the physical taking question. The lower courts have not reached conflicting results, so far as we know, on whether similar mobile home rent control ordinances effect regulatory takings. They have reached conflicting results over whether such ordinances cause physical takings; such a conflict is, of course, a substantial reason for granting certiorari under this Court’s Rule 10. Moreover, the conflict is between two courts whose jurisdiction includes California, the State with the largest population and one with a relatively high percentage of the nation’s mobile homes. Forum-shopping is thus of particular

concern. See *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575, 579 (CA9 1991) (mobile home park owners may file physical taking suits in either state or federal court). Prudence also dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question. See *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545, 552, n. 3 (1990) (“Applying our analysis . . . to the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this Court’s discretion”). In fact, were we to address the issue here, we would apparently be the first court in the nation to determine whether an ordinance like this one effects a regulatory taking. We will accordingly follow Rule 14.1(a), and consider only the question petitioners raised in seeking certiorari. We leave the regulatory taking issue for the California courts to address in the first instance.

Because the Escondido rent control ordinance does not compel a landowner to suffer the physical occupation of his property, it does not effect a per se taking under *Loretto*. The judgment of the Court of Appeal is accordingly

Affirmed.

Session 22. Challenges in Federal Courts

When there has been a “regulatory taking” claimants are guaranteed a day in court by the due to the “self-executing” character of the 5th and 14th Amendments. The Court of Federal Claims has exclusive jurisdiction over just compensation claims against the United States while the U.S. District courts have the power to grant declaratory and injunctive relief against federal officials. Judicial revitalization of §1983 of the Civil Rights Act of 1871 has also provided private litigants with a federal cause of action against state and local governments, subject to significant 11th amendment limitations.

LAKE COUNTRY ESTATES, INC. v. TAHOE REGIONAL PLANNING AGENCY 440 U.S. 391 (1978)

MR. JUSTICE STEVENS delivered the opinion of the Court.

We granted certiorari to decide whether the Tahoe Regional Planning Agency, an entity created by Compact between California and Nevada, is entitled to the immunity that the Eleventh Amendment provides to the compacting States themselves.⁸³ The case also presents the question whether the individual members of the Agency's governing body are entitled to absolute immunity from federal damages claims when acting in a legislative capacity.

Lake Tahoe, a unique mountain lake, is located partly in California and partly in Nevada. The Lake Tahoe Basin, an area comprising 500 square miles, is a popular resort area that has grown rapidly in recent years.

In 1968, the States of California and Nevada agreed to create a single agency to coordinate and regulate development in the Basin and to conserve its natural resources. As required by the Constitution, in 1969 Congress gave its consent to the Compact, and the Tahoe Regional Planning Agency (TRPA) was organized. The Compact authorized TRPA to adopt and to enforce a regional plan for land use, transportation, conservation, recreation, and public services.

Petitioners own property in the Lake Tahoe Basin. In 1973, they filed a complaint in the United States District Court for the Eastern District of California alleging that TRPA, the individual members of its governing body, and its executive officer had adopted a land-use ordinance and general plan, and engaged in other conduct, that destroyed the economic value of petitioners' property. Petitioners alleged that respondents had thereby taken their property without due process of law and without just compensation in violation of the Fifth and

⁸³ "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Fourteenth Amendments to the Constitution of the United States. They sought monetary and equitable relief.

Petitioners advanced alternative theories to support their federal claim. First, they asserted that the alleged violations of the Fifth and Fourteenth Amendments gave rise to an implied cause of action that jurisdiction could be predicated on 28 U. S. C. §1331.⁸⁴ Second, they claimed that respondents had acted under color of state law and therefore their cause of action was authorized by 42 U. S. C. §1983⁸⁵ and jurisdiction was provided by 28 U. S. C. §1343.⁸⁶

The District Court dismissed the complaint. Although it concluded that the complaint sufficiently alleged a cause of action for "inverse condemnation," it held that such an action could not be brought against TRPA because that agency did not have the authority to condemn property. The court also held that the individual defendants were immune from liability for the exercise of the discretionary functions alleged in the complaint. On appeal, the Court of Appeals for the Ninth Circuit affirmed the dismissal of TRPA, but reinstated the complaint against the individual respondents. 566 F.2d 1353. Addressing first the questions of cause of action and jurisdiction, the Court of Appeals rejected petitioners' claims based on §§1983 and 1343. The court held that congressional approval had transformed the Compact between the States into

⁸⁴ The amount in controversy exceeds \$10,000. Title 28 U. S. C. §1331, the general federal – question jurisdiction statute, provides in part:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency, thereof, or any officer or employee thereof in his official capacity."

⁸⁵ Title 42 U. S. C. §1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

⁸⁶ Title 28 U. S. C. §1343 provides in part:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

federal law. As a result, the respondents were acting pursuant to federal authority, rather than under color of state law, and §§1983 and 1343 could not be invoked to provide a cause of action and federal jurisdiction. But the court accepted petitioners' alternative argument: It held that they had alleged a deprivation of due process in violation of the Fifth and Fourteenth Amendments, that an implied remedy was available, and that federal jurisdiction was provided by §1331.

Having found a cause of action and a basis for federal jurisdiction, the court turned to the immunity questions. Although the point had not been argued, the Court of Appeals decided that the Eleventh Amendment immunized TRPA from suit in a federal court. With respect to the individual respondents, the Court of Appeals held that absolute immunity should be afforded for conduct of a legislative character and qualified immunity for executive action. Since the record did not adequately disclose whether the challenged conduct was legislative or executive, the court remanded for a hearing.

Petitioners ask this Court to hold that TRPA is not entitled to Eleventh Amendment immunity and that the individual respondents are not entitled to absolute immunity when acting in a legislative capacity.

I

Before addressing the immunity issues, we must consider whether petitioners properly invoked the jurisdiction of a federal court.

Even if the lack of a cause of action were considered a jurisdictional defect in a suit brought under §1331, we may not dismiss for that reason if the record discloses that federal jurisdiction does in fact exist. In this case...we conclude that there is both a cause of action and federal jurisdiction. Section 1983 provides a remedy for individuals alleging deprivations of their constitutional rights by action taken "under color of state law." The Court of Appeals incorrectly assumed that the requirement of federal approval of the interstate Compact foreclosed the possibility that the conduct of TRPA and its officers could be found to be "under color of state law" within the meaning of §1983.

The Compact had its genesis in the actions of the compacting States, and it remains part of the statutory law of both States. The actual implementation of TRPA, after federal approval was obtained, depended upon the appointment of governing members and executives by the two States and their subdivisions and upon mandatory financing secured, by the terms of the Compact, from the counties. In discharging their duties as officials of TRPA, the state and county appointees necessarily have also served the interests of the political units that appointed them. The federal involvement, by contrast, is limited to the appointment of one nonvoting member to the governing board. While congressional consent to the original Compact was required, the States may confer additional powers and duties on TRPA without further congressional action. And each State retains an absolute right to withdraw from the Compact.

Even if it were not well settled that §1983 must be given a liberal construction, these facts adequately characterize the alleged actions of the respondents as "under color of state law" within the meaning of that statute. Federal jurisdiction therefore rests on §1343, and there is no need to address the question whether there is an implied remedy for violation of the Fifth or the Fourteenth Amendment.

II

The Court of Appeals held that California and Nevada had delegated authority ordinarily residing in each of those States to TRPA. Because "the bi-state Authority serves as an agency of the participant states, exercising a specially aggregated slice of state power," the court concluded "that the TRPA is protected by sovereign immunity, preserved for the states by the Eleventh Amendment." 566 F.2d, at 1359-1360.

The reasoning of the Court of Appeals would extend Eleventh Amendment immunity to every bistate agency unless that immunity were expressly waived. TRPA argues that the propriety of this result is evidenced by the special constitutional requirement of congressional approval of any interstate compact. Any agency that is so important that it could not even be created by the States without a special Act of Congress should receive the same immunity that is accorded to the States themselves.

We cannot accept such an expansive reading of the Eleventh Amendment. By its terms, the protection afforded by that Amendment is only available to "one of the United States." It is true, of course, that some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself. But the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a "slice of state power."

If an interstate compact discloses that the compacting States created an agency comparable to a county or municipality, which has no Eleventh Amendment immunity, the Amendment should not be construed to immunize such an entity. Unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose, there would appear to be no justification for reading additional meaning into the limited language of the Amendment.

California and Nevada have both filed briefs in this Court disclaiming any intent to confer immunity on TRPA. They point to provisions of their Compact that indicate that TRPA is to be regarded as a political subdivision rather than an arm of the State. Finally, instead of the state treasury being directly responsible for judgments against TRPA, Art. VII (f) expressly provides that obligations of TRPA shall not be binding on either State.

The regulation of land use is traditionally a function performed by local governments. Concern with the proper performance of that function in the bistate area was a primary motivation for the creation of TRPA itself, and gave rise to the specific controversy at issue in this litigation. Moreover, while TRPA, like cities, towns, and counties, was originally created by the States, its authority to make rules within its jurisdiction is not subject to veto at the state level. Indeed, that TRPA is not in fact an arm of the State subject to its control is perhaps most forcefully demonstrated by the fact that California has resorted to litigation in an unsuccessful attempt to impose its will on TRPA.

The intentions of Nevada and California, the terms of the Compact, and the actual operation of TRPA make clear that nothing short of an absolute rule, such as that implicit in the holding of the Court of Appeals, would allow TRPA to claim the sovereign immunity provided by the Constitution to Nevada and California. Because the Eleventh Amendment prescribes no such rule, we hold that TRPA is subject to "the judicial power of the United States" within the meaning of that Amendment.

III

We turn, finally, to petitioners' challenge to the Court of Appeals' holding that the individual respondents are absolutely immune from federal damages liability for actions taken in their legislative capacities.

The immunity of legislators from civil suit for what they do or say as legislators has its roots in the parliamentary struggles of 16th- and 17th-century England; such immunity was consistently recognized in the common law and was taken as a matter of course by our Nation's founders. In *Tenney v. Brandhove*, 341 U.S. 367, this Court reasoned that Congress, in enacting §1983 as part of the Civil Rights Act of 1871, could not have intended "to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here." 341 U.S., at 376. It therefore held that state legislators are absolutely immune from suit under §1983 for actions "in the sphere of legitimate legislative activity." 341 U.S., at 376.

Petitioners do not challenge the validity of the holding in *Tenney*, or of the decisions recognizing the absolute immunity of federal legislators. Rather, their claim is that absolute immunity should be limited to the federal and state levels, and should not extend to individuals acting in a legislative capacity at a regional level. In support of this proposed distinction, petitioners argue that the source of immunity for state legislators is found in constitutional provisions, such as the Speech or Debate Clause, which have no application to a body such as TRPA. In addition, they point out that because state legislatures have effective means of disciplining their members that TRPA does not have, the threat of possible personal liability is necessary to deter lawless conduct by the governing members of TRPA.

We find these arguments unpersuasive. The Speech or Debate Clause of the United States Constitution is no more applicable to the members of state legislatures than to the members of TRPA. The States are, of course, free to adopt similar clauses in their own constitutions, and many have in fact done so. These clauses reflect the central importance attached to legislative freedom in our Nation. But the absolute immunity for state legislators recognized in *Tenney* reflected the Court's interpretation of federal law; the decision did not depend on the presence of a speech or debate clause in the constitution of any State, or on any particular set of state rules or procedures available to discipline erring legislators. Rather, the rule of that case recognizes the need for immunity to protect the "public good."

This reasoning is equally applicable to federal, state, and regional legislators. Whatever potential damages liability regional legislators may face as a matter of state law, we hold that petitioners' federal claims do not encompass the recovery of damages from the members of TRPA acting in a legislative capacity.

Like the Court of Appeals, we are unable to determine from the record the extent to which petitioners seek to impose liability upon the individual respondents for the performance of their legislative duties. We agree, however, that to the extent the evidence discloses that these individuals were acting in a capacity comparable to that of members of a state legislature, they are entitled to absolute immunity from federal damages liability.

The judgment of the Court of Appeals is reversed in part and affirmed in part.

It is so ordered.

**WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION v. HAMILTON
BANK OF JOHNSON CITY
473 U.S. 172 (1985)**

JUSTICE BLACKMUN delivered the opinion of the Court.

Respondent, the owner of a tract of land it was developing as a residential subdivision, sued petitioners, the Williamson County (Tennessee) Regional Planning Commission and its members and staff, in United States District Court, alleging that petitioners' application of various zoning laws and regulations to respondent's property amounted to a "taking" of that property. At trial, the jury agreed and awarded respondent \$350,000 as just compensation for the "taking." Although the jury's verdict was rejected by the District Court, which granted a judgment notwithstanding the verdict to petitioners, the verdict was reinstated on appeal. Petitioners and their amici urge this Court to overturn the jury's award. We examine the procedural posture of respondent's claim.

I

A

Under Tennessee law, responsibility for land-use planning is divided between the legislative body of each of the State's counties and regional and municipal "planning commissions." The county legislative body is responsible for zoning ordinances to regulate the uses to which particular land and buildings may be put, and to control the density of population and the location and dimensions of buildings. Tenn. Code Ann. §13-7-101 (1980). The planning commissions are responsible for more specific regulations governing the subdivision of land within their region or municipality for residential development. §§13-3-403, 13-4-303.

As required by §13-3-402, respondent's predecessor-in-interest (developer) in 1973 submitted a preliminary plat for the cluster development of its tract, the Temple Hills Country Club Estates (Temple Hills), to the Williamson County Regional Planning Commission for approval.

On May 3, 1973, the Commission approved the developer's preliminary plat for Temple Hills. The plat indicated that the development was to include 676 acres, of which 260 acres would be open space, primarily in the form of a golf course.

Upon approval of the preliminary plat, the developer conveyed to the county a permanent open space easement for the golf course, and began building roads and installing utility lines for the project. The developer spent approximately \$3 million building the golf course, and another \$500,000 installing sewer and water facilities. Before housing construction was to begin on a particular section, a final plat of that section was submitted for approval. Several sections, containing a total of 212 units, were given final approval by 1979. The preliminary plat, as well, was reapproved four times during that period.

In 1977, the county changed its zoning ordinance to require that calculations of allowable density exclude 10% of the total acreage to account for roads and utilities. allowed in 1973. The Commission continued to apply the zoning ordinance and subdivision regulations in effect in 1973 to Temple Hills, however, and reapproved the preliminary plat in 1978. In August 1979, the Commission reversed its position and decided that plats submitted for renewal should be evaluated under the zoning ordinance and subdivision regulations in effect when the renewal was sought. [T]he Commission disapproved the plat on two other grounds: first, the plat did not comply with the density requirements of the zoning ordinance or subdivision regulations, because no deduction had been made for the land taken for the parkway, and because there had been no deduction for 10% of the acreage attributable to roads or for 50% of the land having a slope of more than 25%; and second, lots were placed on slopes with a grade greater than 25%.

The developer then appealed to the County Board of Zoning Appeals for an "interpretation of the Residential Cluster zoning [ordinance] as it relates to Temple Hills." On November 11, 1980, the Board determined that the Commission should apply the zoning ordinance and subdivision regulations that were in effect in 1973 in evaluating the density of Temple Hills. It also decided that in measuring which lots had excessive grades, the Commission should define the slope in a manner more favorable to the developer.

On November 26, respondent, Hamilton Bank of Johnson City, acquired through foreclosure the property in the Temple Hills subdivision that had not yet been developed, a total of 257.65 acres. This included many of the parcels that had been left blank in the preliminary plat approved in 1973. In June 1981, respondent submitted two preliminary plats to the Commission - the plat that had been approved in 1973 and subsequently reapproved several times, and a plat indicating respondent's plans for the undeveloped areas, which was similar to the plat submitted by the developer in 1980. *Id.*, at 88. The new plat proposed the development of 688 units; the reduction from 736 units represented respondent's concession that 18.5 acres should be removed from the acreage because that land had been taken for the parkway. *Id.*, at 424, 425.

On June 18, the Commission disapproved the plat for eight reasons, including the density and grade problems cited in the October 1980 denial, as well as the objections the Temple Hills Committee had raised in 1980 to the length of two cul-de-sacs, the grade of various roads, the lack of fire protection, the disrepair of the main-access road, and the minimum frontage. The Commission declined to follow the decision of the Board of Zoning Appeals that the plat should be evaluated by the 1973 zoning ordinance and subdivision regulations, stating that the Board lacked jurisdiction to hear appeals from the Commission.

B

Respondent then filed this suit in the United States District Court for the Middle District of Tennessee, pursuant to 42 U. S. C. §1983, alleging that the Commission had taken its property without just compensation and asserting that the Commission should be estopped under state law

from denying approval of the project. Respondent's expert witnesses testified that the design that would meet each of the Commission's eight objections would allow respondent to build only 67 units, 409 fewer than respondent claims it is entitled to build, and that the development of only 67 sites would result in a net loss of over \$1 million. Petitioners' expert witness, on the other hand, testified that the Commission's eight objections could be overcome by a design that would allow development of approximately 300 units.

After a 3-week trial, the jury found that respondent had been denied the "economically viable" use of its property in violation of the Just Compensation Clause, and that the Commission was estopped under state law from requiring respondent to comply with the current zoning ordinance and subdivision regulations rather than those in effect in 1973. The jury awarded damages of \$350,000 for the temporary taking of respondent's property. The court entered a permanent injunction requiring the Commission to apply the zoning ordinance and subdivision regulations in effect in 1973 to Temple Hills, and to approve the plat submitted in 1981.

The court then granted judgment notwithstanding the verdict in favor of the Commission on the taking claim, reasoning in part that respondent was unable to derive economic benefit from its property on a temporary basis only, and that such a temporary deprivation, as a matter of law, cannot constitute a taking.

A divided panel of the United States Court of Appeals for the Sixth Circuit reversed. 729 F.2d 402 (1984). The court held that application of government regulations affecting an owner's use of property may constitute a taking if the regulation denies the owner all "economically viable" use of the land, and that the evidence supported the jury's finding that the property had no economically feasible use during the time between the Commission's refusal to approve the preliminary plat and the jury's verdict.

II

We granted certiorari to address the question whether Federal, State, and local Governments must pay money damages to a landowner whose property allegedly has been "taken" temporarily by the application of government regulations. 469 U.S. 815 (1984). We conclude that respondent's claim is premature.

III

We examine the posture of respondent's cause of action first by viewing it as stating a claim under the Just Compensation Clause. This Court often has referred to regulation that "goes too far," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), as a "taking."

The jury verdict in this case cannot be upheld. Because respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its

property, nor utilized the procedures Tennessee provides for obtaining just compensation, respondent's claim is not ripe.

A

As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. [I]n *Agins v. Tiburon*, supra, the Court held that a challenge to the application of a zoning ordinance was not ripe because the property owners had not yet submitted a plan for development of their property. 447 U.S., at 260.

Respondent's claim is premature.... [R]espondent did not then seek variances that would have allowed it to develop the property according to its proposed plat, notwithstanding the Commission's finding that the plat did not comply with the zoning ordinance and subdivision regulations. It appears that variances could have been granted to resolve at least five of the Commission's eight objections to the plat. The Board of Zoning Appeals had the power to grant certain variances from the zoning ordinance, including the ordinance's density requirements and its restriction on placing units on land with slopes having a grade in excess of 25%.

Respondent argues that it "did everything possible to resolve the conflict with the commission," Brief for Respondent 42, and that the Commission's denial of approval for respondent's plat was equivalent to a denial of variances. The record does not support respondent's claim, however. There is no evidence that respondent applied to the Board of Zoning Appeals for variances from the zoning ordinance.

Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although "[the] question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty," *Penn Central Transp. Co. v. New York City*, 438 U.S., at 123, this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. *Id.*, at 124. See also *Ruckelshaus v. Monsanto Co.*, 467 U.S., at 1005; *PruneYard Shopping Center v. Robins*, 447 U.S., at 83; *Kaiser Aetna v. United States*, 444 U.S., at 175. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

The Commission's refusal to approve the preliminary plat does not determine that issue; it prevents respondent from developing its subdivision without obtaining the necessary variances, but leaves open the possibility that respondent may develop the subdivision according to its plat after obtaining the variances. In short, the Commission's denial of approval does not

conclusively determine whether respondent will be denied all reasonable beneficial use of its property, and therefore is not a final, reviewable decision.

B

A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so. The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. If the government has provided an adequate process for obtaining compensation, and if resort to that process "[yields] just compensation," then the property owner "has no claim against the Government" for a taking. Thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U. S. C. §1491. *Monsanto*, 467 U.S., at 1016-1020. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

Under Tennessee law, a property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking of property under certain circumstances. Tenn. Code Ann. §29-16-123 (1980). Respondent has not shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature.

As we have noted, resolution of that [taking] question depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property. No such decision had been made at the time respondent filed its §1983 action, because respondent failed to apply for variances from the regulations.

V

In sum, respondent's claim is premature, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

SUITUM v. TAHOE REGIONAL PLANNING AGENCY
520 U.S. 725 (1997)

JUSTICE SOUTER delivered the opinion of the Court.

Petitioner Bernadine Suitum owns land near the Nevada shore of Lake Tahoe. Respondent Tahoe Regional Planning Agency, which regulates land use in the region, determined that Suitum's property is ineligible for development but entitled to receive certain allegedly valuable "Transferable Development Rights" (TDRs). Suitum has brought an action for compensation under Rev. Stat. §1979, 42 U.S.C. §1983, claiming that the Agency's determinations amounted to a regulatory taking of her property. While the pleadings raise issues about the significance of the TDRs both to the claim that a taking has occurred and to the constitutional requirement of just compensation, we have no occasion to decide, and we do not decide, whether or not these TDRs may be considered in deciding the issue of whether there has been a taking in this case, as opposed to the issue of whether just compensation has been afforded for such a taking. The sole question here is whether the claim is ripe for adjudication, even though Suitum has not attempted to sell the development rights she has or is eligible to receive. We hold that it is.

I

In 1969, Congress approved the Tahoe Regional Planning Compact between the States of California and Nevada, creating respondent as an interstate agency to regulate development in the Lake Tahoe basin. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 394, 59 L. Ed. 2d 401, 99 S. Ct. 1171 (1979). After the 1969 compact had proven inadequate for protection of the lake and its environment, the States proposed and Congress approved an amendment in 1980, requiring the agency to adopt a plan barring any development exceeding such specific "environmental threshold carrying capacities" as the agency might find appropriate. Pub. L. 96-551, Arts. I(b), V(b), V(g), 94 Stat. 3234, 3239-3241.⁸⁷

In 1987, the agency adopted a new Regional Plan providing for an "Individual Parcel Evaluation System" (IPES) to rate the suitability of vacant residential parcels for building and other modification. Tahoe Regional Planning Agency Code of Ordinances ch. 37 (TRPA Code). Whereas any property must attain a minimum IPES score to qualify for construction, *id.*, §37.8.E; App. 145, an undeveloped parcel in certain areas carrying run-off into the watershed (known as "Stream Environment Zones" (SEZs)) receives an IPES score of zero, TRPA Code

⁸⁷ The 1980 Compact defines "environmental threshold carrying capacity" as "an environmental standard necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain public health and safety within the region. Such standards shall include but not be limited to standards for air quality, water quality, soil conservation, vegetation preservation and noise." Art. II(i), 94 Stat. 3235.

§37.4.A(3). With limited exceptions not relevant here, the agency permits no "additional land coverage or other permanent land disturbance" on such a parcel. Id., §20.4.

Although the agency's 1987 plan does not provide for the variances and exceptions of conventional land use schemes, it addresses the potential sharpness of its restrictions by granting property owners TDRs that may be sold to owners of parcels eligible for construction, id., §§20.3.C, 34.0 to 34.3. There are three kinds of residential TDRs. An owner needs both a "Residential Development Right" and a "Residential Allocation" to place a residential unit on a buildable parcel, id., §§21.6.C, 33.2.A; the latter permits construction to begin in a specific calendar year, but expires at year's end, id., §33.2.B(3)(b). An owner must also have "Land Coverage Rights" for each square foot of impermeable cover placed upon land. App. 145; see also TRPA Code ch. 20. All owners of vacant residential parcels that existed at the effective date of the 1987 plan (July 1, 1987), including SEZ parcels, automatically receive one Residential Development Right, id., §21.6.A; owners of SEZ property may obtain and transfer bonus points equivalent to three additional Residential Development Rights, id., §§35.2.C, 35.2.D. SEZ property owners also receive Land Coverage Rights authorizing coverage of an area equal to 1% of the surface area of their land. Id., §§20.3.A, 37.11. Finally, SEZ owners, like other property owners, may apply for a Residential Allocation, awarded by local jurisdictions in random drawings each year.⁸⁸ Id., §33.2.B; App. 98-99. All three kinds of TDRs may be transferred for the benefit of any eligible property in the Lake Tahoe Region, subject to approval by the agency based on the eligibility of the receiving parcel for development. TRPA Code §§20.3.C.

In 1972, Suitum and her late husband bought an undeveloped lot in Washoe County, Nevada, within the agency's jurisdiction, and 17 years later, after adoption of the 1987 Regional Plan, Suitum obtained a Residential Allocation through Washoe County's annual drawing. When she then applied to the agency for permission to construct a house on her lot, the agency determined that her property was located within a SEZ, assigned it an IPES score of zero, and denied permission to build. Suitum appealed the denial to the agency's governing board, which itself denied relief.

After the agency turned down the request for a building permit, Suitum made no effort to transfer any of the TDRs that were hers under the 1987 plan, and there is no dispute that she still has the one Residential Development Right that owners of undeveloped lots automatically received, plus the Land Coverage Rights for 183 square feet that she got as the owner of 18,300 square feet of SEZ land. It is also common ground that Suitum has the right to receive three "bonus" Residential Development Rights. Although Suitum has questioned the certainty that she

⁸⁸ Counsel for the agency at oral argument represented that "at this point" there are "fewer applicants than allocations" in Washoe County, where petitioner's land is located, and there is thus a "100 percent chance of winning the [drawing]." See Tr. of Oral Arg. 39-40.

would obtain a new Residential Allocation if she sought one, the agency has represented to this Court that she undoubtedly would, see n.2, supra.

Instead, Suitum brought this 42 U.S.C. §1983 action alleging that in denying her the right to construct a house on her lot, the agency's restrictions deprived her of "all reasonable and economically viable use" of her property, and so amounted to a taking of her property without just compensation in violation of the Fifth and Fourteenth Amendments. The agency responded by objecting, among other things, that Suitum's taking claim was not ripe due to her "failure to obtain a final decision by TRPA as to the amount of development . . . that may be allowed by" the agency. On cross-motions for summary judgment, the District Court ordered supplemental briefing on the nature of Suitum's TDRs, including "what [TDRs] can be transferred in [Suitum's] case and the procedures, prerequisites and value of such transfer as applicable in this case." The agency introduced an affidavit from a real estate appraiser, whose opinion was that the Residential Development Right that Suitum already has, and the three more to which she is entitled, have a market value between \$1,500 and \$2,500 each; that her Land Coverage Rights can be sold for \$6 to \$12 per square foot (\$1,098 - \$2,196 total); and that her lot devoid of all TDRs would sell for \$7,125 to \$16,750. The appraiser also said that if Suitum were to obtain a Residential Allocation and sell it with a Development Right, together they would bring between \$30,000 and \$35,000. As if in spite of the figures supplied by its own affidavit, however, the agency maintained that the "actual benefits of the [TDR] program for [Suitum] . . . can only be known if she pursues an appropriate [transfer] application," with the result that Suitum's claim was not ripe for adjudication. *Id.*, at 91. For her part, Suitum insisted that trying to transfer her TDRs would be an "idle and futile act" because the TDR program is a "sham," and she supplied the affidavit of one of the agency's former employees whose view was that "there is little to no value to [Suitum's TDRs] at the present time as . . . either [there is] no market for them or the procedure for transferring one particular right would restrict the opportunity to transfer a remaining right," *Id.*, at 135.

The District Court decided that Suitum's claim was not ripe for consideration because "as things now stand, there is no final decision as to how [Suitum] will be allowed to use her property." *Suitum v. Tahoe Regional Planning Agency*, No. CV-N-91-040-ECR (D. Nev., Mar. 30, 1994) (App. to Pet. for Cert. C-3)). Although the Court found that "there is significant value in the transfer of [Suitum's TDRs], . . . until [specific] values attributable to the transfer program are known, the court cannot realistically assess whether and to what extent [the agency's] regulations have frustrated [Suitum's] reasonable expectations." *Id.*, at C-3 to C-4.

The Court of Appeals for the Ninth Circuit affirmed this ripeness ruling for the like reason that "without an application for the transfer of development rights" there would be no way to "know the regulations' full economic impact or the degree of their interference with [Suitum's] reasonable investment-backed expectations[.]" and without action on a transfer application there would be no "final decision from [the agency] regarding the application of the regulations to the

property at issue." 80 F.3d 359, 362-363 (1996). We granted certiorari to consider the ripeness of Suitum's taking claim, 519 U.S. , 117 S. Ct. 293, 136 L. Ed. 2d 213 (1996), and now reverse.

II

The only issue presented is whether Suitum's claim of a regulatory taking of her land in violation of the Fifth and Fourteenth Amendments is ready for judicial review under prudential ripeness principles.⁸⁹ There are two independent prudential hurdles to a regulatory taking claim brought against a state entity in federal court. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985), explained that a plaintiff must demonstrate that she has both received a "final decision regarding the application of the [challenged] regulations to the property at issue" from "the government entity charged with implementing the regulations," *id.*, at 186, and sought "compensation through the procedures the State has provided for doing so," *id.*, at 194. The first requirement follows from the principle that only a regulation that "goes too far," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (1922), results in a taking under the Fifth Amendment, see, e.g., *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348, 91 L. Ed. 2d 285, 106 S. Ct. 2561 (1986) ("[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes"); see also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-1019, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992) (regulation "goes too far" and results in a taking "at least in the extraordinary circumstance when no productive or economically beneficial use of land is permitted"). The second hurdle stems from the Fifth Amendment's proviso that only takings without "just compensation" infringe that Amendment; "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation," *Williamson County*, *supra*, at 195. Because only the "final decision" prong of *Williamson* was addressed below and briefed before this Court, we confine our discussion here to that issue.⁹⁰

⁸⁹ "We have noted that ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57, n.18, 125 L. Ed. 2d 38, 113 S. Ct. 2485 (1993). The agency does not question that Suitum properly presents a genuine "case or controversy" sufficient to satisfy Article III, but maintains only that Suitum's action fails to satisfy our prudential ripeness requirements.

⁹⁰ We therefore do not decide whether *Williamson County's* "state procedures" requirement has been satisfied in this case. Ordinarily, a plaintiff must seek compensation through state inverse condemnation proceedings before initiating a taking suit in federal court, unless the State does not provide adequate remedies for obtaining compensation. See *Williamson County*, 473 U.S. at 194-196. Suitum's counsel stated at oral argument that "the position of the Tahoe Regional Planning Agency is that they do not . . . have provisions for paying just compensation," *Tr. of Oral Arg.* 4, thus suggesting that the agency is not subject to inverse condemnation proceedings, and the agency's counsel did not disagree. Suitum's position therefore appears to be that the sole remedy against the agency for a taking without just compensation is a §1983 suit for damages, such as she has

In holding Suitum's claim to be unripe, the Ninth Circuit agreed with the agency's argument that Suitum had failed to obtain a final and authoritative decision from the agency sufficient to satisfy the first prong of Williamson County, *supra*. Although it is unclear whether the agency still urges precisely that position before this Court, see, e.g., Brief for Respondent 21 (conceding that "we know the full extent of the regulation's impact in restricting petitioner's development of her own land"), we think it important to emphasize that the rationale adopted in the decision under review is unsupported by our precedents.

Agin v. City of Tiburon, 447 U.S. 255, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980), is the first case in which this Court employed a notion of ripeness in declining to reach the merits of an as-applied regulatory taking claim. In *Agin*, the landowners who challenged zoning ordinances restricting the number of houses they could build on their property sued without seeking approval for any particular development on their land. We held that the only issue justiciable at that point was whether mere enactment of the statute amounted to a taking.⁹¹ *Id.*, at 260. Without employing the term "ripeness," the Court explained that because the owners "had not submitted a plan for development of their property as the [challenged] ordinances permitted, there [was] as yet no concrete controversy regarding the application of the specific zoning provisions." *Ibid.*

The following Term, *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981), toughened our nascent ripeness requirement. There, coal producers and landowners challenged the enactment of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1201 et seq., as a taking of their property. As in *Agin*, we concluded that an as-applied challenge was unripe, reasoning that "there is no indication in the record that appellees had availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting . . . a variance from the [applicable provisions of the Act]," 452 U.S. at 297. *Hodel* thus held that where the regulatory regime offers the possibility of a variance from its facial requirements, a landowner must go beyond submitting a plan for development and actually seek such a variance to ripen his claim.

Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985), confirmed *Hodel*'s holding. In *Williamson*

brought here. Cf. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1341-1342 (CA9 1990). We leave this matter to the Court of Appeals on remand.

⁹¹ Such "facial" challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed, but face an "uphill battle," *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987), since it is difficult to demonstrate that "mere enactment" of a piece of legislation "deprived [the owner] of economically viable use of [his] property." *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 297, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981). *Suitum* does not purport to challenge the agency's regulations on their face.

County, a developer's plan to build a residential complex was rejected by the local Planning Commission as inconsistent with zoning ordinances and subdivision regulations in eight different respects. This Court acknowledged that "respondent had submitted a plan for developing its property, and thus had passed beyond the Agins threshold," *id.*, at 187, but nonetheless held the taking challenge unripe, reasoning that "among the factors of particular significance in the [taking] inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations," *id.*, at 191, "factors [that] simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question," *ibid.* Thus, a developer must at least "resort to the procedure for obtaining variances . . . [and obtain] a conclusive determination by the Commission whether it would allow" the proposed development, *id.*, at 193, in order to ripen its taking claim.

Leaving aside the question of how definitive a local zoning decision must be to satisfy Williamson County's demand for finality, two points about the requirement are clear: it applies to decisions about how a taking plaintiff's own land may be used, and it responds to the high degree of discretion characteristically possessed by land use boards in softening the strictures of the general regulations they administer. When such flexibility or discretion may be brought to bear on the permissible use of property as singular as a parcel of land, a sound judgment about what use will be allowed simply cannot be made by asking whether a parcel's characteristics or a proposal's details facially conform to the terms of the general use regulations.

The demand for finality is satisfied by Suitum's claim, however, there being no question here about how the "regulations at issue [apply] to the particular land in question." Williamson County, *supra*, at 191. It is undisputed that the agency "has finally determined that petitioner's land lies entirely within an SEZ," Brief for Respondent 21, and that it may therefore permit "no additional land coverage or other permanent land disturbance" on the parcel, TRPA Code §20.4. Because the agency has no discretion to exercise over Suitum's right to use her land, no occasion exists for applying Williamson County's requirement that a landowner take steps to obtain a final decision about the use that will be permitted on a particular parcel. The parties, of course, contest the relevance of the TDRs to the issue of whether a taking has occurred, but resolution of that legal issue will require no further agency action of the sort demanded by Williamson County.

Suitum does not challenge the validity of the agency's regulations; her litigating position assumes that the agency may validly bar her land development just as all agree it has actually done, and her only challenge to the TDRs raises a question about their value, not about the lawfulness of issuing them. Suitum seeks not to be free of the regulations but to be paid for their consequences, and even if for some odd reason she had decided to bring things to a head by building without a permit, a §1983 action for money would not be a defense to an equity proceeding to enjoin development.

* * *

Because we find that Suitum has received a "final decision" consistent with Williamson County's ripeness requirement, we vacate the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR and JUSTICE THOMAS join, concurring in part and concurring in the judgment.

I concur in the judgment of the Court, and join its opinion except for those sections [that] consider whether the Tahoe Regional Planning Agency (TRPA) [has] reached a final decision regarding Suitum's ability to sell her Transferable Development Rights (TDRs), and whether the value of Suitum's TDRs [are] known. That discussion presumes that the answers to those questions may be relevant to the issue presented at this preliminary stage of the present case: whether Suitum's takings claim is ripe for judicial review under the "final decision" requirement. In my view they are not relevant to that issue, and the Court's discussion is beside the point.

To describe the nature of the "final decision" inquiry, the Court's opinion quotes only the vague language of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985), that there must be a "final decision regarding the application of the [challenged] regulations to the property at issue," and that "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes". Unmentioned in the opinion are other, more specific, statements in those very cases (and elsewhere) which display quite clearly that the quoted generalizations (and the "final decision" inquiry) have nothing to do with TDRs. The Court fails even to mention, in its otherwise encyclopedic description of the development of the "final decision" requirement, the most recent of our opinions addressing the subject, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), in which we relied exclusively on these more precise formulations and did not mention the vague language quoted by the Court today, see *id.*, at 1011.

The focus of the "final decision" inquiry is on ascertaining the extent of the governmental restriction on land use, not what the government has given the landowner in exchange for that restriction. When our cases say, as the Court explains that without a "final decision" it is impossible to know whether the regulation "goes too far," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (1922), they mean "goes too far in restricting the profitable use of the land," not "goes not far enough in providing compensation for restricting the profitable use of the land." The latter pertains not to whether there has been a taking, but to the subsequent question of whether, if so, there has been just compensation.

TDRs, of course, have nothing to do with the use or development of the land to which they are (by regulatory decree) "attached." The right to use and develop one's own land is quite distinct from the right to confer upon someone else an increased power to use and develop his

land. The latter is valuable, to be sure, but it is a new right conferred upon the landowner in exchange for the taking, rather than a reduction of the taking. In essence, the TDR permits the landowner whose right to use and develop his property has been restricted or extinguished to extract money from others. Just as a cash payment from the government would not relate to whether the regulation "goes too far" (i.e., restricts use of the land so severely as to constitute a taking), but rather to whether there has been adequate compensation for the taking; and just as a chit or coupon from the government, redeemable by and hence marketable to third parties, would relate not to the question of taking but to the question of compensation; so also the marketable TDR, a peculiar type of chit which enables a third party not to get cash from the government but to use his land in ways the government would otherwise not permit, relates not to taking but to compensation. It has no bearing upon whether there has been a "final decision" concerning the extent to which the plaintiff's land use has been constrained.

Putting TDRs on the taking rather than the just-compensation side of the equation (as the Ninth Circuit did below) is a clever, albeit transparent, device that seeks to take advantage of a peculiarity of our takings-clause jurisprudence: once there is a taking, the Constitution requires just (i.e., full) compensation, see, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978). If money that the government-regulator gives to the landowner can be counted on the question of whether there is a taking (causing the courts to say that the land retains substantial value, and has thus not been taken), rather than on the question of whether the compensation for the taking is adequate, the government can get away with paying much less. That is all that is going on here. It would be too obvious, of course, for the government simply to say "although your land is regulated, our land-use scheme entitles you to a government payment of \$1,000." That is patently compensation and not retention of land-value. It would be a little better to say "under our land-use scheme, TDRs are attached to every parcel, and if the parcel is regulated its TDR can be cashed in with the government for \$1,000." But that still looks too much like compensation. The cleverness of the scheme before us here is that it causes the payment to come, not from the government but from third parties-whom the government reimburses for their outlay by granting them (as the TDRs promise) a variance from otherwise applicable land-use restrictions.

Respondent maintains that *Penn Central* supports the conclusion that TDRs are relevant to the question whether there has been a taking. In *Penn Central* we remarked that because the rights to develop the airspace above Grand Central Terminal had been made transferable to other parcels in the vicinity (some of which the owners of the terminal themselves owned), it was "not literally accurate to say that [the owners] have been denied all use of [their] pre-existing air rights"; and that even if the TDRs were inadequate to constitute "just compensation" if a taking had occurred, they could nonetheless "be taken into account in considering the impact of regulation." *Penn Central*, supra, at 137 (emphasis in original). This analysis can be distinguished from the case before us on the ground that it was applied to landowners who owned at least eight nearby parcels, some immediately adjacent to the Terminal, that could be benefited by the TDRs.

See 438 U.S. at 115. The relevant land, it could be said, was the aggregation of the owners' parcels subject to the regulation (or at least the contiguous parcels); and the use of that land, as a whole, had not been diminished. It is for that reason that the TDRs affected "the impact of the regulation." This analysis is supported by the concluding clause of the opinion, which says that the restrictions "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." *Id.*, at 138. If Penn Central's one-paragraph expedition into the realm of TDRs were not distinguishable in this fashion, it would deserve to be overruled. Considering in the takings calculus the market value of TDRs is contrary to the import of a whole series of cases, before and since, which make clear that the relevant issue is the extent to which use or development of the land has been restricted. Indeed, it is contrary to the whole principle that land-use regulation, if severe enough, can constitute a taking which must be fully compensated.

I do not mean to suggest that there is anything undesirable or devious about TDRs themselves. To the contrary, TDRs can serve a commendable purpose in mitigating the economic loss suffered by an individual whose property use is restricted, and property value diminished, but not so substantially as to produce a compensable taking. They may also form a proper part, or indeed the entirety, of the full compensation accorded a landowner when his property is taken. Accord, *Penn Central*, *supra*, at 152 (Rehnquist, J., dissenting) (noting that Penn Central had been "offered substantial amounts" for its TDRs and suggesting the appropriateness of a remand for a determination of whether the TDRs are valuable enough to constitute full compensation). I suggest only that the relevance of TDRs is limited to the compensation side of the takings analysis, and that taking them into account in determining whether a taking has occurred will render much of our regulatory takings jurisprudence a nullity, see Comment, "Environmental Interest Groups and Land Regulation: Avoiding the Clutches of *Lucas v. South Carolina Coastal Council*," 48 U. Miami L. Rev. 1179, 1212 (1994).

In sum, I would resolve the question of whether there has been a "final decision" in this case by looking only to the fixing of petitioner's rights to use and develop her land. There has never been any dispute over whether that has occurred. Before bringing the present suit, petitioner applied for permission to build a house on her lot, and was denied permission to do so on the basis of TRPA's determination that her property is located within a "Stream Environment Zone"--a designation that carries the consequence that "no additional land coverage or other permanent land disturbance shall be permitted," TRPA Code §20.4. Respondent in fact concedes that "we know the full extent of the regulation's impact in restricting petitioner's development of her own land," Brief for Respondent 21. That is all we need to know to conclude that the final decision requirement has been met.

SAN REMO HOTEL v. SAN FRANCISCO, CALIFORNIA
545 U.S. 323

JUDGES: STEVENS, J., delivered the opinion of the Court, in which SCALIA, SOUTER, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in the judgment, in which O'CONNOR, KENNEDY, and THOMAS, JJ., joined.

JUSTICE STEVENS delivered the opinion of the Court.

This case presents the question whether federal courts may craft an exception to the full faith and credit statute, 28 U.S.C. §1738, for claims brought under the Takings Clause of the Fifth Amendment.

Petitioners, who own and operate a hotel in San Francisco, California (hereinafter City), initiated this litigation in response to the application of a city ordinance that required them to pay a \$567,000 "conversion fee" in 1996. After the California courts rejected petitioners' various state-law takings claims, they advanced in the Federal District Court a series of federal takings claims that depended on issues identical to those that had previously been resolved in the state-court action. In order to avoid the bar of issue preclusion, petitioners asked the District Court to exempt from §1738's reach claims brought under the Takings Clause of the Fifth Amendment.

Petitioners' argument is predicated on *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985), which held that takings claims are not ripe until a State fails "to provide adequate compensation for the taking." *Id.*, at 195, 87 L. Ed. 2d 126, 105 S. Ct. 3108. Unless courts disregard §1738 in takings cases, petitioners argue, plaintiffs will be forced to litigate their claims in state court without any realistic possibility of ever obtaining review in a federal forum.

I

The San Remo Hotel is a three-story, 62-unit hotel in the Fisherman's Wharf neighborhood in San Francisco. In 1979, San Francisco's Board of Supervisors responded to "a severe shortage" of affordable rental housing for elderly, disabled, and low-income persons by instituting a moratorium on the conversion of residential hotel units into tourist units. Two years later, the City enacted the first version of the Hotel Conversion Ordinance to regulate all future conversions. San Francisco Ordinance No. 330-81, codified in §41.1 et seq.

The City zoned the San Remo Hotel as "residential hotel" -- in other words, a hotel that consisted entirely of residential units. And that zoning determination meant that petitioners were required to apply for a conditional use permit to do business officially as a "tourist hotel," 27 Cal. 4th 643, 654, 117 Cal. Rptr. 2d 269, 41 P. 3d 87, 94 (2002).

In 1993, the City Planning Commission granted petitioners' requested conversion and conditional use permit, but only after imposing several conditions, one of which included the

requirement that petitioners pay a \$567,000 "in lieu" fee. Petitioners appealed, arguing that the HCO requirement was unconstitutional.

In March 1993, Petitioners filed for a writ of administrative mandamus in California Superior Court. That action lay dormant for several years, and the parties ultimately agreed to stay that action after petitioners filed for relief in Federal District Court. Petitioners filed in federal court for the first time on May 4, 1993. Petitioners' first amended complaint alleged four counts of takings (facial and as-applied) violations under the Fifth and Fourteenth Amendments to the United States Constitution, one count seeking damages under Rev. Stat. §1979, 42 U.S.C. §1983, for those violations. The District Court granted respondents summary judgment. As relevant to this action, the court found that the as-applied takings claim was unripe under *Williamson County*, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108.

On appeal to the Court of Appeals for the Ninth Circuit the court, however, affirmed the District Court's determination that petitioners' as-applied takings claim -- the claim that the application of the HCO to the San Remo Hotel violated the Takings Clause -- was unripe. Because petitioners had failed to pursue an inverse condemnation action in state court, they had not yet been denied just compensation as contemplated by *Williamson County*. 145 F.3d at 1105.

At the conclusion of the Ninth Circuit's opinion, the court appended a footnote stating that petitioners would be free to raise their federal takings claims in the California courts. [There] the California Supreme Court in the portion of its opinion discussing the Takings Clause "analyze[d] [the petitioners'] takings claim under the relevant decisions of both this court and the United States Supreme Court" [and denied relief].

Petitioners did not seek a writ of certiorari from the California Supreme Court's decision in this Court. Instead, they returned to Federal District Court by filing an amended complaint based on the complaint that they had filed [originally]. The District Court reasoned that 28 U.S.C. §1738 requires federal courts to give preclusive effect to any state-court judgment that would have preclusive effect under the laws of the State in which the judgment was rendered. Because California courts had interpreted the relevant substantive state takings law coextensively with federal law, petitioners' federal claims constituted the same claims that had already been resolved in state court.

The Court of Appeals affirmed[finding] itself bound to apply general issue preclusion doctrine. Given that general issue preclusion principles governed, the only remaining question was whether the District Court properly applied that doctrine; the court concluded that it did. The court expressly rejected petitioners' contention "that California takings law is not coextensive with federal takings law," and held that the state court's application of the "reasonable relationship" test was an "'equivalent determination' of such claims under the federal takings clause." We granted certiorari and now affirm.

II

Article IV, §1, of the United States Constitution demands that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." In 1790, Congress responded to the Constitution's invitation by enacting the first version of the full faith and credit statute. See Act of May 26, 1790, ch. 11, 1 Stat. 122. The modern version of the statute, 28 U.S.C. §1738, provides that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State" This statute has long been understood to encompass the doctrines of *res judicata*, or "claim preclusion," and collateral estoppel, or "issue preclusion." See *Allen v. McCurry*, 449 U.S. 90, 94-96, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980).

The general rule implemented by the full faith and credit statute -- that parties should not be permitted to relitigate issues that have been resolved by courts of competent jurisdiction -- predates the Republic. It "has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it, an end could never be put to litigation." *Hopkins v. Lee*, 19 U.S. 109, 6 Wheat. 109, 114, 5 L. Ed. 218 (1821).

As this case is presented to us, under our limited grant of certiorari, we have only one narrow question to decide: whether we should create an exception to the full faith and credit statute, and the ancient rule on which it is based, in order to provide a federal forum for litigants who seek to advance federal takings claims that are not ripe until the entry of a final state judgment denying just compensation. See *Williamson County*, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108.

The essence of petitioners' argument is as follows: because no claim that a state agency has violated the federal Takings Clause can be heard in federal court until the property owner has "been denied just compensation" through an available state compensation procedure, *id.*, at 195, 87 L. Ed. 2d 126, 105 S. Ct. 3108, "federal courts [should be] required to disregard the decision of the state court" in order to ensure that federal takings claims can be "considered on the merits in . . . federal court." Therefore, the argument goes, whenever plaintiffs reserve their claims under *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461 (1964), federal courts should review the reserved federal claims *de novo*, regardless of what issues the state court may have decided or how it may have decided them.

Federal courts are not free to disregard 28 U.S.C. §738 simply to guarantee that all takings plaintiffs can have their day in federal court.

Petitioners' argue that federal courts simply should not apply ordinary preclusion rules to state-court judgments when a case is forced into state court by the ripeness rule of *Williamson County*.

We are presently concerned only with issues actually decided by the state court that are dispositive of federal claims raised under §1983. And, it is clear that petitioners would have preferred not to have been forced to have their federal claims resolved by issues decided in state court. Unfortunately for petitioners, it is entirely unclear why their preference for a federal forum should matter for constitutional or statutory purposes.

The second reason we find petitioners' argument unpersuasive is that it assumes that courts may simply create exceptions to 28 U.S.C. §1738 wherever courts deem them appropriate. Congress has not expressed any intent to exempt from the full faith and credit statute federal takings claims. Consequently, we apply our normal assumption that the weighty interests in finality and comity trump the interest in giving losing litigants access to an additional appellate tribunal.

It is hardly a radical notion to recognize that, as a practical matter, a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts. It was settled well before *Williamson County* that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." 473 U.S., at 186, 87 L. Ed. 2d 126, 105 S. Ct. 3108. As a consequence, there is scant precedent for the litigation in federal district court of claims that a state agency has taken property in violation of the Fifth Amendment's takings clause. To the contrary, most of the cases in our takings jurisprudence, including nearly all of the cases on which petitioners rely, came to us on writs of certiorari from state courts of last resort. At base, petitioners' claim amounts to little more than the concern that it is unfair to give preclusive effect to state-court proceedings that are not chosen, but are instead required in order to ripen federal takings claims. Whatever the merits of that concern may be, we are not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum. The Court of Appeals was correct to decline petitioners' invitation to ignore the requirements of 28 U.S.C. §1738. The judgment of the Court of Appeals is therefore affirmed.

It is so ordered

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE THOMAS join, concurring in the judgment.

It is not clear to me that *Williamson County* was correct in demanding that, once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court. It is not obvious that either constitutional or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim.

Williamson County's state-litigation rule has created some real anomalies, justifying our revisiting the issue. For example, our holding today ensures that litigants who go to state court to

seek compensation will likely be unable later to assert their federal takings claims in federal court. As the Court recognizes, Williamson County all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee. The basic principle that state courts are competent to enforce federal rights and to adjudicate federal takings claims is sound, but that principle does not explain why federal takings claims in particular should be singled out to be confined to state court, in the absence of any asserted justification or congressional directive.

I joined the opinion of the Court in Williamson County. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic. Here, no court below has addressed the correctness of Williamson County, neither party has asked us to reconsider it, and resolving the issue could not benefit petitioners. In an appropriate case, I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts.

EASTERN ENTERPRISES v. APFEL
524 U.S. 498 (1998)

[PART I]

[Summary: The 1992 “Coal Act” established benefits for retired miners. Eastern Enterprises which had left the industry 27 years before was required to provide pensions for over 1000 miners who had worked for the company before 1966. Ed.]

JUSTICE O'CONNOR announced the judgment of the Court.

We begin with a threshold jurisdictional question, raised in the federal respondents' answer to Eastern's complaint: Whether petitioner's takings claim was properly filed in Federal District Court rather than the United States Court of Federal Claims. Although the Commissioner no longer challenges the Court's adjudication of this action, it is appropriate that we clarify the basis of our jurisdiction over petitioner's claims.

Under the Tucker Act, 28 U.S.C. §1491(a)(1), the Court of Federal Claims has exclusive jurisdiction to render judgment upon any claim against the United States for money damages exceeding \$10,000 that is "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." Accordingly, a claim for just compensation under the Takings Clause must be brought to the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute. See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-1019, 81 L. Ed. 2d 815, 104 S. Ct. 2862 (1984).

In this case, however, Eastern does not seek compensation from the Government. Instead, Eastern requests a declaratory judgment that the Coal Act violates the Constitution and a corresponding injunction against the Commissioner's enforcement of the Act as to Eastern. Such equitable relief is arguably not within the jurisdiction of the Court of Federal Claims under the Tucker Act. See *United States v. Mitchell*, 463 U.S. 206, 216, 77 L. Ed. 2d 580, 103 S. Ct. 2961 (1983) (explaining that, in order for a claim to be "cognizable under the Tucker Act," it "must be one for money damages against the United States").

Some Courts of Appeals have accepted the view that the Tucker Act does not apply to suits seeking only equitable relief, see *In re Chateaugay Corp.*, 53 F.3d 478, 493 (CA2), cert. denied sub nom. *LTV Steel Co. v. Shalala*, 516 U.S. 913, 133 L. Ed. 2d 204, 116 S. Ct. 298 (1995); *Southeast Kansas Community Action Program, Inc. v. Secretary of Agriculture*, 967 F.2d 1452, 1455-1456

(CA10 1992), while others have concluded that a claim for equitable relief under the Takings Clause is hypothetical, and therefore not within the district courts' jurisdiction, until compensation has been sought and refused in the Court of Federal Claims.

On the one hand, this Court's precedent can be read to support the latter conclusion that regardless of the nature of relief sought, the availability of a Tucker Act remedy renders premature any takings claim in federal district court. See *Preseault v. ICC*, 494 U.S. 1, 11, 108 L. Ed. 2d 1, 110 S. Ct. 914 (1990); see also *Monsanto*, *supra*, at 1016. On the other hand, in a case such as this one, it cannot be said that monetary relief against the Government is an available remedy. The payments mandated by the Coal Act, although calculated by a Government agency, are paid to the privately operated Combined Fund. Congress could not have contemplated that the Treasury would compensate coal operators for their liability under the Act, for "every dollar paid pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation." *In re Chateaugay Corp.*, *supra*, at 493. Accordingly, the "presumption of Tucker Act availability must be reversed where the challenged statute, rather than burdening real or physical property, requires a direct transfer of funds" mandated by the Government. *Ibid.* In that situation, a claim for compensation "would entail an utterly pointless set of activities." *Student Loan Marketing Assn. v. Riley*, 322 U.S. App. D.C. 354, 104 F.3d 397, 401 (CADDC), cert. denied, 522 U.S. 913, 139 L. Ed. 2d 227, 118 S. Ct. 295 (1997). Instead, as we explained in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 71, n. 15, 57 L. Ed. 2d 595, 98 S. Ct. 2620 (1978), the Declaratory Judgment Act "allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained."

Moreover, in situations analogous to this case, we have assumed the lack of a compensatory remedy and have granted equitable relief for Takings Clause violations without discussing the applicability of the Tucker Act. See, e.g., *Babbitt v. Youpee*, 519 U.S. 234, 243-245, 136 L. Ed. 2d 696, 117 S. Ct. 727 (1997); *Hodel v. Irving*, 481 U.S. 704, 716-718, 95 L. Ed. 2d 668, 107 S. Ct. 2076 (1987). Without addressing the basis of this Court's jurisdiction, we have also upheld similar statutory schemes against Takings Clause challenges. See *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 641-647, 124 L. Ed. 2d 539, 113 S. Ct. 2264 (1993); *Connolly*, 475 U.S. at 221-228. "While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed sub silentio, neither should we disregard the implications of an exercise of judicial authority assumed to be proper" in previous cases. *Brown Shoe Co. v. United States*, 370 U.S. 294, 307, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962) (citations omitted). Based on the nature of the taking alleged in this case, we conclude that the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the circumstances, and that it is within the district courts' power to award such equitable relief. [remainder of the opinion omitted].

PRESLEY v. CITY OF CHARLOTTESVILLE
464 F.3d 480 (2006)

MOTZ, Circuit Judge:

Shirley Presley, a long-time resident of Charlottesville, Virginia, brought this 42 U.S.C. §1983 (2000) action against the City of Charlottesville and the Rivanna Trails Foundation ("RTF"), a nonprofit private corporation (collectively, the Defendants). She alleges that, without her consent, the Defendants conspired to publish a map that showed a public trail crossing her yard. Presley further alleges that, even after the Defendants realized their error, they did not correct it but rather criminally prosecuted her when she herself took measures to prevent trespasses on her property. Presley asserts that the Defendants' actions violated her Fourth Amendment rights. The district court granted the Defendants' motions to dismiss Presley's complaint for failure to state a claim upon which relief could be granted. For the reasons that follow, we reverse and remand for further proceedings.

Presley's home and yard encompass less than an acre of land along the Rivanna River. In 1998, without having obtained her consent, the RTF began distributing a map that displayed a public trail -- known as the Rivanna trail -- crossing a portion of Presley's property. The City publicized the RTF's map on the City's official website. Relying on the Rivanna trail map, members of the public began traveling across Presley's yard, leaving behind trash, damaging the vegetation, and sometimes even setting up overnight camp sites. Initially, Presley did not realize the extent of the intrusion because she was caring for her ailing husband in a nursing home. After her husband's death in 2001, however, Presley became aware of the extent of the trail's use and began complaining to the RTF and the City about the trespasses.

Although the Defendants acknowledged their error, they assertedly neither changed the map nor stopped its distribution. Rather, several RTF officials and members of the Charlottesville city council met with Presley and asked her to give the Defendants an easement across her property in exchange for favorable tax treatment and other official favors (but not compensation). Presley refused.

The intrusions by trespassers persisted and became more severe. Presley called the City police several times to eject the trespassers, but, although the police responded regularly, they could not stem the tide. Presley then posted over one hundred "no trespassing" signs on her property, all of which were defaced and destroyed. Finally, Presley installed razor wire along the perimeter of her property. City officials responded by revising a local ordinance to prohibit Presley's protective measures and then bringing a criminal prosecution against her for violating that ordinance. The prosecution was later dismissed.

When Presley filed this action in February 2005, the City and the RTF still had not amended the trail map. Presley alleges that the Defendants have engaged in a conspiracy to violate her constitutional rights. Specifically, she asserts that the Defendants' actions constitute

an unreasonable Fourth Amendment seizure. Pursuant to Federal Rule of Civil Procedure 12(b)(6), the Defendants moved to dismiss the action for failure to state a claim. The district court granted their motions, and Presley filed a timely appeal.

We consider whether Presley has stated a claim under the Fourth Amendment, which provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable . . . seizures, shall not be violated." U.S. Const. amend. IV. Presley alleges that an unreasonable seizure of her property occurred here when private individuals trespassed onto her land due to the active and knowing encouragement of the Defendants.

The Fourth Amendment's protections against unreasonable seizures clearly extend to real property.⁹² Nevertheless, the district court held that Presley had failed to allege a Fourth Amendment violation. The court offered two grounds for its holding; we find neither persuasive.

A

The district court held that Presley's Fourth Amendment seizure claim was foreclosed because it "merely amount[ed]" to a Fifth Amendment takings claim. But the Supreme Court has time and again considered multiple constitutional claims based on the same facts.

As the Court has explained, "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Soldal v. Cook County*, 506 U.S. 56, 70, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992). Indeed, the Court has squarely rejected the argument that, on the basis of a single set of facts, a plaintiff could only assert the violation of one constitutional provision, holding instead that the plaintiff could simultaneously bring a due process claim and a Fourth Amendment claim. See *James Daniel Good Real Property*, 510 U.S. at 52; *Soldal*, 506 U.S. at 70-71. Moreover, the Court has observed that it sees "no basis for doling out constitutional protections" one at a time; rather, a court should examine each constitutional claim in turn. *Soldal*, 506 U.S. at 70.

In just one circumstance has the Supreme Court held that a single set of facts may not simultaneously give rise to two constitutional violations: when one of the provisions assertedly violated contains only a "generalized notion" of constitutional rights -- such as substantive due process -- and the other provision is "an explicit textual source of constitutional protection" that specifically addresses the precise harm at issue. *Graham v. Connor*, 490 U.S. 386, 395, 109 S.

⁹² We recognize that the Fourth Amendment may not protect real property other than a house and its surrounding curtilage. See *Oliver v. United States*, 466 U.S. 170, 173, 176, 180, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984) (holding that "open fields" -- land "over a mile" from defendant's home and beyond its curtilage -- was not among "the places and things encompassed by [the Fourth Amendment's] protections"). To date, the district court has made no finding as to the extent of the curtilage surrounding Presley's home. The Defendants have not contended that the property allegedly seized -- a trail through Presley's less-than-one-acre yard -- extends beyond the curtilage, and the facts as alleged in Presley's complaint provide no basis for so concluding.

Ct. 1865, 104 L. Ed. 2d 443 (1989). This is not the case here -- both the Fourth Amendment Seizure Clause and the Fifth Amendment Takings Clause address specific, rather than general, harms, and the Court has never held that one specific constitutional clause gives way to another equally specific clause when their domains overlap.

More importantly, even when the same appropriation does constitute both a seizure and a taking, meaningful legal differences continue to separate a Fourth Amendment seizure claim from a Fifth Amendment takings claim. To prevail on a seizure claim, a plaintiff must prove that the government unreasonably seized property. *Soldal*, 506 U.S. at 71. By contrast, to make out a takings claim, a plaintiff must demonstrate that the government took property without just compensation. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). Because the legal elements of a seizure claim and a takings claim differ, there is no danger that one constitutional provision will subsume the other, even if a single set of facts provides the basis for a cause of action under both.

In sum, here, as in *James Daniel Good Real Property and Soldal*, "the seizure of property implicates two explicit textual sources of constitutional protection, the Fourth Amendment and the Fifth." *James Daniel Good Real Prop.*, 510 U.S. at 50 (internal quotation marks omitted); *Soldal*, 506 U.S. at 70. In such circumstances, the Supreme Court has directed that "the proper question is not which Amendment controls but whether either Amendment is violated." *James Daniel Good Real Prop.*, 510 U.S. at 50.

Like the lower court in *Soldal*, the dissent here worries that applying the Fourth Amendment to seizures of real property would lead to "unworkable" results. But the Supreme Court in *Soldal* expressly rejected this concern, explaining why it is appropriate to subject even seizures for a public purpose to constitutional scrutiny. *Soldal* pointed out that because "reasonableness" is still the "ultimate" Fourth Amendment standard, numerous seizures of the "type" in *Soldal*, including those pursuant to a court order, "will survive constitutional scrutiny," since a "showing of unreasonableness" in such circumstances will be a "laborious task indeed." *Soldal*, 506 U.S. at 71. Thus, the *Soldal* Court itself rejected the dissent's theory: a seizure for a public purpose may well be reasonable and so "survive constitutional scrutiny" under the Fourth Amendment, but an allegation that a seizure was for a public purpose does not somehow eliminate Fourth Amendment scrutiny.

Put simply, that *Presley* may also have a claim under the Fifth Amendment's Takings Clause does not bar her from bringing a Fourth Amendment seizure claim.

B

The district court alternatively held that no seizure had occurred here because *Presley* was not "completely deprived . . . of her possessory interests in her property." But a deprivation need not be this severe to constitute a seizure subject to constitutional protections. Rather, the

Fourth Amendment also governs temporary or partial seizures. See *United States v. Place*, 462 U.S. 696, 705, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983)

In fact, the Supreme Court has held that a seizure of property occurs whenever "there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984). Presley has alleged an "interference with" her "possessory interests" that is clearly "meaningful"; indeed, this interference has assertedly been disruptive, stressful, and invasive. Her complaint states that she has been deprived of the use of part of her property due to the regular presence of a veritable army of trespassers who freely and regularly traverse her yard, littering, making noise, damaging her land, and occasionally even camping overnight. This constant physical occupation certainly constitutes a "meaningful interference" with Presley's "possessory interests" in her property.

Of course, it is private individuals, not City officials, who have actually interfered with Presley's possessory interests here. Although private actions generally do not implicate the Fourth Amendment, when a private person acts "as an agent of the Government or with the participation or knowledge of any governmental official," then the private person's acts are attributed to the government. *Jacobsen*, 466 U.S. at 113 (internal quotation marks omitted). The government need not compel nor even involve itself directly in the private person's actions.

In this case "combine to convince us that [the Defendants] did more than adopt a passive attitude toward the underlying private conduct" and that therefore the acts of private persons are attributable to the Defendants. At some point, the Defendants knew that their map was erroneous. They also knew that the Rivanna trail map would encourage public use of the trail -- this was, after all, the map's purpose. Finally, Defendants also knew that the City's involvement would communicate to trail users that there were no legal barriers to their use of the entire trail, including the portion that cut through Presley's property.

Nevertheless, despite this knowledge, the Defendants assertedly did nothing to correct their error, and consequently, in reliance upon the erroneous map, private individuals trespassed onto Presley's yard. Moreover, when Presley attempted to protect her own property, the Defendants initiated a meritless criminal prosecution against her to force her to take down the razor wire. See *Soldal*, 506 U.S. at 60 n.6 (noting that Fourth Amendment is implicated when government officials prevent lawful resistance against seizures effected by private persons). These factors "are clear indices of the [Defendants'] encouragement, endorsement, and participation, and suffice to implicate the Fourth Amendment." *Skinner*, 489 U.S. at 615-16; see also *United States v. Walther*, 652 F.2d 788, 791 (9th Cir. 1981) (noting that a private search is attributed to the government if the government is "involved . . . indirectly as an encourager of the private citizen's actions").

C

In sum, we cannot agree with the district court that Presley "can prove no set of facts in support of [her] claim which would entitle [her] to relief." Although she ultimately may not be able to prevail, Presley has at least raised a Fourth Amendment seizure claim by alleging that private individuals, knowingly encouraged and aided by the Defendants, trespassed onto her property. Accordingly, we reverse the district court's dismissal of this claim.

For the foregoing reasons, we reverse the judgment of the district court dismissing her Fourth Amendment seizure and conspiracy claims and remand for further proceedings consistent with this opinion.

TRAXLER, Circuit Judge, dissenting:

Today's decision, in my view, departs from a long and well-established body of law under the Fifth Amendment and drastically changes important substantive and procedural aspects of federal inverse condemnation actions. As I explain below, permitting Presley to pursue her claim under the Fourth Amendment results in nothing less than the application of a new standard of liability, the creation of a new spectrum of damages, and the elimination of procedural prerequisites for pursuing an inverse condemnation claim in federal court.

According to Presley's complaint, the City "seized" a strip of her land for a public use -- to establish a section of a public hiking trail along the Rivanna River. She does not want her land used by the public, however, and sued to stop the City from representing to the public that her property is open for public use as part of the Rivanna trail system. Instead of raising a Fifth Amendment claim that the City is taking her property without just compensation, Presley asserts only that she suffered an unreasonable seizure of her property in violation of the Fourth Amendment. My belief is that Presley's allegations present a quintessential takings claim under the Fifth Amendment and that to allow her to pursue relief under the Fourth Amendment here would undercut well-established Fifth Amendment takings jurisprudence.

At first glance, the Fourth Amendment may appear to apply in this situation. There was a seizure of her property, and an easy argument can be made that the seizure was unreasonable. In my judgment, however, the fact that the City seized her real property for permanent public use puts this matter under the Takings Clause of the Fifth Amendment exclusively. The Supreme Court's Fifth Amendment case law establishes both procedural requirements and remedies tailored to circumstances involving landowners who are informally dispossessed of all or a portion of their real property by the government for an ongoing public use. As explained below, permitting Presley to invoke the Fourth Amendment here would allow her to make an end-run around this well-established body of law. And, just as significantly, I believe that application of Fourth Amendment reasonableness standards to Presley's claim would ultimately prove to be unworkable.

First, to say the City's actions may fall within the definition of a seizure does not necessarily mean Presley's claim arises under the Fourth Amendment. Indeed, a "seizure" as defined in Fourth Amendment cases occurs in every case where there is a taking by physical occupation as opposed to a regulatory taking. But the application of the Fourth Amendment to cases like this one would upset the well-established and clear procedure for raising constitutional challenges to this type of taking by the government, requiring the plaintiff first to seek in state court compensation for the taking and permitting the plaintiff to proceed to federal court only if just compensation is denied. See *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). Allowing a plaintiff to bring a Fourth Amendment claim any time a state government physically seizes real property for public use, as Presley contends we must, would severely undermine the process contemplated by the Supreme Court in *Williamson*.

Moreover, permitting plaintiffs like Presley to proceed under the Fourth Amendment would expose governments to a radically different measure of damages than would be available in a traditional inverse condemnation action where the plaintiff's damages are generally limited to the fair market value of the property taken. See *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10, 104 S. Ct. 2187, 81 L. Ed. 2d 1 (1984) ("Just compensation' . . . means in most cases the fair market value of the property on the date it is appropriated."). A plaintiff asserting a Fourth Amendment violation, however, would be entitled to recover the full measure of damages typically available in a §1983 action, including damages for the emotional distress caused by the government's unreasonable conduct, and even punitive damages in the proper case. Accordingly, when §1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts

I also believe that permitting Presley to pursue a Fourth Amendment claim under the facts of this case is inconsistent with existing Fourth Amendment jurisprudence. Most Fourth Amendment seizure cases involve relatively brief and completed seizures, such as traffic stops and arrests. Since the seizure at issue in this case is a continuing one, the cases rejecting the "continuing seizure" concept and placing a temporal restriction on Fourth Amendment claims would seem to foreclose Presley's claim that she may proceed under the Fourth Amendment.

Even assuming, however, that the continuing nature of the seizure was not an insuperable obstacle to Presley's Fourth Amendment claim, application of the general Fourth Amendment standard would simply be unworkable in cases like this one. Reasonableness is the overarching standard in Fourth Amendment inquiries. I cannot envision a case where a government taking of private property for a public purpose without just compensation, which is what Presley alleges happened in this case, would be anything but unreasonable per se. To accept Presley's characterization of her claim as arising under the Fourth Amendment would thus create an entire class of constitutional tort claims where liability on the part of the government would be virtually automatic and where the government would be exposed to the full panoply of common-law damages.

Accordingly, I would hold that although the district court erred by concluding that no seizure occurred in this case, the dismissal of Presley's complaint was nonetheless proper. Although Presley might be unhappy with the City's apparent decision to place a public trail across her property, the exercise of eminent domain does not require the consent of the affected landowner. Her remedy is to initiate an inverse condemnation action in state court and seek just compensation for the public easement that the City created over a portion of her property. See *Williamson*, 473 U.S. at 194-96. At that point, the City would be required to decide how to proceed. If the City believes that the public is best served by the trail continuing to cross Presley's property, then it would be required to pay her just compensation for the permanent easement across her land. If the City were instead to decide that the trail could be relocated so that it did not cross Presley's property, then it would be required to compensate her only for the time that easement was in place. If Presley does not receive just compensation through the state proceedings, her Fifth Amendment claim would then be ripe. But until then, Presley's constitutional claim based on the taking of her property for a public purpose is premature and she cannot circumvent the ripeness hurdle by couching her claim in Fourth Amendment terms. Thus, I believe the district court properly dismissed this claim.

JOHN R. SAND & GRAVEL COMPANY v. UNITED STATES
2008 U.S. LEXIS 744

JUDGES: BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, SOUTER, THOMAS, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined. GINSBURG, J., filed a dissenting opinion.

JUSTICE BREYER delivered the opinion of the Court.

The question presented is whether a court must raise on its own the timeliness of a lawsuit filed in the Court of Federal Claims, despite the Government's waiver of the issue. We hold that the special statute of limitations governing the Court of Federal Claims requires that sua sponte consideration.

I

Petitioner John R. Sand & Gravel Company filed an action in the Court of Federal Claims in May 2002. The complaint explained that petitioner held a 50-year mining lease on certain land. And it asserted that various Environmental Protection Agency activities on that land (involving, e.g., the building and moving of various fences) amounted to an unconstitutional taking of its leasehold rights.

The Government initially asserted that petitioner's several claims were all untimely in light of the statute providing that "every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. §2501. Later, however, the Government effectively conceded that certain claims were timely. The Government subsequently won on the merits. See 62 Fed. Cl. 556, 589 (2004).

Petitioner appealed the adverse judgment to the Court of Appeals for the Federal Circuit. See 457 F.3d 1345, 1346 (2006). The Government's brief said nothing about the statute of limitations, but an amicus brief called the issue to the court's attention. The court considered itself obliged to address the limitations issue, and it held that the action was untimely. We subsequently agreed to consider whether the Court of Appeals was right to ignore the Government's waiver and to decide the timeliness question.

II

Most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims. Thus, the law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver. See Fed. Rules Civ. Proc. 8(c)(1), 12(b), 15(a). Such statutes also typically permit courts to toll the limitations period in light of special equitable considerations.

Some statutes of limitations, however, seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency. The Court has often read the time limits of these statutes as more absolute, say as requiring a court to decide a timeliness question despite a waiver, or as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period. As convenient shorthand, the Court has sometimes referred to the time limits in such statutes as "jurisdictional."

This Court has long interpreted the court of claims limitations statute as setting forth this second, more absolute, kind of limitations period.

A

In *Kendall v. United States*, 107 U.S. 123 (1883), the Court applied a predecessor of the current 6-year bar to a claim that had first accrued in 1865 but that the plaintiff did not bring until 1872. The plaintiff, a former Confederate States employee, had asked for equitable tolling on the ground that he had not been able to bring the suit until Congress, in 1868, lifted a previously imposed legal disability. But the Court denied the request. It did so not because it thought the equities ran against the plaintiff, but because the statute (with certain listed exceptions) did not permit tolling. Justice Harlan, writing for the Court, said the statute was "jurisdictional," that it was not susceptible to judicial "engrafting" of unlisted disabilities such as "sickness, surprise, or inevitable accident," and that "it [was] the duty of the court to raise the [timeliness] question whether it [was] done by plea or not." *Ibid.* (emphasis added).

Four years later, in *Finn v. United States*, 123 U.S. 227, (1887), the Court found untimely a claim that had originally been filed with a Government agency, but which that agency had then voluntarily referred by statute to the Court of Claims. That Government reference, it might have been argued, amounted to a waiver by the Government of any limitations-based defense. The Court nonetheless held that the long (over 10-year) delay between the time the claim accrued and the plaintiff's filing of the claim before the agency made the suit untimely. And as to any argument of Government waiver or abandonment of the time-bar defense, Justice Harlan, again writing for the Court, said that the ordinary legal principle that "limitation . . . is a defence [that a defendant] must plead . . . has no application to suits in the Court of Claims against the United States."

Over the years, the Court has reiterated in various contexts this or similar views about the more absolute nature of the court of claims limitations statute.

B

III

In consequence, petitioner can succeed only by convincing us that this Court has overturned, or that it should now overturn, its earlier precedent.

Petitioner's argument must therefore come down to an invitation now to reject or to overturn *Kendall*, *Finn*, and related cases. Basic principles of stare decisis, however, require us to reject this argument. Further, stare decisis in respect to statutory interpretation has "special force," for "Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) Additionally, Congress has long acquiesced in the interpretation we have given. See *ibid.*; *Shepard v. United States*, 544 U.S. 13, 23, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005).

To overturn a decision settling one such matter simply because we might believe that decision is no longer "right" would inevitably reflect a willingness to reconsider others. And that willingness could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability. We have not found here any factors that might overcome these considerations.

IV

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting. [omitted]

Session 23. Procedure and Remedies

When a claimant wins a regulatory taking claim and the government agency recants, the question arises as to the availability of interim damages for the temporary taking. On one hand "lost time is lost money," but on the other the threat of unbudgeted for, and unexpected damages may have a "chilling effect" which discourages regulators from imposing legitimate controls.

SAN DIEGO GAS & ELECTRIC CO. v. CITY OF SAN DIEGO 450 U.S. 621 (1980)

Justice Blackmun delivered the opinion of the Court.

Appellant San Diego Gas & Electric Company, a California corporation, asks this Court to rule that a State must provide a monetary remedy to a landowner whose property allegedly has been "taken" by a regulatory ordinance claimed to violate the Just Compensation Clause of the Fifth Amendment. This question was left open last Term in *Agins v. City of Tiburon*, 447 U.S. 255, 263 (1980). Because we conclude that we lack jurisdiction in this case, we again must leave the issue undecided.

I

Appellant owns a 412-acre parcel of land in Sorrento Valley, an area in the northwest part of the city of San Diego, Cal. It assembled and acquired the acreage in 1966, at a cost of about \$1,770,000, as a possible site for a nuclear power plant to be constructed in the 1980's. Approximately 214 acres of the parcel lie within or near an estuary known as the Los Penasquitos Lagoon. These acres are low-lying land which serves as a drainage basin for three river systems. About a third of the land is subject to tidal action from the nearby Pacific Ocean. The 214 acres are unimproved, except for sewer and utility lines.

When appellant acquired the 214 acres, most of the land was zoned either for industrial use or in an agricultural "holding" category. The city's master plan, adopted in 1967, designated nearly all the area for industrial use.

Several events that occurred in 1973 gave rise to this litigation. First, the San Diego City Council rezoned parts of the property. It changed 39 acres from industrial to agricultural, and increased the minimum lot size in some of the agricultural areas from 1 acre to 10 acres. The Council recommended, however, that 50 acres of the agricultural land be considered for industrial development upon the submission of specific development plans.

Second, the city, pursuant to Cal. Gov't Code Ann. §65563 (West Supp. 1981), established an open-space plan. This statute required each California city and county to adopt a plan "for the comprehensive and long-range preservation and conservation of open-space land within its jurisdiction." The plan adopted by the city of San Diego placed appellant's property among the city's open-space areas, which it defined as "any urban land or water surface that is

essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes." App. 159. The plan acknowledged appellant's intention to construct a nuclear power plant on the property, stating that such a plant would not necessarily be incompatible with the open-space designation. The plan proposed, however, that the city acquire the property to preserve it as parkland.

Third, the City Council proposed a bond issue in order to obtain funds to acquire open-space lands. The Council identified appellant's land as among those properties to be acquired with the proceeds of the bond issue. The proposition, however, failed to win the voters' approval. The open-space plan has remained in effect, but the city has made no attempt to acquire appellant's property.

On August 15, 1974, appellant instituted this action in the Superior Court for the County of San Diego against the city and a number of its officials. It alleged that the city had taken its property without just compensation, in violation of the Constitutions of the United States and California. Appellant's theory was that the city had deprived it of the entire beneficial use of the property through the rezoning and the adoption of the open-space plan. It alleged that the city followed a policy of refusing to approve any development that was inconsistent with the plan, and that the only beneficial use of the property was as an industrial park, a use that would be inconsistent with the open-space designation. The city disputed this allegation, arguing that appellant had never asked its approval for any development plan for the property.

Appellant sought damages of \$6,150,000 in inverse condemnation, as well as mandamus and declaratory relief. Prior to trial, the court dismissed the mandamus claim, holding that "mandamus is not the proper remedy to challenge the validity of a legislative act." Clerk's Tr. 42. After a nonjury trial on the issue of liability, the court granted judgment for appellant, finding that . . . the city had taken the property and that just compensation was required by the Constitutions of both the United States and California. A subsequent jury trial on the question of damages resulted in a judgment for appellant for over \$3 million.

On appeal, the California Court of Appeal . . . decided that monetary compensation is not an appropriate remedy for any taking of appellant's property that may have occurred, but it has not decided whether any other remedy is available because it has not decided whether any taking in fact has occurred.

Thus, however we might rule with respect to the Court of Appeal's decision that appellant is not entitled to a monetary remedy--and we are frank to say that the federal constitutional aspects of that issue are not to be cast aside lightly--further proceedings are necessary to resolve the federal question whether there has been a taking at all. The court's decision, therefore, is not final, and we are without jurisdiction to review it.

Because §1257 permits us to review only "[final] judgments or decrees" of a state court, the appeal must be, and is, dismissed.

It is so ordered.

Justice Rehnquist, concurring.

If I were satisfied that this appeal was from a "final judgment or decree" of the California Court of Appeal, as that term is used in 28 U. S. C. §1257, I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan.

Justice Brennan, with whom Justice Stewart, Justice Marshall, and Justice Powell join, dissenting.

Title 28 U. S. C. §1257 limits this Court's jurisdiction to review judgments of state courts to "[final] judgments or decrees rendered by the highest court of a State in which a decision could be had." The Court today dismisses this appeal on the ground that the Court of Appeal of California, Fourth District, failed to decide the federal question whether a "taking" of appellant's property had occurred, and therefore had not entered a final judgment or decree on that question appealable under §1257. Because the Court's conclusion fundamentally mischaracterizes the holding and judgment of the Court of Appeal, I respectfully dissent from the Court's dismissal and reach the merits of appellant's claim.

I

In 1966, appellant assembled a 412-acre parcel of land as a potential site for a nuclear power plant. At that time, approximately 116 acres of the property were zoned for industrial use, with most of the balance zoned in an agricultural holding category. In 1967, appellee city of San Diego adopted its general plan designating most of appellant's property for industrial use. In 1973, the city took three critical actions which together form the predicate of the instant litigation: it down-zoned some of appellant's property from industrial to agricultural; it incorporated a new open-space element in its plan that designated about 233 acres of appellant's land for open-space use; and it prepared a report mapping appellant's property for purchase by the city for open-space use, contingent on passage of a bond issue.

Appellant filed suit in California Superior Court alleging, inter alia, a "taking" of its property by "inverse condemnation" in violation of the United States and California Constitutions, and seeking compensation of over \$6 million. After a nonjury trial on liability, the court held that appellee city had taken a portion of appellant's property without just compensation, thereby violating the United States and California Constitutions. *Id.* at 42-43. A subsequent jury trial on damages resulted in a judgment of over \$3 million, plus interest as of the date of the "taking," and appraisal, engineering, and attorney's fees. *Id.* at 46.

The California Court of Appeal, Fourth District, affirmed, holding that there was "substantial evidence to support the court's conclusion [that] there was inverse condemnation." *Id.* The California Supreme Court denied further review.

II

This Court therefore errs, I respectfully submit, when it concludes that the Court of Appeal "has not decided whether any taking in fact has occurred." For whatever the merits of the California courts' substantive rulings on the federal constitutional issue, it is clear that the California Supreme Court has held that California courts in a challenge, as here, to a police power regulation, are barred from holding that a Fifth Amendment "taking" requiring just compensation has occurred. No set of factual circumstances, no matter how severe, can "transmute" an arbitrary exercise of the city's police power into a Fifth Amendment "taking." *Agins v. City of Tiburon*, *supra*, at 273, 598 P.2d, at 28.

III

The Just Compensation Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, states in clear and unequivocal terms: "[Nor] shall private property be taken for public use, without just compensation." The question presented on the merits in this case is whether a government entity must pay just compensation when a police power regulation has effected a "taking" of "private property" for "public use" within the meaning of that constitutional provision. Implicit in this question is the corollary issue whether a government entity's exercise of its regulatory police power can ever effect a "taking" within the meaning of the Just Compensation Clause.

A

The California courts have held that a city's exercise of its police power, however arbitrary or excessive, cannot as a matter of federal constitutional law constitute a "taking" within the meaning of the Fifth Amendment. This holding flatly contradicts clear precedents of this Court.

The principle . . . has its source in Justice Holmes' opinion for the Court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), in which he stated: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." The determination of a "taking" is "a question of degree--and therefore cannot be disposed of by general propositions." *Id.* at 416. While acknowledging that "[government] hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *id.*, at 413, the Court

rejected the proposition that police power restrictions could never be recognized as a Fifth Amendment "taking."⁹³

B

Not only does the holding of the California Court of Appeal contradict precedents of this Court, but it also fails to recognize the essential similarity of regulatory "takings" and other "takings." The typical "taking" occurs when a government entity formally condemns a landowner's property and obtains the fee simple pursuant to its sovereign power of eminent domain. See, e. g., *Berman v. Parker*, 348 U.S. 26, 33 (1954). However, a "taking" may also occur without a formal condemnation proceeding or transfer of fee simple. This Court long ago recognized that

"[it] would be a very curious and unsatisfactory result, if in construing [the Just Compensation Clause] . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use." *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 177-178 (1872) (emphasis in original).

In service of this principle, the Court frequently has found "takings" outside the context of formal condemnation proceedings or transfer of fee simple, in cases where government action benefiting the public resulted in destruction of the use and enjoyment of private property.

Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of

⁹³ More recent Supreme Court cases have emphasized this aspect of "taking" analysis, commenting that the Court has been unable to develop any "set formula to determine where regulation ends and taking begins," *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962), and that "[it] calls as much for the exercise of judgment as for the application of logic," *Andrus v. Allard*, 444 U.S. 51, 65 (1979). See *Penn Central Transp. Co. v. New York City*, 438 U.S., at 124 ("ad hoc, factual inquiries"); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958) ("question properly turning upon the particular circumstances of each case").

One distinguished commentator has characterized the attempt to differentiate "regulation" from "taking" as "the most haunting jurisprudential problem in the field of contemporary land-use law . . . one that may be the lawyer's equivalent of the physicist's hunt for the quark." C. Haar, *Land-Use Planning* 766 (3d ed. 1976). See generally *id.*, at 766-777; Berger, *A Policy Analysis of the Taking Problem*, 49 N. Y. U. L. Rev. 165 (1974); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967); Sax, *Takings and the Police Power*, 74 Yale L. J. 36 (1964). Another has described a 30-year series of Court opinions resulting from this case-by-case approach as a "crazy-quilt pattern." Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 S. Ct. Rev. 63.

view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property.

IV

Having determined that property may be "taken for public use" by police power regulation within the meaning of the Just Compensation Clause of the Fifth Amendment, the question remains whether a government entity may constitutionally deny payment of just compensation to the property owner and limit his remedy to mere invalidation of the regulation instead. Appellant argues that it is entitled to the full fair market value of the property. Appellees argue that invalidation of the regulation is sufficient without payment of monetary compensation. In my view, once a court establishes that there was a regulatory "taking," the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation. This interpretation, I believe, is supported by the express words and purpose of the Just Compensation Clause, as well as by cases of this Court construing it.

The language of the Fifth Amendment prohibits the "[taking]" of private property for "public use" without payment of "just compensation." As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has already suffered a constitutional violation, and "'the self-executing character of the constitutional provision with respect to compensation,'" *United States v. Clarke*, 445 U.S. 253, 257 (1980), quoting 6 J. Sackman, *Nichols' Law of Eminent Domain* §25.41 (rev. 3d ed. 1980), is triggered. This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a "taking," compensation must be awarded. Invalidation unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken.⁹⁴

⁹⁴ The instant litigation is a good case in point. The trial court, on April 9, 1976, found that the city's actions effected a "taking" of appellant's property on June 19, 1973. If true, then appellant has been deprived of all beneficial use of its property in violation of the Just Compensation Clause for the past seven years.

Invalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity. At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow City Attorneys the following advice:

Moreover, mere invalidation would fall far short of fulfilling the fundamental purpose of the Just Compensation Clause. That guarantee was designed to bar the government from forcing some individuals to bear burdens which, in all fairness, should be borne by the public as a whole. When one person is asked to assume more than a fair share of the public burden, the payment of just compensation operates to redistribute that economic cost from the individual to the public at large. Because police power regulations must be substantially related to the advancement of the public health, safety, morals, or general welfare, see *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926), it is axiomatic that the public receives a benefit while the offending regulation is in effect. If the regulation denies the private property owner the use and enjoyment of his land and is found to effect a "taking," it is only fair that the public bear the cost of benefits received during the interim period between application of the regulation and the government entity's rescission of it.

The fact that a regulatory "taking" may be temporary, by virtue of the government's power to rescind or amend the regulation, does not make it any less of a constitutional "taking." Nothing in the Just Compensation Clause suggests that "takings" must be permanent and irrevocable.

But contrary to appellant's claim that San Diego must formally condemn its property and pay full fair market value, nothing in the Just Compensation Clause empowers a court to order a government entity to condemn the property and pay its full fair market value, where the "taking" already effected is temporary and reversible and the government wants to halt the "taking." Just as the government may cancel condemnation proceedings before passage of title, it must have the same power to rescind a regulatory "taking." As the Court has noted: "[An] abandonment does not prejudice the property owner. It merely results in an alteration of the property interest taken--from full ownership to one of temporary use and occupation In such cases compensation would be measured by the principles normally governing the taking of a right to use property temporarily." *Ibid.*; see *Danforth v. United States*, 308 U.S. 271, 284 (1939).

"IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.

"If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent [California] Supreme Court case of *Selby v. City of San Buenaventura*, 10 C. 3d 110, appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.

"See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck."

Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, in 38B NIMLO Municipal Law Review 192-193 (1975) (emphasis in original).

The constitutional rule I propose requires that, once a court finds that a police power regulation has effected a "taking," the government entity must pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation. Ordinary principles determining the proper measure of just compensation, regularly applied in cases of permanent and temporary "takings" involving formal condemnation proceedings, occupations, and physical invasions, should provide guidance to the courts in the award of compensation for a regulatory "taking." As a starting point, the value of the property taken may be ascertained as of the date of the "taking." The government must inform the court of its intentions vis-a-vis the regulation with sufficient clarity to guarantee a correct assessment of the just compensation award. Should the government decide immediately to revoke or otherwise amend the regulation, it would be liable for payment of compensation only for the interim during which the regulation effected a "taking." Rules of valuation already developed for temporary "takings" may be particularly useful to the courts in their quest for assessing the proper measure of monetary relief in cases of revocation or amendment. Alternatively the government may choose formally to condemn the property, or otherwise to continue the offending regulation: in either case the action must be sustained by proper measures of just compensation.

Because I believe that the Just Compensation Clause requires the constitutional rule outlined supra, I would vacate the judgment of the California Court of Appeal, Fourth District, and remand for further proceedings not inconsistent with this opinion.

**FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE v.
COUNTY OF LOS ANGELES, CALIFORNIA
482 U.S. 304 (1987)**

Chief Justice Rehnquist delivered the opinion of the Court.

In this case the California Court of Appeal held that a landowner who claims that his property has been “taken” by a land-use regulation may not recover damages for the time before it is finally determined that the regulation constitutes a “taking” of his property. We disagree, and conclude that in these circumstances the Fifth and Fourteenth Amendments to the United States Constitution would require compensation for that period.

In 1957, appellant First English Evangelical Lutheran Church purchased a 21-acre parcel of land in a canyon along the banks of the Middle Fork of Mill Creek in the Angeles National Forest. The Middle Fork is the natural drainage channel for a watershed area owned by the National Forest Service. Twelve of the acres owned by the church are flat land, and contained a dining hall, two bunkhouses, a caretaker’s lodge, an outdoor chapel, and a footbridge across the creek. The church operated on the site a campground, known as “Lutherglen,” as a retreat center and a recreational area for handicapped children.

In July 1977, a forest fire denuded the hills upstream from Lutherglen, destroying approximately 3,860 acres of the watershed area and creating a serious flood hazard. Such flooding occurred on February 9 and 10, 1978, when a storm dropped 11 inches of rain in the watershed. The runoff from the storm overflowed the banks of the Mill Creek, flooding Lutherglen and destroying its buildings.

In response to the flooding of the canyon, appellee County of Los Angeles adopted Interim Ordinance No. 11,855 in January 1979. The ordinance provided that “[a] person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon” App. to Juris. Statement A31. The ordinance was effective immediately because the county determined that it was “required for the immediate preservation of the public health and safety” Id. at A32. The interim flood protection area described by the ordinance included the flat areas on either side of Mill Creek on which Lutherglen had stood.

The church filed a complaint in the Superior Court of California a little more than a month after the ordinance was adopted. As subsequently amended, the . . . second claim sought to recover from the Flood Control District in inverse condemnation Appellant sought damages . . . for loss of use of Lutherglen. The defendants moved to strike the portions of the complaint alleging that the county’s ordinance denied all use of Lutherglen, on the view that the California Supreme Court’s decision in *Agins v. Tiburon*, 24 Cal. 3d 266, 598 P. 2d 25 (1979), aff’d on other grounds, 447 U.S. 255 (1980), rendered the allegation “entirely immaterial and irrelevant, [with] no bearing upon any conceivable cause of action herein.” In *Agins v. Tiburon*,

supra, the California Supreme Court decided that a landowner may not maintain an inverse condemnation suit in the courts of that State based upon a “regulatory” taking. 24 Cal. 3d, at 275-277, 598 P. 2d, at 29-31. In the court’s view, maintenance of such a suit would allow a landowner to force the legislature to exercise its power of eminent domain. Under this decision, then, compensation is not required until the challenged regulation or ordinance has been held excessive in an action for declaratory relief or a writ of mandamus and the government has nevertheless decided to continue the regulation in effect. Based on this decision, the trial court in the present case granted the motion to strike the allegation that the church had been denied all use of Lutherglen. It explained that “a careful rereading of the Agins case persuades the Court that when an ordinance, even a non-zoning ordinance, deprives a person of the total use of his lands, his challenge to the ordinance is by way of declaratory relief or possibly mandamus.” App. 26. Because the appellant alleged a regulatory taking and sought only damages, the allegation that the ordinance denied all use of Lutherglen was deemed irrelevant.

On appeal, the California Court of Appeal declin[ed] appellant’s invitation to reevaluate Agins in light of this Court’s opinions in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981). The court found itself obligated to follow Agins “because the United States Supreme Court has not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief”

This appeal followed, and we noted probable jurisdiction. 478 U.S. 1003 (1986). Appellant asks us to hold that the California Supreme Court erred in Agins v. Tiburon in determining that the Fifth Amendment, as made applicable to the States through the Fourteenth Amendment, does not require compensation as a remedy for “temporary” regulatory takings—those regulatory takings which are ultimately invalidated by the courts. Four times this decade, we have considered similar claims and have found ourselves for one reason or another unable to consider the merits of the Agins rule. See *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172 (1985); *San Diego Gas & Electric Co.*, supra; *Agins v. Tiburon*, supra. For the reasons explained below, however, we find the constitutional claim properly presented in this case, and hold that on these facts the California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment.

I

Concerns with finality left us unable to reach the remedial question in the earlier cases where we have been asked to consider the rule of Agins. Consideration of the remedial question in those circumstances, we concluded, would be premature. The posture of the present case is quite different. Appellant’s complaint alleged that “Ordinance No. 11,855 denies [it] all use of Lutherglen,” and sought damages for this deprivation. In affirming the decision to strike this allegation, the Court of Appeal assumed that the complaint sought “damages for the uncompensated taking of all use of Lutherglen by County Ordinance No. 11,855.” It relied on

the California Supreme Court's *Agins* decision for the conclusion that "the remedy for a taking [is limited] to nonmonetary relief" The disposition of the case on these grounds isolates the remedial question for our consideration. The California Court of Appeal has thus held that, regardless of the correctness of appellant's claim that the challenged ordinance denies it "all use of Lutherglen," appellant may not recover damages until the ordinance is finally declared unconstitutional, and then only for any period after that declaration for which the county seeks to enforce it. The constitutional question pretermitted in our earlier cases is therefore squarely presented here.

II

Consideration of the compensation question must begin with direct reference to the language of the Fifth Amendment, which provides in relevant part that "private property [shall not] be taken for public use, without just compensation." As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of "the self-executing character of the constitutional provision with respect to compensation" *United States v. Clarke*, 445 U.S. 253, 257 (1980), quoting 6 P. Nichols, *Eminent Domain* §25.41 (3d rev. ed. 1972). As noted in Justice Brennan's dissent in *San Diego Gas & Electric Co.*, 450 U.S., at 654-655, it has been established at least since *Jacobs v. United States*, 290 U.S. 13 (1933), that claims for just compensation are grounded in the Constitution itself.

It has also been established doctrine at least since Justice Holmes' opinion for the Court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), that "the general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. Later cases have unhesitatingly applied this principle. See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *United States v. Dickinson*, 331 U.S. 745, 750 (1947); *United States v. Causby*, *supra*.

While the California Supreme Court may not have actually disavowed this general rule in *Agins*, we believe that it has truncated the rule by disallowing damages that occurred prior to the ultimate invalidation of the challenged regulation. The California Supreme Court justified its conclusion at length in the *Agins* opinion, concluding that:

“In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances.” 24 Cal. 3d, at 276-277, 598 P. 2d, at 31.

We, of course, are not unmindful of these considerations, but they must be evaluated in the light of the command of the Just Compensation Clause of the Fifth Amendment. The Court has recognized in more than one case that the government may elect to abandon its intrusion or discontinue regulations. Similarly, a governmental body may acquiesce in a judicial declaration that one of its ordinances has effected an unconstitutional taking of property; the landowner has no right under the Just Compensation Clause to insist that a “temporary” taking be deemed a permanent taking. But we have not resolved whether abandonment by the government requires payment of compensation for the period of time during which regulations deny a landowner all use of his land.

In considering this question, we find substantial guidance in cases where the government has only temporarily exercised its right to use private property. These cases reflect the fact that “temporary” takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation. In the present case the interim ordinance was adopted by the County of Los Angeles in January 1979, and became effective immediately. Appellant filed suit within a month after the effective date of the ordinance and yet when the California Supreme Court denied a hearing in the case on October 17, 1985, the merits of appellant’s claim had yet to be determined. The United States has been required to pay compensation for leasehold interests of shorter duration than this. The value of a leasehold interest in property for a period of years may be substantial, and the burden on the property owner in extinguishing such an interest for a period of years may be great indeed. Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period. Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a “temporary” one, is not a sufficient remedy to meet the demands of the Just Compensation Clause.

Nothing we say today is intended to abrogate the principle that the decision to exercise the power of eminent domain is a legislative function “for Congress and Congress alone to determine.” *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984), quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954). Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain. Thus we do not, as the Solicitor General suggests, “permit a court, at the behest of a private person, to require the . . . Government to exercise the power of eminent domain . . .” Brief for United States as Amicus Curiae 22. We merely hold that where the government’s activities have already worked a taking

of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.

We also point out that the allegation of the complaint which we treat as true for purposes of our decision was that the ordinance in question denied appellant all use of its property. We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us. We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, “a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 416.

Here we must assume that the Los Angeles County ordinance has denied appellant all use of its property for a considerable period of years, and we hold that invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy. The judgment of the California Court of Appeal is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice Stevens, with whom Justice Blackmun and Justice O'Connor join as to Parts I and III, dissenting.

One thing is certain. The Court's decision today will generate a great deal of litigation. Most of it, I believe, will be unproductive. But the mere duty to defend the actions that today's decision will spawn will undoubtedly have a significant adverse impact on the land-use regulatory process. The Court has reached out to address an issue not actually presented in this case, and has then answered that self-imposed question in a superficial and, I believe, dangerous way. The policy implications of today's decision are obvious and, I fear, far reaching. Cautious local officials and land-use planners may avoid taking any action that might later be challenged and thus give rise to a damages action. Much important regulation will never be enacted, even perhaps in the health and safety area. Were this result mandated by the Constitution, these serious implications would have to be ignored. But the loose cannon the Court fires today is not only unattached to the Constitution, but it also takes aim at a long line of precedents in the regulatory takings area. It would be the better part of valor simply to decide the case at hand instead of igniting the kind of litigation explosion that this decision will undoubtedly touch off.

I respectfully dissent.

CITY OF MONTEREY v. DEL MONTE DUNES
526 U.S. 687 (1999)

KENNEDY, J., announced the judgment of the Court.

This case began with attempts by the respondent, Del Monte Dunes, and its predecessor in interest to develop a parcel of land within the jurisdiction of the petitioner, the city of Monterey. The city, in a series of repeated rejections, denied proposals to develop the property, each time imposing more rigorous demands on the developers. Del Monte Dunes brought suit in the United States District Court for the Northern District of California, under 42 U.S.C. §1983. After protracted litigation, the case was submitted to the jury on Del Monte Dunes' theory that the city effected a regulatory taking or otherwise injured the property by unlawful acts, without paying compensation or providing an adequate post-deprivation remedy for the loss. The jury found for Del Monte Dunes, and the Court of Appeals affirmed.

The petitioner contends that the regulatory takings claim should not have been decided by the jury and that the Court of Appeals adopted an erroneous standard for regulatory takings liability. We need not decide all of the questions presented by the petitioner, nor need we examine each of the points given by the Court of Appeals in its decision to affirm. The controlling question is whether, given the city's apparent concession that the instructions were a correct statement of the law, the matter was properly submitted to the jury. We conclude that it was, and that the judgment of the Court of Appeals should be affirmed.

The property which respondent and its predecessor in interest (landowners) sought to develop was a 37.6 acre ocean-front parcel located in the city of Monterey, at or near the city's boundary to the north, where Highway 1 enters. With the exception of the ocean and a state park located to the northeast, the parcel was virtually surrounded by a railroad right-of-way and properties devoted to industrial, commercial, and multifamily residential uses. The parcel itself was zoned for multifamily residential use under the city's general zoning ordinance.

The parcel had not been untouched by its urban and industrial proximities. A sewer line housed in 15-foot man-made dunes covered with jute matting and surrounded by snow fencing traversed the property. Trash, dumped in violation of the law, had accumulated on the premises. The parcel had been used for many years by an oil company as a terminal and tank farm where large quantities of oil were delivered, stored, and reshipped. When the company stopped using the site, it had removed its oil tanks but left behind tank pads, an industrial complex, pieces of pipe, broken concrete, and oil-soaked sand. The company had introduced nonnative ice plant to prevent erosion and to control soil conditions around the oil tanks. Ice plant secretes a substance that forces out other plants and is not compatible with the parcel's natural flora. By the time the landowners sought to develop the property, ice plant had spread to some 25 percent of the parcel, and, absent human intervention, would continue to advance, endangering and perhaps eliminating the parcel's remaining natural vegetation.

The natural flora the ice plant encroached upon included buckwheat, the natural habitat of the endangered Smith's Blue Butterfly. The butterfly lives for one week, travels a maximum of 200 feet, and must land on a mature, flowering buckwheat plant to survive. Searches for the butterfly from 1981 through 1985 yielded but a single larva, discovered in 1984. No other specimens had been found on the property, and the parcel was quite isolated from other possible habitats of the butterfly.

In 1981 the landowners submitted an application to develop the property in conformance with the city's zoning and general plan requirements. Although the zoning requirements permitted the development of up to 29 housing units per acre, or more than 1,000 units for the entire parcel, the landowners' proposal was limited to 344 residential units. In 1982 the city's planning commission denied the application but stated that a proposal for 264 units would receive favorable consideration. In keeping with the suggestion, the landowners submitted a revised proposal for 264 units. In late 1983, however, the planning commission again denied the application. The commission once more requested a reduction in the scale of the development, this time saying a plan for 224 units would be received with favor. The landowners returned to the drawing board and prepared a proposal for 224 units, which, its previous statements notwithstanding, the planning commission denied in 1984. The landowners appealed to the city council, which overruled the planning commission's denial and referred the project back to the commission, with instructions to consider a proposal for 190 units.

The landowners once again reduced the scope of their development proposal to comply with the city's request, and submitted four specific, detailed site plans, each for a total of 190 units for the whole parcel. Even so, the planning commission rejected the landowners' proposal later in 1984. Once more the landowners appealed to the city council. The council again overruled the commission, finding the proposal conceptually satisfactory and in conformance with the city's previous decisions regarding, inter alia, density, number of units, location on the property, and access. The council then approved one of the site plans, subject to various specific conditions, and granted an 18-month conditional use permit for the proposed development.

The landowners spent most of the next year revising their proposal and taking other steps to fulfill the city's conditions. Their final plan, submitted in 1985, devoted 17.9 of the 37.6 acres to public open space (including a public beach and areas for the restoration and preservation of the buckwheat habitat), 7.9 acres to open, landscaped areas, and 6.7 acres to public and private streets (including public parking and access to the beach). Only 5.1 acres were allocated to buildings and patios. The plan was designed, in accordance with the city's demands, to provide the public with a beach, a buffer zone between the development and the adjoining state park, and view corridors so the buildings would not be visible to motorists on the nearby highway; the proposal also called for restoring and preserving as much of the sand dune structure and buckwheat habitat as possible consistent with development and the city's requirements.

After detailed review of the proposed buildings, roads, and parking facilities, the city's architectural review committee approved the plan. Following hearings before the planning commission, the commission's professional staff found the final plan addressed and substantially satisfied the city's conditions. It proposed the planning commission make specific findings to this effect and recommended the plan be approved.

In January 1986, less than two months before the landowners' conditional use permit was to expire, the planning commission rejected the recommendation of its staff and denied the development plan. The landowners appealed to the city council, also requesting a 12-month extension of their permit to allow them time to attempt to comply with any additional requirements the council might impose. The permit was extended until a hearing could be held before the city council in June 1986. After the hearing, the city council denied the final plan, not only declining to specify measures the landowners could take to satisfy the concerns raised by the council but also refusing to extend the conditional use permit to allow time to address those concerns. The council's decision, moreover, came at a time when a sewer moratorium issued by another agency would have prevented or at least delayed development based on a new plan.

The council did not base its decision on the landowners' failure to meet any of the specific conditions earlier prescribed by the city. Rather, the council made general findings that the landowners had not provided adequate access for the development (even though the landowners had twice changed the specific access plans to comply with the city's demands and maintained they could satisfy the city's new objections if granted an extension), that the plan's layout would damage the environment (even though the location of the development on the property was necessitated by the city's demands for a public beach, view corridors, and a buffer zone next to the state park), and that the plan would disrupt the habitat of the Smith's Blue Butterfly (even though the plan would remove the encroaching ice plant and preserve or restore buckwheat habitat on almost half of the property, and even though only one larva had ever been found on the property).

After five years, five formal decisions, and 19 different site plans, respondent Del Monte Dunes decided the city would not permit development of the property under any circumstances. Del Monte Dunes commenced suit against the city in the United States District Court for the Northern District of California under 42 U.S.C. §1983, alleging, inter alia, that denial of the final development proposal was a violation of the Due Process and Equal Protection provisions of the Fourteenth Amendment and an uncompensated, and so unconstitutional, regulatory taking.

The District Court determined, over the city's objections, to submit Del Monte Dunes' takings and equal protection claims to a jury but to reserve the substantive due process claim for decision by the court. Del Monte Dunes argued to the jury that, although the city had a right to regulate its property, the combined effect of the city's various demands—that the development be invisible from the highway, that a buffer be provided between the development and the state park, and that the public be provided with a beach—was to force development into the “bowl”

area of the parcel. As a result, Del Monte Dunes argued, the city's subsequent decision that the bowl contained sensitive buckwheat habitat which could not be disturbed blocked the development of any portion of the property. While conceding the legitimacy of the city's stated regulatory purposes, Del Monte Dunes emphasized the tortuous and protracted history of attempts to develop the property, as well as the shifting and sometimes inconsistent positions taken by the city throughout the process, and argued that it had been treated in an unfair and irrational manner. Del Monte Dunes also submitted evidence designed to undermine the validity of the asserted factual premises for the city's denial of the final proposal and to suggest that the city had considered buying, or inducing the State to buy, the property for public use as early as 1979, reserving some money for this purpose but delaying or abandoning its plans for financial reasons. The State of California's purchase of the property during the pendency of the litigation may have bolstered the credibility of Del Monte Dunes' position.

At the close of argument, the District Court instructed the jury it should find for Del Monte Dunes if it found either that Del Monte Dunes had been denied all economically viable use of its property or that "the city's decision to reject the plaintiff's 190 unit development proposal did not substantially advance a legitimate public purpose." The essence of these instructions was proposed by the city. The jury delivered a general verdict for Del Monte Dunes on its takings claim, a separate verdict for Del Monte Dunes on its equal protection claim, and a damages award of \$1.45 million. After the jury's verdict, the District Court ruled for the city on the substantive due process claim, stating that its ruling was not inconsistent with the jury's verdict on the equal protection or the takings claim. The court later denied the city's motions for a new trial or for judgment as a matter of law.

The Court of Appeals affirmed. 95 F.3d 1422 (CA9 1996). The court first ruled that the District Court did not err in allowing Del Monte Dunes' regulatory takings claim to be tried to a jury, 95 F.3d at 1428, because Del Monte Dunes had a right to a jury trial under §1983, 95 F.3d at 1426-1427, and whether Del Monte Dunes had been denied all economically viable use of the property and whether the city's denial of the final proposal substantially advanced legitimate public interests were, on the facts of this case, questions suitable for the jury, 95 F.3d at 1430. The court ruled that sufficient evidence had been presented to the jury from which it reasonably could have decided each of these questions in Del Monte Dunes' favor. 95 F.3d at 1430-1434. Because upholding the verdict on the regulatory takings claim was sufficient to support the award of damages, the court did not address the equal protection claim. 95 F.3d at 1426. The court stated that

"Del Monte provided evidence sufficient to rebut each of these reasons [for denying the final proposal]. Taken together, Del Monte argued that the City's reasons for denying their application were invalid and that it unfairly intended to forestall any reasonable development of the Dunes. In light of the evidence proffered by Del Monte, the City has incorrectly argued that no rational juror could conclude that the City's denial of Del Monte's application lacked a sufficient nexus with its stated objectives." 95 F.3d at 1431-1432.

The controlling question is whether, given the city's apparent concession that the instructions were a correct statement of the law, the matter was properly submitted to the jury. We conclude that it was, and that the judgment of the Court of Appeals should be affirmed. The questions presented in the city's petition for certiorari were whether (1) issues of liability were properly submitted to the jury on Del Monte Dunes' regulatory takings claim, (2) whether the Court of Appeals impermissibly based its decision on a standard that allowed the jury to reweigh the reasonableness of the city's land-use decision.

The city challenges the Court of Appeals' holding that the jury could have found the city's denial of the final development plan not reasonably related to legitimate public interests. Although somewhat obscure, the city's argument is not cast as a challenge to the sufficiency of the evidence; rather, the city maintains that the Court of Appeals adopted a legal standard for regulatory takings liability that allows juries to second-guess public land-use policy.

As the city itself proposed the essence of the instructions given to the jury, it cannot now contend that the instructions did not provide an accurate statement of the law. In any event, although this Court has provided neither a definitive statement of the elements of a claim for a temporary regulatory taking nor a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests we note that the trial court's instructions are consistent with our previous general discussions of regulatory takings liability. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985); *Agins v. City of Tiburon*, 447 U.S. 255, 260, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980). The city did not challenge below the applicability or continued viability of the general test for regulatory takings liability recited by these authorities and upon which the jury instructions appear to have been modeled. Given the posture of the case before us, we decline the suggestions of amici to revisit these precedents.

In short, the question submitted to the jury on this issue was confined to whether, in light of all the history and the context of the case, the city's particular decision to deny Del Monte Dunes' final development proposal was reasonably related to the city's proffered justifications. This question was couched, moreover, in an instruction that had been proposed in essence by the city, and as to which the city made no objection.

Thus, despite the protests of the city and its amici, it is clear that the Court of Appeals did not adopt a rule of takings law allowing wholesale interference by judge or jury with municipal land-use policies, laws, or routine regulatory decisions. To the extent the city argues that, as a matter of law, its land-use decisions are immune from judicial scrutiny under all circumstances, its position is contrary to settled regulatory takings principles. We reject this claim of error.

We next address whether it was proper for the District Court to submit the question of liability on Del Monte Dunes' regulatory takings claim to the jury. As the Court of Appeals recognized, the answer depends on whether Del Monte Dunes had a statutory or constitutional

right to a jury trial, and, if it did, the nature and extent of the right. Del Monte Dunes asserts the right to a jury trial is conferred by §1983 and by the Seventh Amendment.

The Seventh Amendment provides that “in Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved” Consistent with the textual mandate that the jury right be preserved, our interpretation of the Amendment has been guided by historical analysis comprising two principal inquiries. “We ask, first, whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was.” *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376, 134 L. Ed. 2d 577, 116 S. Ct. 1384 (1996). “If the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.”

Del Monte Dunes brought this suit pursuant to §1983 to vindicate its constitutional rights. We hold that a §1983 suit seeking legal relief is an action at law within the meaning of the Seventh Amendment. It is undisputed that when the Seventh Amendment was adopted there was no action equivalent to §1983, framed in specific terms for vindicating constitutional rights. It is settled law, however, that the Seventh Amendment jury guarantee extends to statutory claims unknown to the common law, so long as the claims can be said to “sound basically in tort,” and seek legal relief. *Curtis*, 415 U.S. at 195-196.

Here Del Monte Dunes sought legal relief. It was entitled to proceed in federal court under §1983 because, at the time of the city’s actions, the State of California did not provide a compensatory remedy for temporary regulatory takings. The constitutional injury alleged, therefore, is not that property was taken but that it was taken without just compensation. Had the city paid for the property or had an adequate post-deprivation remedy been available, Del Monte Dunes would have suffered no constitutional injury from the taking alone. See *Williamson*, 473 U.S. at 194-195. Because its’ statutory action did not accrue until it was denied just compensation, in a strict sense Del Monte Dunes sought not just compensation per se but rather damages for the unconstitutional denial of such compensation. Damages for a constitutional violation are a legal remedy.

In attempt to avoid the force of this conclusion, the city urges us [that] the jury’s role in estimating just compensation in condemnation proceedings was inconsistent and unclear at the time the Seventh Amendment was adopted, this Court has said “that there is no constitutional right to a jury in eminent domain proceedings.” *United States v. Reynolds*, 397 U.S. 14, 18, 25 L. Ed. 2d 12, 90 S. Ct. 803 (1970); accord, *Bauman v. Ross*, 167 U.S. 548, 593, 42 L. Ed. 270, 17 S. Ct. 966 (1897). The city submits that the analogy to formal condemnation proceedings is controlling, so that there is no jury right here.

Although condemnation proceedings spring from the same Fifth Amendment right to compensation which, as incorporated by the Fourteenth Amendment, is applicable here a condemnation action differs in important respects from a §1983 action to redress an

uncompensated taking. Most important, when the government initiates condemnation proceedings, it concedes the landowner's right to receive just compensation and seeks a mere determination of the amount of compensation due. Liability simply is not an issue. As a result, even if condemnation proceedings were an appropriate analogy, condemnation practice would provide little guidance on the specific question whether Del Monte Dunes was entitled to a jury determination of liability.

This difference renders the analogy to condemnation proceedings not only unhelpful but also inapposite. When the government takes property without initiating condemnation proceedings, it "shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation." *United States v. Clarke*, 445 U.S. 253, 257 (1980). Even when the government does not dispute its seizure of the property or its obligation to pay for it, the mere "shifting of the initiative from the condemning authority to the condemnee" can place the landowner "at a significant disadvantage." *Id.*, at 258. Where, as here, the government not only denies liability but fails to provide an adequate post-deprivation remedy (thus refusing to submit the question of liability to an impartial arbiter), the disadvantage to the owner becomes all the greater. At least in these circumstances, the analogy to ordinary condemnation procedures is simply untenable.

Our conclusion is confirmed by precedent. Early authority finding no jury right in a condemnation proceeding did so on the ground that condemnation did not involve the determination of legal rights because liability was undisputed

Condemnation proceedings differ from the instant cause of action in another fundamental respect as well. When the government condemns property for public use, it provides the landowner a forum for seeking just compensation, as is required by the Constitution. If the condemnation proceedings do not, in fact, deny the landowner just compensation, the government's actions are neither unconstitutional nor unlawful. See *Williamson*, 473 U.S. at 194 ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation"). Even when the government takes property without initiating condemnation proceedings, there is no constitutional violation "unless or until the state fails to provide an adequate post-deprivation remedy for the property loss." 473 U.S. at 195 (quoting *Hudson v. Palmer*, 468 U.S. 517, 532, n. 12, 82 L. Ed. 2d 393, 104 S. Ct. 3194 (1984)). In this case, however, Del Monte Dunes was denied not only its property but also just compensation or even an adequate forum for seeking it. That is the gravamen of the §1983 claim. In these circumstances, we conclude the cause of action sounds in tort and is most analogous to the various actions that lay at common law to recover damages for interference with property interests.

Having decided Del Monte Dunes' §1983 suit was an action at law, we must determine whether the particular issues of liability were proper for determination by the jury. Where history does not provide a clear answer, we look to precedent and functional considerations.

Just as no exact analogue of Del Monte Dunes' §1983 suit can be identified at common law, so also can we find no precise analogue for the specific test of liability submitted to the jury in this case. We do know that in suits sounding in tort for money damages, questions of liability were decided by the jury, rather than the judge, in most cases. This allocation preserved the jury's role in resolving what was often the heart of the dispute between plaintiff and defendant. Although these general observations provide some guidance on the proper allocation between judge and jury of the liability issues in this case, they do not establish a definitive answer.

We turn next to considerations of process and function. Almost from the inception of our regulatory takings doctrine, we have held that whether a regulation of property goes so far that "there must be an exercise of eminent domain and compensation to sustain the act . . . depends upon the particular facts." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 67 L. Ed. 322, 43 S. Ct. 158 (1922). Consistent with this understanding, we have described determinations of liability in regulatory takings cases as "essentially ad hoc, factual inquiries," *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978)), requiring "complex factual assessments of the purposes and economic effects of government actions," *Yee*, 503 U.S. at 523. In accordance with these pronouncements, we hold that the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question. As our implied acknowledgment of the procedure in *Williamson*, *supra*, suggests, in actions at law otherwise within the purview of the Seventh Amendment, this question is for the jury.

The jury's role in determining whether a land-use decision substantially advances legitimate public interests within the meaning of our regulatory takings doctrine presents a more difficult question. Although our cases make clear that this inquiry involves an essential factual component, see *Yee*, 503 U.S. at 523, it no doubt has a legal aspect as well, and is probably best understood as a mixed question of fact and law.

We note the limitations of our Seventh Amendment holding. We do not address the jury's role in an ordinary inverse condemnation suit. The action here was brought under §1983, a context in which the jury's role in vindicating constitutional rights has long been recognized by the federal courts. A federal court, moreover, cannot entertain a takings claim under §1983 unless or until the complaining landowner has been denied an adequate post-deprivation remedy. Even the State of California, where this suit arose, now provides a facially adequate procedure for obtaining just compensation for temporary takings such as this one. Our decision is also circumscribed in its conceptual reach. The posture of the case does not present an appropriate occasion to define with precision the elements of a temporary regulatory takings claim; although the city objected to submitting issues of liability to the jury at all, it approved the instructions that were submitted to the jury and therefore has no basis to challenge them.

For these reasons, we do not attempt a precise demarcation of the respective provinces of judge and jury in determining whether a zoning decision substantially advances legitimate

governmental interests. The city and its amici suggest that sustaining the judgment here will undermine the uniformity of the law and eviscerate state and local zoning authority by subjecting all land-use decisions to plenary, and potentially inconsistent, jury review. Our decision raises no such specter. Del Monte Dunes did not bring a broad challenge to the constitutionality of the city's general land-use ordinances or policies, and our holding does not extend to a challenge of that sort. In such a context, the determination whether the statutory purposes were legitimate, or whether the purposes, though legitimate, were furthered by the law or general policy, might well fall within the province of the judge. Nor was the gravamen of Del Monte Dunes' complaint even that the city's general regulations were unreasonable as applied to Del Monte Dunes' property; we do not address the proper trial allocation of the various questions that might arise in that context. Rather, to the extent Del Monte Dunes' challenge was premised on unreasonable governmental action, the theory argued and tried to the jury was that the city's denial of the final development permit was inconsistent not only with the city's general ordinances and policies but even with the shifting ad hoc restrictions previously imposed by the city. Del Monte Dunes' argument, in short, was not that the city had followed its zoning ordinances and policies but rather that it had not done so. As is often true in §1983 actions, the disputed questions were whether the government had denied a constitutional right in acting outside the bounds of its authority, and, if so, the extent of any resulting damages. These were questions for the jury.

AFFIRMED.

JUSTICE SOUTER, with whom JUSTICE O'CONNOR, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting in part.

The city's proposed analogy of inverse condemnation proceedings to direct ones is intuitively sensible, given their common Fifth Amendment constitutional source and link to the sovereign's power of eminent domain. The intuition is borne out by closer analysis of the respective proceedings. The ultimate issue is identical in both direct and inverse condemnation actions: a determination of "the fair market value of the property [taken] on the date it is appropriated," as the measure of compensation required by the Fifth Amendment. *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 10, 81 L. Ed. 2d 1, 104 S. Ct. 2187 (1984). As we said in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987):

"The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners does not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment." 482 U.S. at 315 (quoting *Jacobs v. United States*, 290 U.S. 13, 16, 78 L. Ed. 142, 54 S. Ct. 26 (1933)).

The strength of the analogy is fatal to respondents' claim to a jury trial as a matter of right. Reaffirming what was already a well-established principle, the Court explained over a century ago that "the estimate of the just compensation for property taken for the public use,

under the right of eminent domain, is not required to be made by a jury,” *Bauman v. Ross*, 167 U.S. 548, 593, 42 L. Ed. 270, 17 S. Ct. 966 (1897)

In sum, at the time of the framing the notion of regulatory taking or inverse condemnation was yet to be derived, the closest analogue to the then-unborn claim was that of direct condemnation, and the right to compensation for such direct takings carried with it no right to a jury trial, just as the jury right is foreign to it in the modern era. On accepted Seventh Amendment analysis, then, there is no reason to find a jury right either by direct analogy or for the sake of preserving the substance of any jury practice known to the law at the crucial time. Indeed, the analogy with direct condemnation actions is so strong that there is every reason to conclude that inverse condemnation should implicate no jury right.

Even if an argument for §1983 simplicity and uniformity were sustainable, however, it would necessarily be weaker than the analogy with direct condemnation actions. That analogy rests on two elements that are present in each of the two varieties of condemnation actions: a Fifth Amendment constitutional right and a remedy specifically mandated by that same amendment. Because constitutional values are superior to statutory values, uniformity as between different applications of a given constitutional guarantee is more important than uniformity as between different applications of a given statute. If one accepts that proposition as I do, a close analogy between direct and inverse condemnation proceedings is necessarily stronger than even a comparably close resemblance between two statutory actions.

IV

Were the results of the analysis to this point uncertain, one final anomaly of the Court’s position would point up its error. The inconsistency of recognizing a jury trial right in inverse condemnation, notwithstanding its absence in condemnation actions, appears the more pronounced on recalling that under *Agins* one theory of recovery in inverse condemnation cases is that the taking makes no substantial contribution to a legitimate governmental purpose. This issue includes not only a legal component that may be difficult to resolve, but one so closely related to similar issues in substantive due process property claims, that this Court cited a substantive due process case when recognizing the theory under the rubric of inverse condemnation. See *Agins*, 447 U.S. at 260 (citing *Nectow v. Cambridge*, 277 U.S. 183, 188, 72 L. Ed. 842, 48 S. Ct. 447 (1928)). Substantive due process claims are, of course, routinely reserved without question for the court. Thus, it would be far removed from usual practice to charge a jury with the duty to assess the constitutional legitimacy of the government’s objective or the constitutional adequacy of its relationship to the government’s chosen means.

The usual practice makes perfect sense. While juries are not customarily called upon to assume the subtleties of deferential review, courts apply this sort of limited scrutiny in all sorts of contexts and are routinely accorded institutional competence to do it. It therefore should bring no surprise to find that in the taking cases a question whether regulatory action substantially advances a legitimate public aim has more often than not been treated by the federal courts as a

legal issue. See, e.g., *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1092 (CA11 1996) (whether regulatory taking occurred is an issue for the court); *Mid Gulf, Inc. v. Bishop*, 792 F. Supp. 1205, 1213-1214, 1215 (Kan. 1992) (whether city's regulations unreasonable and a taking a question of law for the court); *Gissel v. Kenmare Township*, 512 N.W.2d 470, 474 (N. D. 1994) (necessity for proposed taking a question for the court); *Yegen v. Bismarck*, 291 N.W.2d 422, 424 (N. D. 1980) (taking vel non of private property for public use a question of law). These practices point up the great gulf between the practical realities of taking litigation, and the Court's reliance on the assertion that "in suits sounding in tort for money damages, questions of liability were decided by the jury, rather than the judge, in most cases," ante, at 27.

The Court apparently seeks to distance itself from the ramifications of today's determination. The Court disclaims any attempt to set a "precise demarcation of the respective provinces of judge and jury in determining whether a zoning decision substantially advances legitimate governmental interests." It denies that today's holding would extend to "a broad challenge to the constitutionality of the city's general land-use ordinances or policies," in which case, "the determination whether the statutory purposes were legitimate, or whether the purposes, though legitimate, were furthered by the law or general policy, might well fall within the province of the judge." (And the plurality presumably does not mean to address any Seventh Amendment issue that someone might raise when the government has provided an adequate remedy, for example, by recognizing a compensatory action for inverse condemnation, see ante, at 23, 26.) But the Court's reticence is cold comfort simply because it rests upon distinctions that withstand analysis no better than the tort-law analogies on which the Court's conclusion purports to rest. The narrowness of the Court's intentions cannot, therefore, be accepted as an effective limit on the consequences on its reasoning, from which, I respectfully dissent.

Session 24. Ad Hoc Factual Inquiries

PENN CENTRAL TRANSPORTATION CO. v. NEW YORK CITY **438 U.S. 104 (1978)**

[Review in Session 5]

ANDRUS v. ALLARD **444 U.S. 51 (1979)**

Mr. Justice Brennan delivered the opinion of the Court.

The Eagle Protection Act and the Migratory Bird Treaty Act are conservation statutes designed to prevent the destruction of certain species of birds.⁹⁵ Challenged in

⁹⁵ The Eagle Protection Act, §1, 54 Stat. 250, as amended, as set forth in 16 U. S. C. §668 (a), provides in pertinent part:

“Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined not more than \$5,000 or imprisoned not more than one year or both Provided further, That nothing herein shall be construed to prohibit possession or transportation of any bald eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to June 8, 1940, and that nothing herein shall be construed to prohibit possession or transportation of any golden eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to the addition to this subchapter of the provisions relating to preservation of the golden eagle.”

The Migratory Bird Treaty Act, §2, 40 Stat. 755, as amended, as set forth in 16 U. S. C. §703, similarly provides:

“Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or eggs of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican

this case is the validity of regulations promulgated by appellant Secretary of the Interior that prohibit commercial transactions in parts of birds legally killed before the birds came under the protection of the statutes. The regulations provide in pertinent part:

50 CFR §21.2 (a) (1978):

“Migratory birds, their parts, nests, or eggs, lawfully acquired prior to the effective date of Federal protection under the Migratory Bird Treaty Act . . . may be possessed or transported without a Federal permit, but may not be imported, exported, purchased, sold, bartered, or offered for purchase, sale, trade, or barter”

50 CFR §22.2 (a) (1978):

“Bald eagles, alive or dead, or their parts, nests, or eggs lawfully acquired prior to June 8, 1940, and golden eagles, alive or dead, or their parts, nests, or eggs lawfully acquired prior to October 24, 1962, may be possessed, or transported without a Federal permit, but may not be imported, exported, purchased, sold, traded, bartered, or offered for purchase, sale, trade or barter”

Appellees are engaged in the trade of Indian artifacts: several own commercial enterprises, one is employed by such an enterprise, and one is a professional appraiser. A number of the artifacts are partly composed of the feathers of currently protected birds, but these artifacts existed before the statutory protections came into force. After two of the appellees who had sold “pre-existing” artifacts were prosecuted for violations of the Eagle Protection Act and the Migratory Bird Treaty Act, appellees brought this suit for declaratory and injunctive relief in the District Court for the District of Colorado. The complaint alleged that the statutes do not forbid the sale of appellees’ artifacts insofar as the constituent birds’ parts were obtained prior to the effective dates of the statutes. It further alleged that if the statutes and regulations do apply to such property, they violate the Fifth Amendment.

A three-judge court, convened pursuant to 28 U.S.C. §2282 (1970 ed.), held that because of “grave doubts whether these two acts would be constitutional if they were construed to apply to pre-act bird products,” the Acts were to be interpreted as “not applicable to preexisting, legally-obtained bird parts or products therefrom” App. to Juris. Statement 13a-14a. Accordingly, the court ruled that “the interpretive regulations,

States for the protection of migratory birds and game mammals concluded February 7, 1936, and the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972.”

50 C. F. R. §§21.2 (a) and 22.2 (a) [are] void as unauthorized extensions of the Migratory Bird Treaty Act and the Eagle Protection Act and [are] violative of the [appellees'] Fifth Amendment property rights." Id. at 14a. Judgment was entered declaring "the subject regulations to be invalid and unenforceable as against the [appellees'] property rights in feathers and artifacts owned before the effective date of the subject statute," and enjoining appellants "from any interference with the exercise of such rights, including the rights of sale, barter or exchange." Id. at 16a-17a. We noted probable jurisdiction. 440 U.S. 905 (1979). We reverse.

I

Appellant Secretary of the Interior contends that both the Eagle Protection and Migratory Bird Treaty Acts contemplate regulatory prohibition of commerce in the parts of protected birds, without regard to when those birds were originally taken. Appellees respond that such a prohibition serves no purpose, arguing that statutory protection of wildlife is not furthered by an embargo upon traffic in avian artifacts that existed before the statutory safeguards came into effect.

A

Our point of departure in statutory analysis is the language of the enactment. See *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979). "Though we may not end with the words in construing a disputed statute, one certainly begins there." F. Frankfurter, *Some Reflections on the Reading of Statutes* 16 (1947).

The terms of the Eagle Protection Act plainly must be read as appellant Secretary argues. The sweepingly framed prohibition in §668 (a) makes it unlawful to "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import" protected birds. Congress expressly dealt with the problem of pre-existing bird products by qualifying that general prohibition with the proviso that "nothing herein shall be construed to prohibit possession or transportation" of bald or golden eagle parts taken prior to the effective date of coverage under the Act. (Emphasis supplied.)

In view of the exhaustive and careful enumeration of forbidden acts in §668 (a), the narrow limitation of the proviso to "possession or transportation" compels the conclusion that, with respect to pre-existing artifacts, Congress specifically declined to except any activities other than possession and transportation from the general statutory ban. To read a further exemption for pre-existing artifacts into the Eagle Protection Act, "we would be forced to ignore the ordinary meaning of plain language." *TVA v. Hill*, 437 U.S. 153, 173 (1978). Nor can there be any question of oversight or drafting error. Throughout the statute the distinct concepts of possession, transportation, taking, and sale or purchase are treated with precision. The broad proscriptive provisions of the Eagle Protection Act were consistently framed to encompass a full catalog of prohibited acts,

always including sale or purchase. See §§668 (a), 668 (b), 668b (b). In contrast, the exemptions created were specifically limited to possession or transportation, §668 (a), taking, §668a, n.6 or taking, possession, or transportation, *ibid*.

The prohibition against the sale of bird parts lawfully taken before the effective date of federal protection is fully consonant with the purposes of the Eagle Protection Act. It was reasonable for Congress to conclude that the possibility of commercial gain presents a special threat to the preservation of the eagles because that prospect creates a powerful incentive both to evade statutory prohibitions against taking birds and to take a large volume of birds. The legislative draftsmen might well view evasion as a serious danger because there is no sure means by which to determine the age of bird feathers; feathers recently taken can easily be passed off as having been obtained long ago.

B

The fundamental prohibition in the Migratory Bird Treaty Act is couched in language as expansive as that employed in the Eagle Protection Act. Title 16 U. S. C. §703 provides:

“[unless] and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful . . . to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export.”

But the Migratory Bird Treaty Act contains no explicit exception for the possession or transportation of bird parts obtained before the federal protection became effective: that exception is created by the Secretary’s regulation. 50 CFR §21.2 (1978). Unlike our analysis under the Eagle Protection Act, therefore, reliance upon the negative inference from a narrow statutory exemption for the transportation or possession of pre-existing artifacts is precluded.⁹⁶ Nevertheless, the text, context, and purpose of the Migratory Bird Treaty Act support the Secretary’s interpretative regulations of that enactment.

⁹⁶ The Migratory Bird Treaty Act, passed in 1918, 40 Stat. 755, predates the Eagle Protection Act by 22 years. Originally the legislation implementing a Migratory Bird Convention between Great Britain (on behalf of Canada) and the United States, the Act now implements similar treaties between this country and other nations. See generally Coggins & Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 *Colo. L. Rev.* 165, 169-174 (1979); M. Bean, *The Evolution of National Wildlife Law* 68-74 (1977).

On its face, the comprehensive statutory prohibition is naturally read as forbidding transactions in all bird parts, including those that compose pre-existing artifacts. While there is no doubt that regulations may exempt transactions from the general ban, nothing in the statute requires an exception for the sale of pre-existing artifacts. And no such statutory exception can be implied.⁹⁷ When Congress wanted an exemption from the statutory prohibition, it provided so in unmistakable terms. Cf. 16 U. S. C. §711.

We are therefore persuaded that the Migratory Bird Treaty Act empowers the Secretary of the Interior to bar commercial transactions in covered bird parts in spite of the fact that the parts were lawfully taken before the onset of federal protection. We see no indication to the contrary. It follows that the Secretary could properly permit the possession or transportation, and not the sale or purchase, of pre-existing bird artifacts. Accordingly, we disagree with the District Court's interpretation of the Act as inapplicable to pre-existing legally obtained bird parts.

II

We also disagree with the District Court's holding that, as construed to authorize the prohibition of commercial transactions in pre-existing avian artifacts, the Eagle Protection and Migratory Bird Treaty Acts violate appellees' Fifth Amendment property rights because the prohibition wholly deprives them of the opportunity to earn a profit from those relics.⁹⁸ *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-128 (1978), is our most recent exposition on the Takings Clause. That exposition need not be repeated at length here. Suffice it to say that government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase. “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

⁹⁷ Our interpretation of the statute does not depart from any course of construction adopted by other courts. *United States v. Marks*, 4 F.2d 420 (SD Tex. 1925), did hold it impermissible to punish the sale of birds taken before the Migratory Bird Treaty Act was passed. But that ruling rested upon the court's view that Congress' authority to regulate the birds must rest wholly upon the treaty rather than the commerce power. Whatever the logic of that ruling, the underlying assumption that the national commerce power does not reach migratory wildlife is clearly flawed. See, e. g., *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

⁹⁸ Although this argument appears to have been cast in the District Court in terms of economic substantive due process, before this Court appellees have used the terminology of the Takings Clause.

general law.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); see *Penn Central*, *supra*, at 124.

The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of “justice and fairness.” *Ibid*; see *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. Formulas and factors have been developed in a variety of settings. See *Penn Central*, *supra*, at 123-128. Resolution of each case, however, ultimately calls as much for the exercise of judgment as for the application of logic.

The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least 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. Compare *Penn Central*, *supra*, at 130-131, and *United States v. Twin City Power Co.*, 350 U.S. 222 (1956), with *Pennsylvania Coal Co. v. Mahon*, *supra*, and *United States v. Virginia Electric & Power Co.*, 365 U.S. 624 (1961). See also Michelman, “Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law,” 80 *Harv. L. Rev.* 1165, 1230-1233 (1967). In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.

It is, to be sure, undeniable that the regulations here prevent the most profitable use of appellees’ property. Again, however, that is not dispositive. When we review regulation, a reduction in the value of property is not necessarily equated with a taking. In the instant case, it is not clear that appellees will be unable to derive economic benefit from the artifacts; for example, they might exhibit the artifacts for an admissions charge. At any rate, loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests. Cf., e. g., *Fuller & Perdue, The Reliance Interest in Contract Damages* (pt. 1), 46 *Yale L. J.* 52 (1936).

Regulations that bar trade in certain goods have been upheld against claims of unconstitutional taking. For example, the Court has sustained regulations prohibiting the sale of alcoholic beverages despite the fact that individuals were left with previously acquired stocks. *Everard’s Breweries v. Day*, 265 U.S. 545 (1924), involved a federal

statute that forbade the sale of liquors manufactured before passage of the statute. The claim of a taking in violation of the Fifth Amendment was tersely rejected. *Id.* at 563.

It is true that appellees must bear the costs of these regulations. But, within limits, that is a burden borne to secure “the advantage of living and doing business in a civilized community.” *Pennsylvania Coal Co. v. Mahon*, *supra*, at 422 (Brandeis, J., dissenting). We hold that the simple prohibition of the sale of lawfully acquired property in this case does not effect a taking in violation of the Fifth Amendment.

Reversed.

RUCKELSHAUS v. MONSANTO
467 U.S. 986 (1984)

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case, we are asked to review a United States District Court's determination that several provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, as amended, 7 U. S. C. §136 et seq., are unconstitutional. The provisions at issue authorize the Environmental Protection Agency (EPA) to use data submitted by an applicant for registration of a pesticide in evaluating the application of a subsequent applicant, and to disclose publicly some of the submitted data.

I

Over the past century, the use of pesticides to control weeds and minimize crop damage caused by insects, disease, and animals has become increasingly more important for American agriculture. While pesticide use has led to improvements in productivity, it has also led to increased risk of harm to humans and the environment. Although the Federal Government has regulated pesticide use for nearly 75 years, FIFRA was first adopted in 1947. 61 Stat. 163.

In 1970, the Department of Agriculture's FIFRA responsibilities were transferred to the then newly created Environmental Protection Agency, whose Administrator is the appellant in this case. Because of mounting public concern about the safety of pesticides and their effect on the environment and because of a growing perception that the existing legislation was not equal to the task of safeguarding the public interest, Congress undertook a comprehensive revision of FIFRA through the adoption of the Federal Environmental Pesticide Control Act of 1972, 86 Stat. 973. The amendments transformed FIFRA from a labeling law into a comprehensive regulatory statute. As amended, FIFRA regulated the use, as well as the sale and labeling, of pesticides; regulated pesticides produced and sold in both intrastate and interstate commerce; provided for review, cancellation, and suspension of registration; and gave EPA greater enforcement authority. Congress also added a new criterion for registration: that EPA determine that the pesticide will not cause "unreasonable adverse effects on the environment." §§3(c)(5)(C) and (D), 86 Stat. 980-981.

For purposes of this litigation, the most significant of the 1972 amendments pertained to the pesticide-registration procedure and the public disclosure of information learned through that procedure. Congress added to FIFRA a new section governing public disclosure of data submitted in support of an application for registration.

The 1972 amendments also included a provision that allowed EPA to consider data submitted by one applicant for registration in support of another application

pertaining to a similar chemical, provided the subsequent applicant offered to compensate the applicant who originally submitted the data. In effect, the provision instituted a mandatory data-licensing scheme. The amount of compensation was to be negotiated by the parties, or, in the event negotiations failed, was to be determined by EPA, subject to judicial review upon the instigation of the original data submitter.

Congress enacted other amendments to FIFRA in 1978. [A]s amended in 1978, applicants are granted a 10-year period of exclusive use for data on new active ingredients contained in pesticides registered after September 30, 1978. §3(c)(1)(D)(i). All other data submitted after December 31, 1969, may be cited and considered in support of another application for 15 years after the original submission if the applicant offers to compensate the original submitter. §3(c)(1)(D)(ii). If the parties cannot agree on the amount of compensation, either may initiate a binding arbitration proceeding.

II

Appellee Monsanto Company (Monsanto) is an inventor, developer, and producer of various kinds of chemical products, including pesticides. Monsanto, headquartered in St. Louis County, Mo., sells in both domestic and foreign markets. It is one of a relatively small group of companies that invent and develop new active ingredients for pesticides and conduct most of the research and testing with respect to those ingredients.

The District Court found that development of a potential commercial pesticide candidate typically requires the expenditure of \$5 million to \$15 million annually for several years. The development process may take between 14 and 22 years, and it is usually that long before a company can expect any return on its investment. *Id.*, at 555. For every manufacturing-use pesticide the average company finally markets, it will have screened and tested 20,000 others. Monsanto has a significantly better-than-average success rate; it successfully markets 1 out of every 10,000 chemicals tested. *Ibid.*

Monsanto, like any other applicant for registration of a pesticide, must present research and test data supporting its application. The District Court found that Monsanto had incurred costs in excess of \$23.6 million in developing the health, safety, and environmental data submitted by it under FIFRA. *Id.*, at 560. The information submitted with an application usually has value to Monsanto beyond its instrumentality in gaining that particular application. Monsanto uses this information to develop additional end-use products and to expand the uses of its registered products. The information would also be valuable to Monsanto's competitors. For that reason, Monsanto has instituted stringent security measures to ensure the secrecy of the data. *Ibid.*

It is this health, safety, and environmental data that Monsanto sought to protect by bringing this suit. The District Court found that much of these data “[contain] or [relate]

to trade secrets as defined by the Restatement of Torts and Confidential, commercial information.” *Id.*, at 562.

Monsanto brought suit in District Court, seeking injunctive and declaratory relief from the operation of the data-consideration provisions of FIFRA’s §3(c)(1)(D), and the data-disclosure provisions of FIFRA’s §10 and the related §3(c)(2)(A). Monsanto alleged that all of the challenged provisions effected a “taking” of property without just compensation, in violation of the Fifth Amendment. In addition, Monsanto alleged that the data-consideration provisions violated the Amendment because they effected a taking of property for a private, rather than a public, purpose. Finally, Monsanto alleged that the arbitration scheme provided by §3(c)(1)(D)(ii) violates the original submitter’s due process rights and constitutes an unconstitutional delegation of judicial power.

After a bench trial, the District Court concluded that Monsanto possessed property rights in its submitted data, specifically including the right to exclude others from the enjoyment of such data by preventing their unauthorized use and by prohibiting their disclosure. 564 F.Supp., at 566. The court found that the challenged data-consideration provisions “give Monsanto’s competitors a free ride at Monsanto’s expense.” *Ibid.* The District Court reasoned that §3(c)(1)(D) appropriated Monsanto’s fundamental right to exclude, and that the effect of that appropriation is substantial. The court further found that Monsanto’s property was being appropriated for a private purpose and that this interference was much more significant than the public good that the appropriation might serve. 564 F.Supp., at 566-567.

The District Court also found that operation of the disclosure provisions of FIFRA constituted a taking of Monsanto’s property. The cost incurred by Monsanto when its property is “permanently committed to the public domain and thus effectively destroyed” was viewed by the District Court as significantly outweighing any benefit to the general public from having the ability to scrutinize the data, for the court seemed to believe that the general public could derive all the assurance it needed about the safety and effectiveness of a pesticide from EPA’s decision to register the product and to approve the label. *Id.*, at 567, and n. 4.

After finding that the data-consideration provisions operated to effect a taking of property, the District Court found that the compulsory binding-arbitration scheme set forth in §3(c)(1)(D)(ii) did not adequately provide compensation for the property taken. The court found the arbitration provision to be arbitrary and vague, reasoning that the statute does not give arbitrators guidance as to the factors that enter into the concept of just compensation, and that judicial review is foreclosed except in cases of fraud. 564 F.Supp., at 567. The District Court also found that the arbitration scheme was infirm because it did not meet the requirements of Art. III of the Constitution. *Ibid.* Finally, the

court found that a remedy under the Tucker Act was not available for the deprivations of property effected by §§3 and 10. 564 F.Supp., at 567-568.

The District Court therefore declared §§3(c)(1)(D), 3(c)(2)(A), 10(b), and 10(d) of FIFRA, as amended by the Federal Pesticide Act of 1978, to be unconstitutional, and permanently enjoined EPA from implementing or enforcing those We noted probable jurisdiction. 464 U.S. 890 (1983).

III

In deciding this case, we are faced with four questions: (1) Does Monsanto have a property interest protected by the Fifth Amendment's Taking Clause in the health, safety, and environmental data it has submitted to EPA? (2) If so, does EPA's use of the data to evaluate the applications of others or EPA's disclosure of the data to qualified members of the public effect a taking of that property interest? (3) If there is a taking, is it a taking for a public use? (4) If there is a taking for a public use, does the statute adequately provide for just compensation?

For purposes of this case, EPA has stipulated that "Monsanto has certain property rights in its information, research and test data that it has submitted under FIFRA to EPA and its predecessor agencies which may be protected by the Fifth Amendment to the Constitution of the United States.". Since the exact import of that stipulation is not clear, we address the question whether the data at issue here can be considered property for the purposes of the Taking Clause of the Fifth Amendment.

This Court never has squarely addressed the applicability of the protections of the Taking Clause of the Fifth Amendment to commercial data of the kind involved in this case. In answering the question now, we are mindful of the basic axiom that "[property] 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). Monsanto asserts that the health, safety, and environmental data it has submitted to EPA are property under Missouri law, which recognizes trade secrets, as defined in §757, Comment b, of the Restatement of Torts, as property. The Restatement defines a trade secret as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." §757, Comment b. And the parties have stipulated that much of the information, research, and test data that Monsanto has submitted under FIFRA to EPA "contains or relates to trade secrets as defined by the Restatement of Torts."

Because of the intangible nature of a trade secret, the extent of the property right therein is defined by the extent to which the owner of the secret protects his interest from disclosure to others. Information that is public knowledge or that is generally known in an industry cannot be a trade secret. Restatement of Torts, *supra*. If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished. See Harrington, *supra*; 1 R. Milgrim, Trade Secrets §1.01[2] (1983).

Trade secrets have many of the characteristics of more tangible forms of property. A trade secret is assignable. A trade secret can form the res of a trust, Restatement (Second) of Trusts §82, Comment e (1959); 1 A. Scott, Law of Trusts §82.5, p. 703 (3d ed. 1967), and it passes to a trustee in bankruptcy. See *In re Uniservices, Inc.*, 517 F.2d 492, 496-497 (CA7 1975).

Even the manner in which Congress referred to trade secrets in the legislative history of FIFRA supports the general perception of their property-like nature. In discussing the 1978 amendments to FIFRA, Congress recognized that data developers like Monsanto have a “proprietary interest” in their data. S. Rep. No. 95-334, at 31. Further, Congress reasoned that submitters of data are “entitled” to “compensation” because they “have legal ownership of the data.” This general perception of trade secrets as property is consonant with a notion of “property” that extends beyond land and tangible goods and includes the products of an individual’s “labour and invention.” 2 W. Blackstone, Commentaries 405; see generally J. Locke, *The Second Treatise of Civil Government*, ch. 5 (J. Gough ed. 1947).

Although this Court never has squarely addressed the question whether a person can have a property interest in a trade secret, which is admittedly intangible, the Court has found other kinds of intangible interests to be property for purposes of the Fifth Amendment’s Taking Clause. See, e. g., *Armstrong v. United States*, 364 U.S. 40, 44, 46 (1960) (materialman’s lien provided for under Maine law protected by Taking Clause); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602 (1935) (real estate lien protected); *Lynch v. United States*, 292 U.S. 571, 579 (1934) (valid contracts are property within meaning of the Taking Clause). That intangible property rights protected by state law are deserving of the protection of the Taking Clause has long been implicit in the thinking of this Court:

“It is conceivable that [the term ‘property’ in the Taking Clause] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen’s relation to the physical thing, as the right to

possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.” *United States v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945).

We therefore hold that to the extent that Monsanto has an interest in its health, safety, and environmental data cognizable as a trade-secret property right under Missouri law, that property right is protected by the Taking Clause of the Fifth Amendment.

IV

Having determined that Monsanto has a property interest in the data it has submitted to EPA, we confront the difficult question whether a “taking” will occur when EPA discloses those data or considers the data in evaluating another application for registration. The question of what constitutes a “taking” is one with which this Court has wrestled on many occasions. It has never been the rule that only governmental acquisition or destruction of the property of an individual constitutes a taking, for

“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. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.” *United States v. General Motors Corp.*, 323 U.S., at 378.

See also *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

As has been admitted on numerous occasions, “this Court has generally ‘been unable to develop any “set formula” for determining when “justice and fairness” require that economic injuries caused by public action’” must be deemed a compensable taking. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). The inquiry into whether a taking has occurred is essentially an “ad hoc, factual” inquiry. *Kaiser Aetna*, 444 U.S., at 175. The Court, however, has identified several factors that should be taken into account when determining whether a governmental action has gone beyond “regulation” and effects a “taking.” Among those factors are: “the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.” *PruneYard Shopping Center v. Robins*, 447 U.S., at 83; see *Kaiser Aetna*, 444 U.S., at 175; *Penn Central*, 438 U.S., at 124. It is to the last of these three factors that we now direct our attention, for we find that the force of this factor is so overwhelming, at least with respect to certain of the data submitted by Monsanto to EPA, that it disposes of the taking question regarding those data.

A

A “reasonable investment-backed expectation” must be more than a “unilateral expectation or an abstract need.” *Webb’s Fabulous Pharmacies*, 449 U.S., at 161. We find that with respect to any health, safety, and environmental data that Monsanto submitted to EPA after the effective date of the 1978 FIFRA amendments—that is, on or after October 1, 1978—Monsanto could not have had a reasonable, investment-backed expectation that EPA would keep the data confidential beyond the limits prescribed in the amended statute itself. Monsanto was on notice of the manner in which EPA was authorized to use and disclose any data turned over to it by an applicant for registration.

Thus, with respect to any data submitted to EPA on or after October 1, 1978, Monsanto knew that, for a period of 10 years from the date of submission, EPA would not consider those data in evaluating the application of another without Monsanto’s permission. §3(c)(1)(D)(i). It was also aware, however, that once the 10-year period had expired, EPA could use the data without Monsanto’s permission. §§3(c)(1)(D)(ii) and (iii). Monsanto was further aware that it was entitled to an offer of compensation from the subsequent applicant only until the end of the 15th year from the date of submission. §3(c)(1)(D)(iii). In addition, Monsanto was aware that information relating to formulae of products could be revealed by EPA to “any Federal agency consulted and [could] be revealed at a public hearing or in findings of fact” issued by EPA “when necessary to carry out” EPA’s duties under FIFRA. §10(b). The statute also gave Monsanto notice that much of the health, safety, and efficacy data provided by it could be disclosed to the general public at any time. §10(d). If, despite the data-consideration and data-disclosure provisions in the statute, Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment-backed expectations are disturbed when EPA acts to use or disclose the data in a manner that was authorized by law at the time of the submission.

Thus, as long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking. See *Corn Products Refining Co. v. Eddy*, 249 U.S. 427, 431-432 (1919) (“The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the State, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth”); see also *Westinghouse Electric Corp. v. United States Nuclear Regulatory Comm’n*, 555 F.2d 82, 95 (CA3 1977).

B

Prior to the 1972 amendments, FIFRA was silent with respect to EPA's authorized use and disclosure of data submitted to it in connection with an application for registration. Neither FIFRA nor any other provision of law gave EPA authority to disclose data obtained from Monsanto. But in an industry that long has been the focus of great public concern and significant government regulation, the possibility was substantial that the Federal Government, which had thus far taken no position on disclosure of health, safety, and environmental data concerning pesticides, upon focusing on the issue, would find disclosure to be in the public interest. Thus, with respect to data submitted to EPA in connection with an application for registration prior to October 22, 1972, [there was] no basis for a reasonable investment-backed expectation that data submitted to EPA would remain confidential.

C

The situation may be different, however, with respect to data submitted by Monsanto to EPA during the period from October 22, 1972, through September 30, 1978. Under the statutory scheme then in effect, a submitter was given an opportunity to protect its trade secrets from disclosure by designating them as trade secrets at the time of submission. When Monsanto provided data to EPA during this period, it was with the understanding, embodied in FIFRA, that EPA was free to use any of the submitted data that were not trade secrets in considering the application of another, provided that EPA required the subsequent applicant to pay "reasonable compensation" to the original submitter. §3(c)(1)(D), 86 Stat. 979. But the statute also gave Monsanto explicit assurance that EPA was prohibited from disclosing publicly, or considering in connection with the application of another, any data submitted by an applicant if both the applicant and EPA determined the data to constitute trade secrets. §10, 86 Stat. 989. Thus, with respect to trade secrets submitted under the statutory regime in force between the time of the adoption of the 1972 amendments and the adoption of the 1978 amendments, the Federal Government had explicitly guaranteed to Monsanto and other registration applicants an extensive measure of confidentiality and exclusive use. This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation. If EPA, consistent with the authority granted it by the 1978 FIFRA amendments, were now to disclose trade-secret data or consider those data in evaluating the application of a subsequent applicant in a manner not authorized by the version of FIFRA in effect between 1972 and 1978, EPA's actions would frustrate Monsanto's reasonable investment-backed expectation with respect to its control over the use and dissemination of the data it had submitted.

The right to exclude others is generally "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna*, 444 U.S., at

176. With respect to a trade secret, the right to exclude others is central to the very definition of the property interest. Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data. That the data retain usefulness for Monsanto even after they are disclosed—for example, as bases from which to develop new products or refine old products, as marketing and advertising tools, or as information necessary to obtain registration in foreign countries—is irrelevant to the determination of the economic impact of the EPA action on Monsanto’s property right. The economic value of that property right lies in the competitive advantage over others that Monsanto enjoys by virtue of its exclusive access to the data, and disclosure or use by others of the data would destroy that competitive edge.

EPA encourages us to view the situation not as a taking of Monsanto’s property interest in the trade secrets, but as a “pre-emption” of whatever property rights Monsanto may have had in those trade secrets. The agency argues that the proper functioning of the comprehensive FIFRA registration scheme depends upon its uniform application to all data. Thus, it is said, the Supremacy Clause dictates that the scheme not vary depending on the property law of the State in which the submitter is located. *Id.*, at 28. This argument proves too much. If Congress can “pre-empt” state property law in the manner advocated by EPA, then the Taking Clause has lost all vitality. This Court has stated that a sovereign, “by ipse dixit, may not transform private property into public property without compensation. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.” *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S., at 164.

In summary, we hold that EPA’s consideration or disclosure of data submitted by Monsanto to the agency prior to October 22, 1972, or after September 30, 1978, does not effect a taking. We further hold that EPA consideration or disclosure of health, safety, and environmental data will constitute a taking if Monsanto submitted the data to EPA between October 22, 1972, and September 30, 1978; the data constituted trade secrets under Missouri law; Monsanto had designated the data as trade secrets at the time of its submission; the use or disclosure conflicts with the explicit assurance of confidentiality or exclusive use contained in the statute during that period; and the operation of the arbitration provision does not adequately compensate for the loss in market value of the data that Monsanto suffers because of EPA’s use or disclosure of the trade secrets.

V

We must next consider whether any taking of private property that may occur by operation of the data-disclosure and data-consideration provisions of FIFRA is a taking for a “public use.” We have recently stated that the scope of the “public use” requirement of the Taking Clause is “coterminous with the scope of a sovereign’s police powers.”

Hawaii Housing Authority v. Midkiff, ante, at 240; see Berman v. Parker, 348 U.S. 26, 33 (1954). The role of the courts in second-guessing the legislature’s judgment of what constitutes a public use is extremely narrow. Midkiff, supra; Berman, supra, at 32.

So long as the taking has a conceivable public character, “the means by which it will be attained is . . . for Congress to determine. “ Berman, 348 U.S., at 33. Here, the public purpose behind the data-consideration provisions is clear from the legislative history. Congress believed that the provisions would eliminate costly duplication of research and streamline the registration process, making new end-use products available to consumers more quickly. Allowing applicants for registration, upon payment of compensation, to use data already accumulated by others, rather than forcing them to go through the time-consuming process of repeating the research, would eliminate a significant barrier to entry into the pesticide market, thereby allowing greater competition among producers of end-use products. Such a procompetitive purpose is well within the police power of Congress. See Midkiff, ante, at 241-242.

We therefore hold that any taking of private property that may occur in connection with EPA’s use or disclosure of data submitted to it by Monsanto between October 22, 1972, and September 30, 1978, is a taking for a public use.

VI

Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 697, n. 18 (1949). The Fifth Amendment does not require that compensation precede the taking. Hurley v. Kincaid, 285 U.S. 95, 104 (1932). Generally, an individual claiming that the United States has taken his property can seek just compensation under the Tucker Act, 28 U. S. C. §1491. United States v. Causby, 328 U.S. 256, 267 (1946) (“If there is a taking, the claim is ‘founded upon the Constitution’ and within the jurisdiction of the Court of Claims to hear and determine”); Yearsley v. Ross Construction Co., 309 U.S. 18, 21 (1940).

Here, contrary to Monsanto’s claim, it is entirely possible for the Tucker Act and FIFRA to co-exist. That is, FIFRA does not withdraw the possibility of a Tucker Act remedy. In any event, any taking claim under FIFRA is one “founded . . . upon the Constitution,” and is thus remediable under the Tucker Act. The District Court erred in enjoining the taking.

VII

Because we hold that the Tucker Act is available as a remedy for any uncompensated taking Monsanto may suffer as a result of the operation of the challenged

provisions of FIFRA, we conclude that Monsanto's challenges to the constitutionality of the arbitration and compensation scheme are not ripe for our resolution.

VIII

We find no constitutional infirmity in the challenged provisions of FIFRA. Operation of the provisions may effect a taking with respect to certain health, safety, and environmental data constituting trade secrets under state law and designated by Monsanto as trade secrets upon submission to EPA between October 22, 1972, and September 30, 1978. But whatever taking may occur is one for a public use, and a Tucker Act remedy is available to provide Monsanto with just compensation. Once a taking has occurred, the proper forum for Monsanto's claim is the Claims Court. Monsanto's challenges to the constitutionality of the arbitration procedure are not yet ripe for review. The judgment of the District Court is therefore vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

HODEL v. IRVING
481 U.S. 704 (1987)

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.

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, conditioned 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 descend [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 decedents owned 41 fractional interests subject to the provisions of §207. 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.

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.

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 represents 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 \$0.01 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 \$0.000418. 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).

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. The character of the Government regulation here is extraordinary. 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. 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. Cf. 25 U. S. C. §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.

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; 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.

KEYSTONE BITUMINOUS COAL ASSN. v. DeBENEDICTIS
480 U.S. 470 (1987)

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.... 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 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. It often causes substantial damage 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. 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.

Despite what their name may suggest, neither of the "full extraction" mining methods currently used in western Pennsylvania 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. Since 1966, Pennsylvania has placed an additional set of restrictions on the amount of coal that may be 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.... Since 1966 the DER has applied 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.

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

In the portions of the complaint that are relevant to us, petitioners alleged that both §4 of the Subsidence Act, as implemented by the 50% rule, and §6 of the Subsidence Act, constitute a taking of their private property without compensation in violation of the Fifth and Fourteenth Amendments. They also alleged that §6 impairs their contractual agreements in violation of Article I, §10, of the Constitution.

III

Petitioners assert that disposition of their takings claim 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.

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. 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." *Agin 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 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 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 "[taken] 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.

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 "[because] 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 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.

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 is whether the 'mere enactment' of the Surface Mining Act constitutes a taking.

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.

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 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."

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.

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*. The 27 million tons of coal do not constitute a separate segment of property for takings law purposes. There is no basis for treating the less than 2% of petitioners' coal as a separate parcel of property.

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.

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. 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.

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. 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, petitioners' facial attack under the Takings Clause must surely fail.

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. 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. It is well settled that the prohibition against impairing the obligation of contracts is not to be read literally. The context in which the Contracts Clause is found, the historical setting in which it was adopted, 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.

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.

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 with some previous owners of property generations ago, 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.

As we explained more fully above, the Subsidence Act plainly survives scrutiny under our standards for evaluating impairments of private contracts. 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.

JUSTICE REHNQUIST, with whom JUSTICE POWELL, JUSTICE O'CONNOR, and JUSTICE SCALIA join, dissenting.

More than 50 years ago, this Court determined the constitutionality of Pennsylvania's Kohler Act as it affected the property interests of coal mine operators. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). The Bituminous Mine Subsidence and Land Conservation Act approved today effects an interference with such interests in a strikingly similar manner. The Court finds at least two reasons why this case is different. First, we are told, "the character of the governmental action involved here leans heavily against finding a taking." *Ante*, at 485. Second, the Court concludes that the Subsidence Act neither "makes it impossible for petitioners to profitably engage in their business," nor involves "undue interference with [petitioners'] investment-backed expectations." *Ibid*. Neither of these conclusions persuades me that this case is different, and I believe that the Subsidence Act works a taking of petitioners' property interests. Examination of the relevant factors presented here convinces me that the differences between them and those in *Pennsylvania Coal* verge on the trivial.

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.

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. 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."

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. 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. 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.

Session 25. Exactions

Regulators sometimes condition permits on concessions from the applicant. When considering the legitimacy of this practice the Court admixes constitutional limits traditionally imposed on the taxing power with those imposed on the police power.

NOLLAN v. CALIFORNIA COASTAL COMMISSION **483 U.S. 825 (1987)**

JUSTICE SCALIA delivered the opinion of the Court.

James and Marilyn Nollan appeal from a decision of the California Court of Appeal ruling that the California Coastal Commission could condition its grant of permission to rebuild their house on their transfer to the public of an easement across their beachfront property. 177 Cal. App. 3d 719, 223 Cal. Rptr. 28 (1986). The California court rejected their claim that imposition of that condition violates the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment. We noted probable jurisdiction. 479 U.S. 913 (1986).

I

The Nollans own a beachfront lot in Ventura County, California. A quarter-mile north of their property is Faria County Park, an oceanside public park with a public beach and recreation area. Another public beach area, known locally as “the Cove,” lies 1,800 feet south of their lot. A concrete seawall approximately eight feet high separates the beach portion of the Nollans’ property from the rest of the lot. The historic mean high tide line determines the lot’s oceanside boundary.

The Nollans originally leased their property with an option to buy. The building on the lot was a small bungalow, totaling 504 square feet, which for a time they rented to summer vacationers. After years of rental use, however, the building had fallen into disrepair, and could no longer be rented out.

The Nollans’ option to purchase was conditioned on their promise to demolish the bungalow and replace it. In order to do so, under Cal. Pub. Res. Code Ann. §§30106, 30212, and 30600 (West 1986), they were required to obtain a coastal development permit from the California Coastal Commission. On February 25, 1982, they submitted a permit application to the Commission in which they proposed to demolish the existing structure and replace it with a three-bedroom house in keeping with the rest of the neighborhood.

The Nollans were informed that their application had been placed on the administrative calendar, and that the Commission staff had recommended that the permit be granted subject to

the condition that they allow the public an easement to pass across a portion of their property bounded by the mean high tide line on one side, and their seawall on the other side. This would make it easier for the public to get to Faria County Park and the Cove. The Nollans protested imposition of the condition, but the Commission overruled their objections and granted the permit subject to their recordation of a deed restriction granting the easement.

The Commission . . . found that the new house would increase blockage of the view of the ocean, thus contributing to the development of “a ‘wall’ of residential structures” that would prevent the public “psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit.” The new house would also increase private use of the shorefront. These effects of construction of the house, along with other area development, would cumulatively “burden the public’s ability to traverse to and along the shorefront.” Therefore the Commission could properly require the Nollans to offset that burden by providing additional lateral access to the public beaches in the form of an easement across their property.

The Nollans filed a supplemental petition for a writ of administrative mandamus with the Superior Court, in which they argued that imposition of the access condition violated the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment. The Superior Court . . . granted the writ of mandamus and directed that the permit condition be struck.

The Commission appealed to the California Court of Appeal. While that appeal was pending, the Nollans satisfied the condition on their option to purchase by tearing down the bungalow and building the new house, and bought the property. They did not notify the Commission that they were taking that action.

The Court of Appeal reversed the Superior Court. 177 Cal. App. 3d 719, 223 Cal. Rptr. 28 (1986). It . . . ruled that that requirement did not violate the Constitution under the reasoning of an earlier case of the Court of Appeal, *Grupe v. California Coastal Comm’n*, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985). In that case, the court had found that so long as a project contributed to the need for public access, even if the project standing alone had not created the need for access, and even if there was only an indirect relationship between the access exacted and the need to which the project contributed, imposition of an access condition on a development permit was sufficiently related to burdens created by the project to be constitutional. It ruled that the Nollans’ taking claim also failed because, although the condition diminished the value of the Nollans’ lot, it did not deprive them of all reasonable use of their property.

The Nollans appealed to this Court

II

Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather (as Justice Brennan contends) "a mere restriction on its use," is to use words in a manner that deprives them of all their ordinary meaning. We think a "permanent physical occupation" has occurred where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.⁹⁹

Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome. We have long recognized that land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land," *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). See also *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978) ("[A] use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose"). Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter. They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements (scenic zoning; landmark preservation; residential zoning).

The Commission argues that among these permissible purposes are protecting the public's ability to see the beach, assisting the public in overcoming the "psychological barrier" to using the beach created by a developed shorefront, and preventing congestion on the public beaches. We assume, without deciding, that this is so—in which case the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would

⁹⁹ If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens 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) . . . But that is not the basis of the Nollans' challenge here.

substantially impede these purposes, unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking.

The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree. Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere.

Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute \$100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a \$100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster. Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land-use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion." *J. E. D. Associates, Inc. v. Atkinson*, 121 N. H. 581, 584, 432 A. 2d 12, 14-15

(1981); see Brief for United States as Amicus Curiae 22, and n. 20. See also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S., at 439, n. 17.¹⁰⁰

III

The Commission claims that it concedes as much, and that we may sustain the condition at issue here by finding that it is reasonably related to the public need or burden that the Nollans' new house creates or to which it contributes. We can accept, for purposes of discussion, the Commission's proposed test as to how close a "fit" between the condition and the burden is required, because we find that this case does not meet even the most untailed standards. The Commission's principal contention to the contrary essentially turns on a play on the word "access." The Nollans' new house, the Commission found, will interfere with "visual access" to the beach. That in turn (along with other shorefront development) will interfere with the desire of people who drive past the Nollans' house to use the beach, thus creating a "psychological barrier" to "access." The Nollans' new house will also, by a process not altogether clear from the Commission's opinion but presumably potent enough to more than offset the effects of the psychological barrier, increase the use of the public beaches, thus creating the need for more "access." These burdens on "access" would be alleviated by a requirement that the Nollans provide "lateral access" to the beach.

Rewriting the argument to eliminate the play on words makes clear that there is nothing to it. It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house. We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land-use power for any of these purposes.

We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "substantial advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a

¹⁰⁰ One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served than would result from more lenient (but nontradeable) development restrictions. Thus, the importance of the purpose underlying the prohibition not only does not justify the imposition of unrelated conditions for eliminating the prohibition, but positively militates against the practice.

condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.

Reversed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Appellants in this case sought to construct a new dwelling on their beach lot that would both diminish visual access to the beach and move private development closer to the public tidelands. The Commission reasonably concluded that such “buildout,” both individually and cumulatively, threatens public access to the shore. It sought to offset this encroachment by obtaining assurance that the public may walk along the shoreline in order to gain access to the ocean. The Court finds this an illegitimate exercise of the police power, because it maintains that there is no reasonable relationship between the effect of the development and the condition imposed.

The first problem with this conclusion is that the Court imposes a standard of precision for the exercise of a State’s police power that has been discredited for the better part of this century. Furthermore, even under the Court’s cramped standard, the permit condition imposed in this case directly responds to the specific type of burden on access created by appellants’ development. Finally, a review of those factors deemed most significant in takings analysis makes clear that the Commission’s action implicates none of the concerns underlying the Takings Clause. The Court has thus struck down the Commission’s reasonable effort to respond to intensified development along the California coast, on behalf of landowners who can make no claim that their reasonable expectations have been disrupted. The Court has, in short, given appellants a windfall at the expense of the public.

For these reasons, I respectfully dissent.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

[omitted]

DOLAN v. CITY OF TIGARD
512 U.S. 374 (1994)

REHNQUIST, C.J., delivered the opinion of the Court, in which O’CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN and GINSBURG, JJ., joined. SOUTER, J., filed a dissenting opinion.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner challenges the decision of the Oregon Supreme Court which held that the city of Tigard could condition the approval of her building permit on the dedication of a portion of her property for flood control and traffic improvements. 317 Ore. 110, 854 P. 2d 437 (1993). We granted certiorari to resolve a question left open by our decision in *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987), of what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development.

I

The State of Oregon enacted a comprehensive land use management program in 1973. Ore. Rev. Stat. §§197.005-197.860 (1991). The program required all Oregon cities and counties to adopt new comprehensive land use plans that were consistent with the statewide planning goals. §§197.175(1), 197.250. The plans are implemented by land use regulations which are part of an integrated hierarchy of legally binding goals, plans, and regulations. §§197.175, 197.175(2)(b). Pursuant to the State’s requirements, the city of Tigard, a community of some 30,000 residents on the southwest edge of Portland, developed a comprehensive plan and codified it in its Community Development Code (CDC). The CDC requires property owners in the area zoned Central Business District to comply with a 15% open space and landscaping requirement, which limits total site coverage, including all structures and paved parking, to 85% of the parcel. After the completion of a transportation study that identified congestion in the Central Business District as a particular problem, the city adopted a plan for a pedestrian/bicycle pathway intended to encourage alternatives to automobile transportation for short trips. The CDC requires that new development facilitate this plan by dedicating land for pedestrian pathways where provided for in the pedestrian/bicycle pathway plan.¹⁰¹

¹⁰¹ CDC §18.86.040.A.1.b provides: “The development shall facilitate pedestrian/bicycle circulation if the site is located on a street with designated bikepaths or adjacent to a designated greenway/open space/park. Specific items to be addressed [include]: (i) Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bikepaths identified in the comprehensive plan. If direct connections cannot be made, require that funds in the amount of the construction cost be deposited into an account for the purpose of constructing paths.”

The city also adopted a Master Drainage Plan (Drainage Plan). The Drainage Plan noted that flooding occurred in several areas along Fanno Creek, including areas near petitioner's property. The Drainage Plan also established that the increase in impervious surfaces associated with continued urbanization would exacerbate these flooding problems. To combat these risks, the Drainage Plan suggested a series of improvements to the Fanno Creek Basin, including channel excavation in the area next to petitioner's property. Other recommendations included ensuring that the floodplain remains free of structures and that it be preserved as greenways to minimize flood damage to structures. The Drainage Plan concluded that the cost of these improvements should be shared based on both direct and indirect benefits, with property owners along the waterways paying more due to the direct benefit that they would receive. Petitioner Florence Dolan owns a plumbing and electric supply store located on Main Street in the Central Business District of the city. The store covers approximately 9,700 square feet on the eastern side of a 1.67-acre parcel, which includes a gravel parking lot. Fanno Creek flows through the southwestern corner of the lot and along its western boundary. The year-round flow of the creek renders the area within the creek's 100-year floodplain virtually unusable for commercial development. The city's comprehensive plan includes the Fanno Creek floodplain as part of the city's greenway system.

Petitioner applied to the city for a permit to redevelop the site. Her proposed plans called for nearly doubling the size of the store to 17,600 square feet, and paving a 39-space parking lot. The existing store, located on the opposite side of the parcel, would be razed in sections as construction progressed on the new building. In the second phase of the project, petitioner proposed to build an additional structure on the northeast side of the site for complementary businesses, and to provide more parking. The proposed expansion and intensified use are consistent with the city's zoning scheme in the Central Business District.

The City Planning Commission granted petitioner's permit application subject to conditions imposed by the city's CDC. The CDC establishes the following standard for site development review approval:

“Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the city shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan.”

Thus, the Commission required that petitioner dedicate the portion of her property lying within the 100-year floodplain for improvement of a storm drainage system along Fanno Creek and

that she dedicate an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway.¹⁰²

The dedication required by that condition encompasses approximately 7,000 square feet, or roughly 10% of the property. In accordance with city practice, petitioner could rely on the dedicated property to meet the 15% open space and landscaping requirement mandated by the city's zoning scheme. The city would bear the cost of maintaining a landscaped buffer between the dedicated area and the new store.

Petitioner requested variances from the CDC standards. Variances are granted only where it can be shown that, owing to special circumstances related to a specific piece of the land, the literal interpretation of the applicable zoning provisions would cause "an undue or unnecessary hardship" unless the variance is granted.¹⁰³ Rather than posing alternative mitigating measures to offset the expected impacts of her proposed development, as allowed under the CDC, petitioner simply argued that her proposed development would not conflict with the policies of the comprehensive plan. The Commission denied the request.

¹⁰² The city's decision includes the following relevant conditions: "1. The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] (i.e., all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. The building shall be designed so as not to intrude into the greenway area." App. to Pet. for Cert. G-43.

¹⁰³ CDC §18.134.050 contains the following criteria whereby the decision-making authority can approve, approve with modifications, or deny a variance request:

"(1) The proposed variance will not be materially detrimental to the purposes of this title, be in conflict with the policies of the comprehensive plan, to any other applicable policies of the Community Development Code, to any other applicable policies and standards, and to other properties in the same zoning district or vicinity;

"(2) There are special circumstances that exist which are peculiar to the lot size or shape, topography or other circumstances over which the applicant has no control, and which are not applicable to other properties in the same zoning district;

"(3) The use proposed will be the same as permitted under this title and City standards will be maintained to the greatest extent possible, while permitting some economic use of the land;

"(4) Existing physical and natural systems, such as but not limited to traffic, drainage, dramatic land form or parks will not be adversely affected any more than would occur if the development were located as specified in the title; and

"(5) The hardship is not self-imposed and the variance requested is the minimum variance which would alleviate the hardship."

The Commission made a series of findings concerning the relationship between the dedicated conditions and the projected impacts of petitioner's project. First, the Commission noted that "it is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs." The Commission noted that the site plan has provided for bicycle parking in a rack in front of the proposed building and "it is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed." In addition, the Commission found that creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation "could offset some of the traffic demand on [nearby] streets and lessen the increase in traffic congestion."

The Commission went on to note that the required floodplain dedication would be reasonably related to petitioner's request to intensify the use of the site given the increase in the impervious surface. The Commission stated that the "anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes." Based on this anticipated increased storm water flow, the Commission concluded that "the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site." The Tigard City Council approved the Commission's final order, subject to one minor modification; the City Council reassigned the responsibility for surveying and marking the floodplain area from petitioner to the city's engineering department.

Petitioner appealed to the Land Use Board of Appeals (LUBA) on the ground that the city's dedication requirements were not related to the proposed development, and, therefore, those requirements constituted an uncompensated taking of their property under the Fifth Amendment. In evaluating the federal taking claim, LUBA assumed that the city's findings about the impacts of the proposed development were supported by substantial evidence. *Dolan v. Tigard*, LUBA 91-161 (Jan. 7, 1992). Given the undisputed fact that the proposed larger building and paved parking area would increase the amount of impervious surfaces and the runoff into Fanno Creek, LUBA concluded that "there is a 'reasonable relationship' between the proposed development and the requirement to dedicate land along Fanno Creek for a greenway." With respect to the pedestrian/bicycle pathway, LUBA noted the Commission's finding that a significantly larger retail sales building and parking lot would attract larger numbers of customers and employees and their vehicles. It again found a "reasonable relationship" between alleviating the impacts of increased traffic from the development and facilitating the provision of a pedestrian/bicycle pathway as an alternative means of transportation.

The Oregon Court of Appeals affirmed, rejecting petitioner's contention that in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987), we had abandoned the "reasonable relationship" test in favor of a stricter "essential nexus" test. 113 Ore.

App. 162, 832 P. 2d 853 (1992). The Oregon Supreme Court affirmed. 317 Ore. 110, 854 P. 2d 437 (1993). The court also disagreed with petitioner's contention that the Nollan Court abandoned the "reasonably related" test. *Id.* at 118, 854 P. 2d, at 442. Instead, the court read Nollan to mean that an "exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve." *Id.* at 120, 854 P. 2d, at 443. The court decided that both the pedestrian/bicycle pathway condition and the storm drainage dedication had an essential nexus to the development of the proposed site. *Id.* at 121, 854 P. 2d, at 443. Therefore, the court found the conditions to be reasonably related to the impact of the expansion of petitioner's business. We granted certiorari, 510 U.S. ____ (1993), because of an alleged conflict between the Oregon Supreme Court's decision and our decision in *Nollan*, *supra*.

II

The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239, 41 L. Ed. 979, 17 S. Ct. 581 (1897), provides: "Nor shall private property be taken for public use, without just compensation."¹⁰⁴ One of the principal purposes of the Takings Clause is "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. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960). Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred. *Nollan*, *supra*, at 831. Such public access would deprive petitioner of the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979).

On the other side of the ledger, the authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our decision in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926). "Government

¹⁰⁴ Justice Stevens' dissent suggests that this case is actually grounded in "substantive" due process, rather than in the view that the Takings Clause of the Fifth Amendment was made applicable to the States by the Fourteenth Amendment. But there is no doubt that later cases have held that the Fourteenth Amendment does make the Takings Clause of the Fifth Amendment applicable to the States, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 122, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 827, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987). Nor is there any doubt that these cases have relied upon *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897), to reach that result. See, e.g., *Penn Central*, *supra*, at 122 ("The issue presented . . . [is] 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, 41 L. Ed. 979, 17 S. Ct. 581 (1897)").

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, 67 L. Ed. 322, 43 S. Ct. 158 (1922). A land use regulation does not effect a taking if it “substantially advances legitimate state interests” and does not “deny an owner economically viable use of his land.” *Agins v. Tiburon*, 447 U.S. 255, 260, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980).¹⁰⁵

The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city. In *Nollan*, *supra*, we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of “unconstitutional conditions,” the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit. See *Perry v. Sindermann*, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972); *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968).

Petitioner contends that the city has forced her to choose between the building permit and her right under the Fifth Amendment to just compensation for the public easements. Petitioner does not quarrel with the city’s authority to exact some forms of dedication as a condition for the grant of a building permit, but challenges the showing made by the city to justify these exactions. She argues that the city has identified “no special benefits” conferred on her, and has not identified any “special quantifiable burdens” created by her new store that would justify the particular dedications required from her which are not required from the public at large.

III

In evaluating petitioner’s claim, we must first determine whether the “essential nexus” exists between the “legitimate state interest” and the permit condition exacted by the city. *Nollan*, 483 U.S., at 837. If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development. We were not required

¹⁰⁵ There can be no argument that the permit conditions would deprive petitioner “economically beneficial use” of her property as she currently operates a retail store on the lot. Petitioner assuredly is able to derive some economic use from her property. See, e.g., *Lucas v. South Carolina*, 505 U.S. ___, ___ (1992) (slip op., at 13); *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978).

to reach this question in *Nollan*, because we concluded that the connection did not meet even the loosest standard. 483 U.S., at 838. Here, however, we must decide this question.

A

We addressed the essential nexus question in *Nollan*. The California Coastal Commission demanded a lateral public easement across the *Nollan*'s beachfront lot in exchange for a permit to demolish an existing bungalow and replace it with a three-bedroom house. 483 U.S., at 828. The public easement was designed to connect two public beaches that were separated by the *Nollan*'s property. The Coastal Commission had asserted that the public easement condition was imposed to promote the legitimate state interest of diminishing the "blockage of the view of the ocean" caused by construction of the larger house.

We agreed that the Coastal Commission's concern with protecting visual access to the ocean constituted a legitimate public interest. *Id.* at 835. We also agreed that the permit condition would have been constitutional "even if it consisted of the requirement that the *Nollans* provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." *Id.* at 836. We resolved, however, that the Coastal Commission's regulatory authority was set completely adrift from its constitutional moorings when it claimed that a nexus existed between visual access to the ocean and a permit condition requiring lateral public access along the *Nollan*'s beachfront lot. *Id.* at 837. How enhancing the public's ability to "traverse to and along the shorefront" served the same governmental purpose of "visual access to the ocean" from the roadway was beyond our ability to countenance. The absence of a nexus left the Coastal Commission in the position of simply trying to obtain an easement through gimmickry, which converted a valid regulation of land use into "an out-and-out plan of extortion." *Ibid.*, quoting *J.E.D. Associates, Inc. v. Atkinson*, 121 N. H. 581, 584, 432 A. 2d 12, 14-15 (1981).

No such gimmicks are associated with the permit conditions imposed by the city in this case. Undoubtedly, the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld. *Agins*, *supra*, at 260-262. It seems equally obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek's 100-year floodplain. Petitioner proposes to double the size of her retail store and to pave her now-gravel parking lot, thereby expanding the impervious surface on the property and increasing the amount of stormwater run-off into Fanno Creek.

The same may be said for the city's attempt to reduce traffic congestion by providing for alternative means of transportation. In theory, a pedestrian/bicycle pathway provides a useful alternative means of transportation for workers and shoppers: "Pedestrians and bicyclists occupying dedicated spaces for walking and/or bicycling . . . remove potential vehicles from streets, resulting

in an overall improvement in total transportation system flow.” A. Nelson, *Public Provision of Pedestrian and Bicycle Access Ways: Public Policy Rationale and the Nature of Private Benefits* 11, Center for Planning Development, Georgia Institute of Technology, Working Paper Series (Jan. 1994). See also, *Intermodal Surface Transportation Efficiency Act of 1991*, Pub. L. 102-240, 105 Stat. 1914; (recognizing pedestrian and bicycle facilities as necessary components of any strategy to reduce traffic congestion).

B

The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city’s permit conditions bear the required relationship to the projected impact of petitioner’s proposed development. *Nollan*, *supra*, at 834, quoting *Penn Central*, 438 U.S. 104, 127, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978) (“[A] use restriction may constitute a taking if not reasonably necessary to the effectuation of a substantial government purpose”). Here the Oregon Supreme Court deferred to what it termed the “city’s unchallenged factual findings” supporting the dedication conditions and found them to be reasonably related to the impact of the expansion of petitioner’s business. 317 Ore., at 120-121, 854 P. 2d, at 443.

The city required that petitioner dedicate “to the city as Greenway all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] . . . and all property 15 feet above [the floodplain] boundary.” In addition, the city demanded that the retail store be designed so as not to intrude into the greenway area. The city relies on the Commission’s rather tentative findings that increased stormwater flow from petitioner’s property “can only add to the public need to manage the [floodplain] for drainage purposes” to support its conclusion that the “requirement of dedication of the floodplain area on the site is related to the applicant’s plan to intensify development on the site.” *City of Tigard Planning Commission Final Order No. 91-09 PC, App. to Pet. for Cert. G37*.

The city made the following specific findings relevant to the pedestrian/bicycle pathway:

“In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.” *Id.* at 24.

The question for us is whether these findings are constitutionally sufficient to justify the conditions imposed by the city on petitioner’s building permit. Since state courts have been dealing with this question a good deal longer than we have, we turn to representative decisions made by them.

In some States, very generalized statements as to the necessary connection between the required dedication and the proposed development seem to suffice. See, e.g., *Billings Properties*,

Inc. v. Yellowstone County, 144 Mont. 25, 394 P. 2d 182 (1964); Jenad, Inc. v. Scarsdale, 18 N. Y. 2d 78, 218 N. E. 2d 673, 271 N.Y.S.2d 955 (1966). We think this standard is too lax to adequately protect petitioner’s right to just compensation if her property is taken for a public purpose.

Other state courts require a very exacting correspondence, described as the “specific and uniquely attributable” test. The Supreme Court of Illinois first developed this test in *Pioneer Trust & Savings Bank v. Mount Prospect*, 22 Ill. 2d 375, 380, 176 N. E. 2d 799, 802 (1961).¹⁰⁶ Under this standard, if the local government cannot demonstrate that its exaction is directly proportional to the specifically created need, the exaction becomes “a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations.” *Id.* at 381, 176 N.E. 2d, at 802. We do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved.

A number of state courts have taken an intermediate position, requiring the municipality to show a “reasonable relationship” between the required dedication and the impact of the proposed development. Typical is the Supreme Court of Nebraska’s opinion in *Simpson v. North Platte*, 206 Neb. 240, 245, 292 N. W. 2d 297, 301 (1980), where that court stated:

“The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.”

Thus, the court held that a city may not require a property owner to dedicate private property for some future public use as a condition of obtaining a building permit when such future use is not “occasioned by the construction sought to be permitted.” *Id.* at 248, 292 N. W. 2d, at 302.

Some form of the reasonable relationship test has been adopted in many other jurisdictions. See, e.g., *Jordan v. Menomonee Falls*, 28 Wis. 2d 608, 137 N. W. 2d 442 (1965); *Collis v. Bloomington*, 310 Minn. 5, 246 N. W. 2d 19 (1976) (requiring a showing of a reasonable relationship between the planned subdivision and the municipality’s need for land); *College Station v. Turtle Rock Corp.*, 680 S. W. 2d 802, 807 (Tex. 1984); *Call v. West Jordan*, 606 P. 2d 217, 220 (Utah 1979) (affirming use of the reasonable relation test). Despite any semantical differences,

¹⁰⁶ The “specifically and uniquely attributable” test has now been adopted by a minority of other courts. See, e.g., *J. E. D. Associates., Inc. v. Atkinson*, 121 N. H. 581, 585, 432 A. 2d 12, 15 (1981); *Divan Builders, Inc. v. Planning Bd. of Twp. of Wayne*, 66 N. J. 582, 600-601, 334 A. 2d 30, 40 (1975); *McKain v. Toledo City Plan Comm’n*, 26 Ohio App. 2d 171, 176, 270 N. E. 2d 370, 374 (1971); *Frank Ansuini, Inc. v. Cranston*, 107 R. I. 63, 69, 264 A. 2d 910, 913 (1970).

general agreement exists among the courts “that the dedication should have some reasonable relationship to the needs created by the [development].” *Ibid.* See generally, Morosoff, *Take My Beach Please!*: *Nollan v. California Coastal Commission* and a Rational-Nexus Constitutional Analysis of Development Exactions, 69 B. U. L. Rev. 823 (1989); see also *Parks v. Watson*, 716 F.2d 646, 651-653 (CA9 1983).

We think the “reasonable relationship” test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term “reasonable relationship” seems confusingly similar to the term “rational basis” which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as “rough proportionality” best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.¹⁰⁷

We turn now to analysis of whether the findings relied upon by the city here, first with respect to the floodplain easement, and second with respect to the pedestrian/bicycle path, satisfied these requirements.

It is axiomatic that increasing the amount of impervious surface will increase the quantity and rate of storm-water flow from petitioner’s property. Therefore, keeping the floodplain open and free from development would likely confine the pressures on Fanno Creek created by petitioner’s development. In fact, because petitioner’s property lies within the Central Business District, the Community Development Code already required that petitioner leave 15% of it as open space and the undeveloped floodplain would have nearly satisfied that requirement. But the city demanded more- it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner’s property along Fanno Creek for its Greenway system. The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.

The difference to petitioner, of course, is the loss of her ability to exclude others. As we have noted, this right to exclude others is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” *Kaiser Aetna*, 444 U.S., at 176. It is difficult to see

¹⁰⁷ Justice Stevens’ dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. See, e.g., *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926). Here, by contrast, the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel. In this situation, the burden properly rests on the city. See *Nollan*, 483 U.S., at 836. This conclusion is not, as he suggests, undermined by our decision in *Moore v. East Cleveland*, 431 U.S. 494, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977), in which we struck down a housing ordinance that limited occupancy of a dwelling unit to members of a single family as violating the Due Process Clause of the Fourteenth Amendment. The ordinance at issue in *Moore* intruded on choices concerning family living arrangements, an area in which the usual deference to the legislature was found to be inappropriate. *Id.* at 499.

why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems along Fanno Creek, and the city has not attempted to make any individualized determination to support this part of its request.

The city contends that recreational easement along the Greenway is only ancillary to the city's chief purpose in controlling flood hazards. It further asserts that unlike the residential property at issue in *Nollan*, petitioner's property is commercial in character and therefore, her right to exclude others is compromised. Brief for Respondent 41, quoting *United States v. Orito*, 413 U.S. 139, 142, 37 L. Ed. 2d 513, 93 S. Ct. 2674 (1973) (“The Constitution extends special safeguards to the privacy of the home”). The city maintains that “there is nothing to suggest that preventing [petitioner] from prohibiting [the easements] will unreasonably impair the value of [her] property as a [retail store].” *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83, 64 L. Ed. 2d 741, 100 S. Ct. 2035 (1980).

Admittedly, petitioner wants to build a bigger store to attract members of the public to her property. She also wants, however, to be able to control the time and manner in which they enter. The recreational easement on the Greenway is different in character from the exercise of state-protected rights of free expression and petition that we permitted in *PruneYard*. In *PruneYard*, we held that a major private shopping center that attracted more than 25,000 daily patrons had to provide access to persons exercising their state constitutional rights to distribute pamphlets and ask passersby to sign their petitions. *Id.* at 85. We based our decision, in part, on the fact that the shopping center “may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions.” *Id.* at 83. By contrast, the city wants to impose a permanent recreational easement upon petitioner's property that borders Fanno Creek. Petitioner would lose all rights to regulate the time in which the public entered onto the Greenway, regardless of any interference it might pose with her retail store. Her right to exclude would not be regulated, it would be eviscerated.

If petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere. See *Nollan*, 483 U.S., at 836 (“Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end”). But that is not the case here. We conclude that the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building.

With respect to the pedestrian/bicycle pathway, we have no doubt that the city was correct in finding that the larger retail sales facility proposed by petitioner will increase traffic on the streets of the Central Business District. The city estimates that the proposed development would generate roughly 435 additional trips per day.¹⁰⁸ Dedications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use. But on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner’s development reasonably relate to the city’s requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway “could offset some of the traffic demand . . . and lessen the increase in traffic congestion.”¹⁰⁹

As Justice Peterson of the Supreme Court of Oregon explained in his dissenting opinion, however, “the findings of fact that the bicycle pathway system ‘could offset some of the traffic demand’ is a far cry from a finding that the bicycle pathway system will, or is likely to, offset some of the traffic demand.” 317 Ore., at 127, 854 P. 2d, at 447 (emphasis in original). No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.

IV

Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization particularly in metropolitan areas such as Portland. The city’s goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be done. “A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” *Pennsylvania Coal*, 260 U.S., at 416.

The judgment of the Supreme Court of Oregon is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice Stevens, with whom Justice Blackmun and Justice Ginsburg join, dissenting.

¹⁰⁸ The city uses a weekday average trip rate of 53.21 trips per 1000 square feet. Additional Trips Generated = 53.21 X (17,600-9720). App. to Pet. for Cert. G15.

¹⁰⁹ In rejecting petitioner’s request for a variance from the pathway dedication condition, the city stated that omitting the planned section of the pathway across petitioner’s property would conflict with its adopted policy of providing a continuous pathway system. But the Takings Clause requires the city to implement its policy by condemnation unless the required relationship between the petitioner’s development and added traffic is shown.

The record does not tell us the dollar value of petitioner Florence Dolan's interest in excluding the public from the greenway adjacent to her hardware business. The mountain of briefs that the case has generated nevertheless makes it obvious that the pecuniary value of her victory is far less important than the rule of law that this case has been used to establish. It is unquestionably an important case.

Certain propositions are not in dispute. The enlargement of the Tigard unit in Dolan's chain of hardware stores will have an adverse impact on the city's legitimate and substantial interests in controlling drainage in Fanno Creek and minimizing traffic congestion in Tigard's business district. That impact is sufficient to justify an outright denial of her application for approval of the expansion. The city has nevertheless agreed to grant Dolan's application if she will comply with two conditions, each of which admittedly will mitigate the adverse effects of her proposed development. The disputed question is whether the city has violated the Fourteenth Amendment to the Federal Constitution by refusing to allow Dolan's planned construction to proceed unless those conditions are met.

The Court is correct in concluding that the city may not attach arbitrary conditions to a building permit or to a variance even when it can rightfully deny the application outright. I also agree that state court decisions dealing with ordinances that govern municipal development plans provide useful guidance in a case of this kind. Yet the Court's description of the doctrinal underpinnings of its decision, the phrasing of its fledgling test of "rough proportionality," and the application of that test to this case run contrary to the traditional treatment of these cases and break considerable and unpropitious new ground.

I

The Court recognizes as an initial matter that the city's conditions satisfy the "essential nexus" requirement announced in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987), because they serve the legitimate interests in minimizing floods and traffic congestions.¹¹⁰ The Court goes on, however, to erect a new constitutional hurdle in the path of these conditions. In addition to showing a rational nexus to a public purpose that would justify an

¹¹⁰ In *Nollan* the Court recognized that a State agency may condition the grant of a land-use permit on the dedication of a property interest if the dedication serves a legitimate police-power purpose that would justify a refusal to issue the permit. For the first time, however, it held that such a condition is unconstitutional if the condition "utterly fails" to further a goal that would justify the refusal. 483 U.S., at 837. In the *Nollan* Court's view, a condition would be constitutional even if it required the *Nollans* to provide a viewing spot for passersby whose view of the ocean was obstructed by their new house. *Id.* at 836. "Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end." *Ibid.*

outright denial of the permit, the city must also demonstrate “rough proportionality” between the harm caused by the new land use and the benefit obtained by the condition. The Court also decides for the first time that the city has the burden of establishing the constitutionality of its conditions by making an “individualized determination” that the condition in question satisfies the proportionality requirement.

II

Our cases require the analysis to focus on the impact of the city’s action on the entire parcel of private property. In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978), we stated that takings jurisprudence “does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.” *Id.* at 130-131. Instead, this Court focuses “both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.” *Ibid.* *Andrus v. Allard*, 444 U.S. 51, 62 L. Ed. 2d 210, 100 S. Ct. 318 (1979), reaffirmed the non-divisibility principle outlined in *Penn Central*, stating that “at least 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 65-66.¹¹¹

The city of Tigard has demonstrated that its plan is rational and impartial and that the conditions at issue are “conducive to fulfillment of authorized planning objectives.” *Dolan*, on the other hand, has offered no evidence that her burden of compliance has any impact at all on the value or profitability of her planned development. Following the teaching of the cases on which it purports to rely, the Court should not isolate the burden associated with the loss of the power to exclude from an evaluation of the benefit to be derived from the permit to enlarge the store and the parking lot.

The Court’s assurances that its “rough proportionality” test leaves ample room for cities to pursue the “commendable task of land use planning,”— even twice avowing that “no precise mathematical calculation is required,” *ante*—are wanting given the result that test compels here. Under the Court’s approach, a city must not only “quantify its findings,” and make “individualized determinations” with respect to the nature and the extent of the relationship between the conditions and the impact, but also demonstrate “proportionality.” The correct inquiry should instead concentrate on whether the required nexus is present and venture beyond considerations of a condition’s nature or germaneness only if the developer establishes that a concededly germane condition is so grossly disproportionate to the proposed development’s adverse effects that it

¹¹¹ Similarly, in *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 498-499, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987), we concluded that “the 27 million tons of coal do not constitute a separate segment of property for takings law purposes” and that “there is no basis for treating the less than 2% of petitioners’ coal as a separate parcel of property.”

manifests motives other than land use regulation on the part of the city. The heightened requirement the Court imposes on cities is even more unjustified when all the tools needed to resolve the questions presented by this case can be garnered from our existing case law.

III

Applying its new standard, the Court finds two defects in the city's case. First, while the record would adequately support a requirement that Dolan maintain the portion of the floodplain on her property as undeveloped open space, it does not support the additional requirement that the floodplain be dedicated to the city. Second, while the city adequately established the traffic increase that the proposed development would generate, it failed to quantify the offsetting decrease in automobile traffic that the bike path will produce. Ante, at 18-19. Even under the Court's new rule, both defects are, at most, nothing more than harmless error.

In her objections to the floodplain condition, Dolan made no effort to demonstrate that the dedication of that portion of her property would be any more onerous than a simple prohibition against any development on that portion of her property. Given the commercial character of both the existing and the proposed use of the property as a retail store, it seems likely that potential customers "trampling along petitioner's floodplain," are more valuable than a useless parcel of vacant land. Moreover, the duty to pay taxes and the responsibility for potential tort liability may well make ownership of the fee interest in useless land a liability rather than an asset. That may explain why Dolan never conceded that she could be prevented from building on the floodplain. The City Attorney also pointed out that absent a dedication, property owners would be required to "build on their own land" and "with their own money" a storage facility for the water runoff. Dolan apparently "did have that option," but chose not to seek it. If Dolan might have been entitled to a variance confining the city's condition in a manner this Court would accept, her failure to seek that narrower form of relief at any stage of the state administrative and judicial proceedings clearly should preclude that relief in this Court now.

The Court's rejection of the bike path condition amounts to nothing more than a play on words. Everyone agrees that the bike path "could" offset some of the increased traffic flow that the larger store will generate, but the findings do not unequivocally state that it will do so, or tell us just how many cyclists will replace motorists. Predictions on such matters are inherently nothing more than estimates. Certainly the assumption that there will be an offsetting benefit here is entirely reasonable and should suffice whether it amounts to 100 percent, 35 percent, or only 5 percent of the increase in automobile traffic that would otherwise occur. If the Court proposes to have the federal judiciary micromanage state decisions of this kind, it is indeed extending its welcome mat to a significant new class of litigants. Although there is no reason to believe that state courts have failed to rise to the task, property owners have surely found a new friend today.

IV

The Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan. Even more consequential than its incorrect disposition of this case, however, is the Court's resurrection of a species of substantive due process analysis that it firmly rejected decades ago.

The Court begins its constitutional analysis by citing *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239, 41 L. Ed. 979, 17 S. Ct. 581 (1897), for the proposition that the Takings Clause of the Fifth Amendment is “applicable to the States through the Fourteenth Amendment.” That opinion, however, contains no mention of either the Takings Clause or the Fifth Amendment;¹¹² it held that the protection afforded by the Due Process¹¹³ Clause of the Fourteenth Amendment extends to matters of substance as well as procedure, and that the substance of “the due process of law enjoined by the Fourteenth Amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a State.” *Chicago, B. & Q. R. Co.*, 166 U.S., at 235, 236-241. It applied the same kind of substantive due process analysis more frequently identified with a better known case that accorded similar substantive protection to a baker's liberty interest in working 60 hours a week and 10 hours a day. See *Lochner v. New York*, 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539 (1905).¹¹⁴

Later cases have interpreted the Fourteenth Amendment's substantive protection against uncompensated deprivations of private property by the States as though it incorporated the text of the Fifth Amendment's Takings Clause. See, e.g., *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 481, n. 10, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987). There was nothing problematic about that interpretation in cases enforcing the Fourteenth Amendment against state action that involved the actual physical invasion of private property. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-433, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 178-180, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979). Justice Holmes charted a significant new course, however, when he opined that a state law making it “commercially impracticable to mine certain coal” had “very nearly the same effect for

¹¹² An earlier case deemed it “well settled” that the Takings Clause “is a limitation on the power of the Federal government, and not on the States.” *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 13 Wall. 166, 177, 20 L. Ed. 557 (1872).

¹¹³ The Court held that a State “may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form.” *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 234-235, 41 L. Ed. 979, 17 S. Ct. 581 (1897).

¹¹⁴ The *Lochner* Court refused to presume that there was a reasonable connection between the regulation and the state interest in protecting the public health. 198 U.S., at 60-61. A similar refusal to identify a sufficient nexus between an enlarged building with a newly paved parking lot and the state interests in minimizing the risks of flooding and traffic congestion proves fatal to the city's permit conditions in this case under the Court's novel approach.

constitutional purposes as appropriating or destroying it.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414, 67 L. Ed. 322, 43 S. Ct. 158 (1922). The so-called “regulatory takings” doctrine that the Holmes dictum¹¹⁵ kindled has an obvious kinship with the line of substantive due process cases that *Lochner* exemplified. Besides having similar ancestry, both doctrines are potentially open-ended sources of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair.

This case inaugurates an even more recent judicial innovation than the regulatory takings doctrine: the application of the “unconstitutional conditions” label to a mutually beneficial transaction between a property owner and a city. The Court tells us that the city’s refusal to grant Dolan a discretionary benefit infringes her right to receive just compensation for the property interests that she has refused to dedicate to the city “where the property sought has little or no relationship to the benefit.”¹¹⁶ Although it is well settled that a government cannot deny a benefit on a basis that infringes constitutionally protected interests—“especially [one’s] interest in freedom of speech,” *Perry v. Sindermann*, 408 U.S. 593, 597, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972)—the “unconstitutional conditions” doctrine provides an inadequate framework in which to analyze this case.¹¹⁷

Even if Dolan should accept the city’s conditions in exchange for the benefit that she seeks, it would not necessarily follow that she had been denied “just compensation” since it would be appropriate to consider the receipt of that benefit in any calculation of “just compensation.” See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (1922) (noting that an “average reciprocity of advantage” was deemed to justify many laws); *Hodel v. Irving*, 481 U.S. 704, 715, 95 L. Ed. 2d 668, 107 S. Ct. 2076 (1987) (such ““reciprocity of advantage”” weighed in favor of a statute’s constitutionality).

Particularly in the absence of any evidence on the point, we should not presume that the discretionary benefit the city has offered is less valuable than the property interests that Dolan can

¹¹⁵ See *Keystone Bituminous Coal Assn v. DeBenedictis*, 480 U.S. 470, 484, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987) (explaining why this portion of the opinion was merely “advisory”).

¹¹⁶ The Court’s entire explanation reads: “Under the well-settled doctrine of ‘unconstitutional conditions,’ the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit.” *Ibid.*

¹¹⁷ Although it has a long history, see *Home Ins. Co. v. Morse*, 87 U.S. 445, 20 Wall. 445, 451, 22 L. Ed. 365 (1874), the “unconstitutional conditions” doctrine has for just as long suffered from notoriously inconsistent application; it has never been an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question. See, e.g., Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism*, 70 B. U. L. Rev. 593, 620 (1990) (doctrine is “too crude and too general to provide help in contested cases”). The necessary and traditional breadth of municipalities’ power to regulate property development, together with the absence here of fragile and easily “chilled” constitutional rights such as that of free speech, make it quite clear that the Court is really writing on a clean slate rather than merely applying “well-settled” doctrine.

retain or surrender at her option. But even if that discretionary benefit were so trifling that it could not be considered just compensation when it has “little or no relationship” to the property, the Court fails to explain why the same value would suffice when the required nexus is present. In this respect, the Court’s reliance on the “unconstitutional conditions” doctrine is assuredly novel, and arguably incoherent. The city’s conditions are by no means immune from constitutional scrutiny. The level of scrutiny, however, does not approximate the kind of review that would apply if the city had insisted on a surrender of Dolan’s First Amendment rights in exchange for a building permit. One can only hope that the Court’s reliance today on First Amendment cases, see ante, at 10 (citing *Perry v. Sindermann*, supra, and *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968)), and its candid disavowal of the term “rational basis” to describe its new standard of review, see ante, at 15-16, do not signify a reassertion of the kind of super-legislative power the Court exercised during the *Lochner* era.

The Court has decided to apply its heightened scrutiny to a single strand—the power to exclude—in the bundle of rights that enables a commercial enterprise to flourish in an urban environment. That intangible interest is undoubtedly worthy of constitutional protection—much like the grandmother’s interest in deciding which of her relatives may share her home in *Moore v. East Cleveland*, 431 U.S. 494, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977). Both interests are protected from arbitrary state action by the Due Process Clause of the Fourteenth Amendment. It is, however, a curious irony that Members of the majority in this case would impose an almost insurmountable burden of proof on the property owner in the *Moore* case while saddling the city with a heightened burden in this case.

In its application of what is essentially the doctrine of substantive due process, the Court confuses the past with the present. On November 13, 1922, the village of Euclid, Ohio, adopted a zoning ordinance that effectively confiscated 75 percent of the value of property owned by the Ambler Realty Company. Despite its recognition that such an ordinance “would have been rejected as arbitrary and oppressive” at an earlier date, the Court (over the dissent of Justices Van Devanter, McReynolds and Butler) upheld the ordinance. Today’s majority should heed the words of Justice Sutherland:

“Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.” *Euclid v. Ambler Co.*, 272 U.S. 365, 387, 71 L. Ed. 303, 47 S. Ct. 114 (1926).

In our changing world one thing is certain: uncertainty will characterize predictions about the impact of new urban developments on the risks of floods, earthquakes, traffic congestion, or environmental harms. When there is doubt concerning the magnitude of those impacts, the public interest in averting them must outweigh the private interest of the commercial entrepreneur. If the government can demonstrate that the conditions it has imposed in a land-use permit are rational, impartial and conducive to fulfilling the aims of a valid land-use plan, a strong presumption of validity should attach to those conditions. The burden of demonstrating that those conditions have unreasonably impaired the economic value of the proposed improvement belongs squarely on the shoulders of the party challenging the state action's constitutionality. That allocation of burdens has served us well in the past. The Court has stumbled badly today by reversing it.

I respectfully dissent.

CITY OF MONTEREY v. DEL MONTE DUNES
526 U.S. 687 (1999) (part 2)

[The rest of this case may be found in SESSION 24. PROCEDURE AND REMEDIES]

KENNEDY, J., announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Part I

I

This case began with attempts by the respondent, Del Monte Dunes, and its predecessor in interest to develop a parcel of land within the jurisdiction of the petitioner, the city of Monterey. The city, in a series of repeated rejections, denied proposals to develop the property, each time imposing more rigorous demands on the developers. Del Monte Dunes brought suit in the United States District Court for the Northern District of California, under Rev. Stat. §1979, 42 U.S.C. §1983. After protracted litigation, the case was submitted to the jury on Del Monte Dunes' theory that the city effected a regulatory taking or otherwise injured the property by unlawful acts, without paying compensation or providing an adequate post-deprivation remedy for the loss. The jury found for Del Monte Dunes, and the Court of Appeals affirmed.

The petitioner contends that the regulatory takings claim should not have been decided by the jury and that the Court of Appeals adopted an erroneous standard for regulatory takings liability. We need not decide all of the questions presented by the petitioner, nor need we examine each of the points given by the Court of Appeals in its decision to affirm. The controlling question is whether, given the city's apparent concession that the instructions were a correct statement of the law, the matter was properly submitted to the jury. We conclude that it was, and that the judgment of the Court of Appeals should be affirmed.

I

After five years, five formal decisions, and 19 different site plans, respondent Del Monte Dunes decided the city would not permit development of the property under any circumstances. Del Monte Dunes commenced suit against the city in the United States District Court for the Northern District of California under 42 U.S.C. §1983, alleging, inter alia, that denial of the final development proposal was a violation of the Due Process and Equal Protection provisions of the Fourteenth Amendment and an uncompensated, and so unconstitutional, regulatory taking.

The District Court determined, over the city's objections, to submit Del Monte Dunes' takings claim to a jury. While conceding the legitimacy of the city's stated regulatory purposes, Del Monte Dunes emphasized the tortuous and protracted history of attempts to develop the property, as

well as the shifting and sometimes inconsistent positions taken by the city throughout the process, and argued that it had been treated in an unfair and irrational manner.

At the close of argument, the District Court instructed the jury it should find for Del Monte Dunes if it found either that Del Monte Dunes had been denied all economically viable use of its property or that "the city's decision to reject the plaintiff's 190 unit development proposal did not substantially advance a legitimate public purpose." The essence of these instructions was proposed by the city. The jury delivered a general verdict for Del Monte Dunes on its takings claim, and a damages award of \$1.45 million.

The Court of Appeals affirmed. 95 F.3d 1422 (CA9 1996). The court ruled that the District Court did not err in allowing Del Monte Dunes' regulatory takings claim to be tried to a jury, and [that] whether Del Monte Dunes had been denied all economically viable use of the property and whether the city's denial of the final proposal substantially advanced legitimate public interests were, on the facts of this case, questions suitable for the jury. The court ruled that sufficient evidence had been presented to the jury from which it reasonably could have decided each of these questions in Del Monte Dunes' favor.

In the course of holding a reasonable jury could have found the city's denial of the final proposal not substantially related to legitimate public interests, the Court of Appeals stated: "even if the City had a legitimate interest in denying Del Monte's development application, its action must be 'roughly proportional' to furthering that interest That is, the City's denial must be related 'both in nature and extent to the impact of the proposed development.'"

Although in a general sense concerns for proportionality animate the Takings Clause, see *Armstrong v. United States*, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960) ("The Fifth Amendment's guarantee . . . was designed to bar 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"), we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions -- land-use decisions conditioning approval of development on the dedication of property to public use. See *Dolan*, supra, at 385; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987). The rule applied in *Dolan* considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts. It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development. We believe, accordingly, that the rough-proportionality test of *Dolan* is inapposite to a case such as this one.

The instructions given to the jury, however, did not mention proportionality, let alone require it to find for Del Monte Dunes unless the city's actions were roughly proportional to its

asserted interests. The Court of Appeals' discussion of rough proportionality, we conclude, was unnecessary to its decision to sustain the jury's verdict.

Given this holding, it was unnecessary for the Court of Appeals to discuss rough proportionality. That it did so is irrelevant to our disposition of the case.

LAMBERT v. SAN FRANCISCO
529 U.S. 1045 (2000)

Petition for writ of certiorari to the Court of Appeal of California, First Appellate District denied. Dissenting opinion by Justice Scalia with whom Justice Kennedy and Justice Thomas join.

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, dissenting from the denial of certiorari.

Petitioners Claude and Micheline Lambert own the Cornell Hotel in San Francisco. The hotel has 24 residential units and 34 tourist units. After experiencing difficulty renting the hotel's residential units, petitioners applied to the San Francisco Planning Commission for a conditional use permit to convert those units to tourist use.¹¹⁸ That request implicated two bodies of San Francisco's land-use law: the Planning Code and the Residential Hotel Unit Conversion and Demolition Ordinance (HCO). The Planning Code provides that a tourist hotel may not be "significantly altered, enlarged, or intensified, except upon approval of a new conditional use application." S. F. Planning Code, Art. 1.7, §178(c) (2000). The HCO prohibits the issuance of a permit for the conversion of units from residential to tourist use unless the proprietor agrees to provide either one-to-one replacement for those units or to pay a portion of the replacement costs. See S. F. Admin. Code, ch. 41, §41.13 (2000).

Pursuant to the HCO, the city obtained two appraisals of the replacement costs for the units petitioners wished to convert. The first appraisal was \$488,584 and the second was \$612,887; the city settled on \$600,000. Petitioners, however, offered only \$100,000. After the Planning Commission denied the permit application, petitioners brought the present suit.

They contended that the replacement fee is unconstitutional under this Court's decisions in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994), which held that a burden imposed as a condition of permit approval must be related to the public harm that would justify denying the permit, and must be roughly proportional to what is needed to eliminate that harm. The California Court of Appeal affirmed the trial court's rejection of petitioners' claim. It held that the HCO played no part in the commission's decision, and therefore "San Francisco did not demand anything from [petitioners] as a condition of a use permit." 67 Cal. Rptr. 2d at 569. Instead, the court maintained, the commission relied solely on the Planning Code and, basing its decision upon such traditional zoning concerns as compatibility with surrounding development,

¹¹⁸ When petitioners first sought to convert their residential units to tourist use, the hotel contained 31 residential units. Petitioners were successful, however, in convincing the San Francisco Board of Permit Appeals to reclassify seven of those as tourist units, producing the hotel's configuration noted in the text.

effect on traffic patterns, and availability of housing stock, “simply denied the permit outright.” *Ibid.* Because, the court continued, “neither a property right nor money was in fact taken from [petitioners], there [was] no reason to determine if a taking would have occurred had [petitioners] been required to pay \$600,000 as a condition of a use permit, and thus there [was] nothing requiring review under” *Nollan and Dolan*, 67 Cal. Rptr. 2d at 569.

The record belies the Court of Appeal’s claim that the commission ignored petitioners’ refusal to meet its demand for a \$600,000 payment. After acknowledging petitioners’ offer of \$100,000, the commission compared this figure with the amounts offered by two other hotels that had successfully requested similar conversions. 1 Appellants’ App. in No. A076116 (Cal. Ct. App.), pp. 100, 102. It noted that in those two applications, the fee amounted to \$10,000 and \$15,000 per room, respectively. See *id.* at 102. (The fee in petitioners’ case, by contrast, amounted to only \$3,226 per room. See 67 Cal. Rptr. 2d at 571.) The commission then found that petitioners’ application was “not comparable to those previously granted . . .,” because petitioners “failed to demonstrate that the amount offered” was “sufficient to mitigate the loss of housing stock.” It is simply and obviously not true that the commission ignored petitioners’ refusal to satisfy its fee demand.

The Court of Appeal itself, after asserting that “San Francisco did not demand anything” from petitioners, 67 Cal. Rptr. 2d at 569, in the next breath found it “somewhat disturbing that San Francisco’s concerns about congestion, parking and preservation of a neighborhood might have been overcome by payment of [a] significant sum of money,” *ibid.* (emphasis added). This observation makes no sense, of course, unless the court concluded from the record that the commission might have rendered a different decision if petitioners had been more generous. It sought to evade the natural consequence of that conclusion with the following unelaborated assertion: “That the Planning Commission might have granted the permit upon payment of \$600,000 does not make its refusal to issue the permit into a taking.” *Ibid.* (emphasis added).

There are three possible readings of the Court of Appeal’s opinion. First, and most obviously, one might take at face value the court’s factual finding that the fee played no role in the decision. That would be a gross distortion of the record.

Secondly, one might ignore the court’s initial see-no-evil disclaimer, and assume that it accepted what the record undeniably showed, that petitioners’ refusal to meet the fee demand was a motivating force behind the commission’s decision. On that assumption, the court’s refusal to apply *Nollan and Dolan* might be thought to rest upon its determination that that factor was irrelevant, since the commission also relied upon ordinary criteria under the Planning Code. But it is always the case that if the permit applicant does not yield to the extortionate demand, the ordinary criteria will be invoked to deny his permit. If indeed unjustified denial can constitute a taking (the question presented by the third basis for the decision, discussed below), *Nollan and Dolan* can surely not be evaded by simply adding boilerplate “ordinary criteria” language to the denial. The increasing

complexity of land-use permitting processes, and of the criteria by which permit applications are judged, makes an “ordinary criteria” claim almost always plausible. When there is uncontested evidence of a demand for money or other property—and still assuming that denial of a permit because of failure to meet such a demand constitutes a taking—it should be up to the permitting authority to establish either (1) that the demand met the requirements of Nollan and Dolan, or (2) that denial would have ensued even if the demand had been met. Cf. *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977). The record (and the Court of Appeal’s opinion) make clear that the latter cannot be established here.

Finally, and still on the assumption that the Court of Appeal acknowledged that petitioners’ failure to accede to the fee demand was a motivating factor in the commission’s denial, the court’s refusal to apply Nollan and Dolan might rest upon the distinction that it drew between the grant of a permit subject to an unlawful condition and the denial of a permit when an unlawful condition is not met. See Cal. Rptr. 2d, at 569 (Strankman P. J., dissenting) (characterizing the majority’s opinion in this fashion). From one standpoint, of course, such a distinction makes no sense. The object of the Court’s holding in Nollan and Dolan was to protect against the State’s cloaking within the permit process ““an out-and-out plan of extortion,”” Nollan, 483 U.S. at 837 (quoting *J. E. D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)). There is no apparent reason why the phrasing of an extortionate demand as a condition precedent rather than as a condition subsequent should make a difference. It is undeniable, on the other hand, that the subject of any supposed taking in the present case is far from clear. Whereas in Nollan there was arguably a completed taking of an easement (the homeowner had completed construction that had been conditioned upon conveyance of the easement), and in Dolan there was at least a threatened taking of an easement (if the landowner had gone ahead with her contemplated expansion plans the easement would have attached), in the present case there is neither a taking nor a threatened taking of any money. If petitioners go ahead with the conversion of their apartments, the city will not sue for \$600,000 imposed as a condition of the conversion; it will sue to enjoin and punish a conversion that has been prohibited.

The first two of the conceivable bases for the Court of Appeal’s decision are so implausible as to call into question the state court’s willingness to hold state administrators to the Fifth Amendment standards set forth by this tribunal. There is reason to believe that this may be more than a local and isolated phenomenon. See, e.g., Delaney, *Development Agreements: The Road from Prohibition to “Let’s Make a Deal!”* 25 Urb. Law. 49, 52 (1993) (“In addition to anti-development attitudes and vesting problems, property owners and developers are confronting decisions of state courts which either ignore or do not follow the ‘essential nexus’ standard set forth in *Nollan v. California Coastal Comm’n* to validate development exactions” (footnote omitted)); M. Berger, *Recent Developments in the Law of Inverse Condemnation*, Q203 ALI-ABA Video Law Review Study 1, 4 (1991) (“Last year, we noted that the California appellate courts had reacted to

the Supreme Court's decisions in *First English Evangelical Lutheran Church v. County of Los Angeles*, (1987) 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct. 2378 and *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 by seeking ways to evade their evident mandate, either procedurally or substantively"). Were they the only arguable bases for the decision I would favor summary reversal, and remand for conduct of the Nollan-Dolan analysis. The third basis, however, is at least a plausible one, and raises a question that will doubtless be presented in many cases. Though I am unaware of a conflict of authority on the precise point, the other grounds upon which the court relied entitle this case to our attention, and should overcome our usual preference for cases that present actual conflicts. I would therefore grant certiorari and schedule the case for argument.

Session 26. Deprivation of All Economically Feasible Use

For the past quarter century the Supreme Court has struggled to find a principled basis for deciding whether private property has been “taken” by overzealous government regulations.

ANTONIN SCALIA, “THE RULE OF LAW AS A LAW OF RULES” 56 U. CHI. L. REV. 1175 (1989)

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LUCAS v. SOUTH CAROLINA COASTAL COUNCIL 505 U.S. 1003 (1992)

JUSTICE SCALIA delivered the opinion of the Court.

In 1986, petitioner David H. Lucas paid \$975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes. In 1988, however, the South Carolina Legislature enacted the Beachfront Management Act, S.C. Code §48-39-250 et seq. (Su1990) (Act), which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels. See §48-39- 290(A). A state trial court found that this prohibition rendered Lucas’s parcels “valueless.” Ato Pet. for Cert. 37. This case requires us to decide whether the Act’s dramatic effect on the economic value of Lucas’s lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of “just compensation.” U.S. Const., Amdt. 5.

I

A

South Carolina’s expressed interest in intensively managing development activities in the so-called “coastal zone” dates from 1977 when, in the aftermath of Congress’s passage of the federal Coastal Zone Management Act of 1972, 86 Stat. 1280, as amended, 16 U.S.C. §1451 et seq., the legislature enacted a Coastal Zone Management Act of its own. See S. C. Code §48-39-10 et seq. (1987). In its original form, the South Carolina Act required owners of coastal zone land that qualified as a “critical area” (defined in the legislation to include beaches and immediately adjacent sand dunes, §48-39-10(J)) to obtain a permit from the newly created South Carolina Coastal

Council (respondent here) prior to committing the land to a “use other than the use the critical area was devoted to on [September 28, 1977].” §48-39-130(A).

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

The Beachfront Management Act brought Lucas’s plans to an abrupt end. Under that 1988 legislation, the Council was directed to establish a “baseline” connecting the landward-most “points of erosion . . . during the past forty years” in the region of the Isle of Palms that includes Lucas’s lots. §48-39-280(A)(2) (Su1988). In action not challenged here, the Council fixed this baseline landward of Lucas’s parcels. That was significant, for under the Act construction of occupable improvements was flatly prohibited seaward of a line drawn 20 feet landward of, and parallel to, the baseline, §48-39-290(A) (Su1988). The Act provided no exceptions.¹

B

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

¹ The Act did allow the construction of certain non-habitable improvements, e.g., “wooden walkways no larger in width than six feet,” and “small wooden decks no larger than one hundred forty-four square feet.” §§48-39-290(A)(1) and (2) (Su1988).

Lucas's properties had been "taken" by operation of the Act, and it ordered respondent to pay "just compensation" in the amount of \$1,232,387.50. *Id.* at 40.

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

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

We granted certiorari. 502 U.S. ____ (1991).

III

A

Prior to Justice Holmes' exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it was generally thought that the Takings Clause reached only a "direct appropriation" of property, *Legal Tender Cases*, 12 Wall. 457, 551 (1871), or the functional equivalent of a "practical ouster of [the owner's] possession." *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879). See also *Gibson v. United States*, 166 U.S. 269, 275-276 (1897). Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 U.S., at 414-415. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the

qualification more and more until at last private property disappeared.” *Id.* at 415. These considerations gave birth in that case to the oft-cited maxim that, “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Ibid.*

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

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. See *Agins*, 447 U.S., at 260; see also *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 295-296 (1981). As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation “does not substantially advance legitimate state interests or denies an owner economically viable use of his land.” *Agins*, *supra*, at 260 (citations omitted) (emphasis added).¹¹⁹

¹¹⁹ Regrettably, the rhetorical force of our “deprivation of all economically feasible use” rule is greater than its precision, since the rule does not make clear the “property interest” against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme—and, we think, unsupportable—view of the relevant calculus, see *Penn Central Transportation Co. v. New York City*, 42 N. Y. 2d 324, 333-334, 366 N. E. 2d 1271, 1276-1277 (1977), *aff’d*, 438 U.S. 104 (1978), where the state court examined the diminution in a particular parcel’s value produced by a municipal ordinance in light of total value of the taking claimant’s other holdings in the vicinity.) Unsurprisingly, this uncertainty regarding the

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

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. As Justice Brennan explained: "From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property." *San Diego Gas & Elec. Co.*, *supra*, at 652 (Brennan, J., dissenting). We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.¹²⁰

composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. Compare *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) (law restricting subsurface extraction of coal held to effect a taking), with *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497-502 (1987) (nearly identical law held not to effect a taking); see also *id.*, at 515-520 (Rehnquist, C.J., dissenting); Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. Cal. L. Rev. 561, 566-569 (1984). The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.

¹²⁰ Justice Stevens criticizes the "deprivation of all economically beneficial use" rule as "wholly arbitrary," in that "[the] landowner whose property is diminished in value 95% recovers nothing," while the landowner who suffers a

B

The trial court found Lucas's two beachfront lots to have been rendered valueless by respondent's enforcement of the coastal-zone construction ban. Under Lucas's theory of the case, which rested upon our "no economically viable use" statements, that finding entitled him to compensation. Lucas believed it unnecessary to take issue with either the purposes behind the Beachfront Management Act, or the means chosen by the South Carolina Legislature to effectuate those purposes. The South Carolina Supreme Court, however, thought otherwise. In its view, the Beachfront Management Act was no ordinary enactment, but involved an exercise of South Carolina's "police powers" to mitigate the harm to the public interest that petitioner's use of his land might occasion. 304 S. C., at 384, 404 S. E. 2d, at 899. By neglecting to dispute the findings enumerated in the Act or otherwise to challenge the legislature's purposes, petitioner "conceded that the beach/dune area of South Carolina's shores is an extremely valuable public resource; that the erection of new construction, inter alia, contributes to the erosion and destruction of this public resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm." Id. at 382-383, 404 S. E. 2d, at 898. In the court's view, these concessions brought petitioner's challenge within a long line of this Court's cases sustaining against Due Process and Takings Clause challenges the State's use of its "police powers" to enjoin a property owner from activities akin to public nuisances. See *Mugler v. Kansas*, 123 U.S. 623 (1887) (law prohibiting manufacture of alcoholic beverages); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (law barring operation of brick mill in residential area); *Miller v. Schoene*, 276 U.S. 272 (1928) (order to destroy diseased cedar trees to prevent infection of nearby orchards); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (law effectively preventing continued operation of quarry in residential area).

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

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

It is correct that many of our prior opinions have suggested that “harmful or noxious uses” of property may be proscribed by government regulation without the requirement of compensation. For a number of reasons, however, we think the South Carolina Supreme Court was too quick to conclude that that principle decides the present case. The “harmful or noxious uses” principle was the Court’s early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State’s police power. See, e.g., *Penn Central Transportation Co.*, 438 U.S., at 125 (where State “reasonably concludes that ‘the health, safety, morals, or general welfare’ would be promoted by prohibiting particular contemplated uses of land,” compensation need not accompany prohibition). We made this very point in *Penn Central Transportation Co.*, where, in the course of sustaining New York City’s landmarks preservation program against a takings challenge, we rejected the petitioner’s suggestion that *Mugler* and the cases following it were premised on, and thus limited by, some objective conception of “noxiousness”:

“The uses in issue in *Hadacheck*, *Miller*, and *Goldblatt* were perfectly lawful in themselves. They involved no blameworthiness, . . . moral wrongdoing or conscious act of dangerous risk-taking which induce[d society] to shift the cost to a 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.” 438 U.S., at 133-134, n. 30.

“Harmful or noxious use” analysis was, in other words, simply the progenitor of our more contemporary statements that “land-use regulation does not effect a taking if it ‘substantially advances legitimate state interests’” *Agins v. Tiburon*, 447 U.S., at 260; see also *Penn Central Transportation Co.*, *supra*, at 127; *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-388 (1926).

The transition from our early focus on control of “noxious” uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between “harm-preventing” and “benefit-conferring” regulation is often in the eye of the beholder. It is quite possible, for example, to describe in either fashion the ecological, economic, and aesthetic concerns that inspired the South Carolina legislature in the present case. One could say that imposing a servitude on Lucas’s land is necessary in order to prevent his use of it from “harming” South Carolina’s ecological resources; or, instead, in order to

achieve the “benefits” of an ecological preserve.¹²¹ Whether one or the other of the competing characterizations will come to one’s lips in a particular case depends primarily upon one’s evaluation of the worth of competing uses of real estate. See Restatement (Second) of Torts §822, Comment g, p. 112 (1979) (“practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference”). A given restraint will be seen as mitigating “harm” to the adjacent parcels or securing a “benefit” for them, depending upon the observer’s evaluation of the relative importance of the use that the restraint favors. See Sax, “Takings and the Police Power,” 74 Yale L. J. 36, 49 (1964) (“The problem [in this area] is not one of noxiousness or harm-creating activity at all; rather it is a problem of inconsistency between perfectly innocent and independently desirable uses”). Whether Lucas’s construction of single-family residences on his parcels should be described as bringing “harm” to South Carolina’s adjacent ecological resources thus depends principally upon whether the describer believes that the State’s use interest in nurturing those resources is so important that any competing adjacent use must yield.

When it is understood that “prevention of harmful use” was merely our early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value; and that the distinction between regulation that “prevents harmful use” and that which “confers benefits” is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory “takings”—which require compensation—from regulatory deprivations that do not require compensation. A fortiori the legislature’s recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed. The South Carolina Supreme Court’s approach

¹²¹ In the present case, in fact, some of the “[South Carolina] legislature’s ‘findings’” to which the South Carolina Supreme Court purported to defer in characterizing the purpose of the Act as “harm-preventing,” 304 S. C. 376, 385, 404 S. E. 2d 895, 900 (1991), seem to us phrased in “benefit-conferring” language instead. For example, they describe the importance of a construction ban in enhancing “South Carolina’s annual tourism industry revenue,” S. C. Code §48-39-250(1)(b) (Su1991), in “providing habitat for numerous species of plants and animals, several of which are threatened or endangered,” §48-39-250(1)(c), and in “providing a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being.” §48-39-250(1)(d). It would be pointless to make the outcome of this case hang upon this terminology, since the same interests could readily be described in “harm-preventing” fashion.

Justice Blackmun, however, apparently insists that we must make the outcome hinge (exclusively) upon the South Carolina Legislature’s other, “harm-preventing” characterizations, focusing on the declaration that “prohibitions on building in front of the setback line are necessary to protect people and property from storms, high tides, and beach erosion.” He says “nothing in the record undermines [this] assessment,” *ibid.*, apparently seeing no significance in the fact that the statute permits owners of existing structures to remain (and even to rebuild if their structures are not “destroyed beyond repair,” S. C. Code Ann. §48-39-290(B)), and in the fact that the 1990 amendment authorizes the Council to issue permits for new construction in violation of the uniform prohibition, see S. C. Code §48-39-290(D)(1) (Su1991).

would essentially nullify Mahon’s affirmation of limits to the noncompensable exercise of the police power. Our cases provide no support for this: None of them that employed the logic of “harmful use” prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant’s land.¹²²

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our “takings” jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State’s power over, the “bundle of rights” that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; “as long recognized, some values are enjoyed under an implied limitation and must yield to the police power.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 413. And in the case of personal property, by reason of the State’s traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property’s only economically productive use is sale or manufacture for sale), see *Andrus v. Allard*, 444 U.S. 51, 66-67 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the “implied limitation” that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.¹²³

¹²² E.g., *Mugler v. Kansas*, 123 U.S. 623 (1887) (prohibition upon use of a building as a brewery; other uses permitted); *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914) (requirement that “pillar” of coal be left in ground to safeguard mine workers; mineral rights could otherwise be exploited); *Reinman v. Little Rock*, 237 U.S. 171 (1915) (declaration that livery stable constituted a public nuisance; other uses of the property permitted); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (prohibition of brick manufacturing in residential area; other uses permitted); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (prohibition on excavation; other uses permitted).

¹²³ After accusing us of “launching a missile to kill a mouse,” Justice Blackmun expends a good deal of throw-weight of his own upon a noncombatant, arguing that our description of the “understanding” of land ownership that informs the Takings Clause is not supported by early American experience. That is largely true, but entirely irrelevant. The practices of the States prior to incorporation of the Takings and Just Compensation Clauses, see *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897)—which, as Justice Blackmun acknowledges, occasionally included outright physical appropriation of land without compensation . . . were out of accord with any plausible interpretation of those provisions. Justice Blackmun is correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all . . . but even he does not suggest (explicitly, at least) that we renounce the Court’s contrary conclusion in *Mahon*. Since the text of the Clause can be read to encompass regulatory as well as physical deprivations (in contrast to the text originally proposed by Madison, see “Speech Proposing Bill of Rights” (June 8, 1789), in 12 J. Madison, *The Papers of James Madison* 201 (C. Hobson, R. Rutland, W. Rachal, & J. Sisson ed. 1979) (“No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation”),

Where “permanent physical occupation” of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted “public interests” involved, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S., at 426—though we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner’s title. Compare *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900) (interests of “riparian owner in the submerged lands . . . bordering on a public navigable water” held subject to Government’s navigational servitude), with *Kaiser Aetna v. United States*, 444 U.S., at 178-180 (imposition of navigational servitude on marina created and rendered navigable at private expense held to constitute a taking). We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.¹²⁴

On this analysis, the owner of a lake bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others’ land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land’s only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was always unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit. See Michelman, *Property, Utility, and Fairness, Comments on the Ethical Foundations of “Just Compensation” Law*, 80 Harv. L. Rev. 1165, 1239-1241 (1967). In light of our traditional resort to “existing rules or understandings that stem from an independent source such as state law” to define the range of interests that qualify for protection as “property” under the Fifth (and Fourteenth) amendments, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); see, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011-1012 (1984); *Hughes v. Washington*, 389 U.S. 290, 295 (1967) (Stewart, J., concurring), this recognition that the Takings Clause does not require compensation when an owner is barred from

we decline to do so as well.

¹²⁴ The principal “otherwise” that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of “real and personal property, in cases of actual necessity, to prevent the spreading of a fire” or to forestall other grave threats to the lives and property of others. *Bowditch v. Boston*, 101 U.S. 16, 18-19 (1880); see *United States v. Pacific Railroad*, 120 U.S. 227, 238-239 (1887).

putting land to a use that is proscribed by those “existing rules or understandings” is surely unexceptional. When, however, a regulation that declares “off-limits” all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.

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

It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner’s land; they rarely support prohibition of the “essential use” of land, *Curtin v. Benson*, 222 U.S. 78, 86 (1911). The question, however, is one of state law to be dealt with on remand. We emphasize that to win its case South Carolina must do more than proffer the legislature’s declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*. As we have said, a “State, by ipse dixit, may not transform private property into public property without compensation” *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.

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

So ordered.

Justice Blackmun, dissenting.

Today the Court launches a missile to kill a mouse.

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

Nonetheless, the Court presses on to decide the issue, and as it does, it ignores its jurisdictional limits, remakes its traditional rules of review, and creates simultaneously a new categorical rule and an exception (neither of which is rooted in our prior case law, common law, or common sense). I protest not only the Court's decision, but each step taken to reach it. More fundamentally, I question the Court's wisdom in issuing sweeping new rules to decide such a narrow case.

My fear is that the Court's new policies will spread beyond the narrow confines of the present case. For that reason, I, like the Court, will give far greater attention to this case than its narrow scope suggests—not because I can intercept the Court's missile, or save the targeted mouse, but because I hope perhaps to limit the collateral damage.¹²⁵

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

¹²⁵ The country has come to recognize that uncontrolled beachfront development can cause serious damage to life and property. See Brief for Sierra Club, et al. as Amici Curiae 2-5. Hurricane Hugo's September 1989 attack upon South Carolina's coastline, for example, caused 29 deaths and approximately \$6 billion in property damage, much of it the result of uncontrolled beachfront development. See Zalkin, *Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute*, 79 Cal. L. Rev. 205, 212-213 (1991). The beachfront buildings are not only themselves destroyed in such a storm, "but they are often driven, like battering rams, into adjacent inland homes." *Ibid.* Moreover, the development often destroys the natural sand dune barriers that provide storm breaks. *Ibid.*

C

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

The Beachfront Management Act includes a finding by the South Carolina General Assembly that the beach/dune system serves the purpose of “protecting life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner.” §48-39-250(1)(a). The General Assembly also found that “development unwisely has been sited too close to the [beach/dune] system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property.” §48-39-250(4); see also §48-39-250(6) (discussing the need to “afford the beach/dune system space to accrete and erode”).

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

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

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

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Justice O'Connor delivered the opinion of the Court.

On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined. A quarter century ago, in *Agins v. City of Tiburon*, 447 U. S. 255 (1980), the Court declared that government regulation of private property "effects a taking if [such regulation] does not substantially advance legitimate state interests" *Id.*, at 260. Through reiteration in a half dozen or so decisions since *Agins*, this language has been enconced in our Fifth Amendment takings jurisprudence. See *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U. S. 687, 704 (1999) (citing cases).

In the case before us, the lower courts applied *Agins*' "substantially advances" formula to strike down a Hawaii statute that limits the rent that oil companies may charge to dealers who lease service stations owned by the companies. The lower courts held that the rent cap effects an uncompensated taking of private property in violation of the Fifth and Fourteenth Amendments because it does not substantially advance Hawaii's asserted interest in controlling retail gasoline prices. This case requires us to decide whether the "substantially advances" formula announced in *Agins* is an appropriate test for determining whether a regulation effects a Fifth Amendment taking. We conclude that it is not.

I

The State of Hawaii, whose territory comprises an archipelago of 132 islands clustered in the midst of the Pacific Ocean, is located over 1,600 miles from the U. S. mainland and ranks among the least populous of the 50 States. Because of Hawaii's small size and geographic isolation, its wholesale market for oil products is highly concentrated. When this lawsuit began in 1997, only two refineries and six gasoline wholesalers were doing business in the State. As of that time, respondent Chevron U.S.A. Inc. was the largest refiner and marketer of gasoline in Hawaii: It controlled 60 percent of the market for gasoline produced or refined in-state and 30 percent of the wholesale market on the State's most populous island, Oahu.

Gasoline is sold at retail in Hawaii from about 300 different service stations. About half of these stations are leased from oil companies by independent lessee-dealers, another 75 or so are owned and operated by "open" dealers, and the remainder are owned and operated by the oil companies. Chevron sells most of its product through 64 independent lessee-dealer stations. In a typical lessee-dealer arrangement, Chevron buys or leases land from a third party, builds a service station, and then leases the station to a dealer on a turnkey basis. Chevron charges the lessee-dealer a monthly rent, defined as a percentage of the dealer's margin on retail sales of gasoline and other goods. In addition, Chevron requires the lessee-dealer to enter into a supply contract, under which

the dealer agrees to purchase from Chevron whatever is necessary to satisfy demand at the station for Chevron's product. Chevron unilaterally sets the wholesale price of its product.

The Hawaii Legislature enacted Act 257 in June 1997, apparently in response to concerns about the effects of market concentration on retail gasoline prices. See 1997 Haw. Sess. Laws no. 257, §1. The statute seeks to protect independent dealers by imposing certain restrictions on the ownership and leasing of service stations by oil companies. It prohibits oil companies from converting existing lessee-dealer stations to company-operated stations and from locating new company-operated stations in close proximity to existing dealer-operated stations. Haw. Rev. Stat. §§486H-10.4(a), (b) (1998 Cum. Supp.). More importantly for present purposes, Act 257 limits the amount of rent that an oil company may charge a lessee-dealer to 15 percent of the dealer's gross profits from gasoline sales plus 15 percent of gross sales of products other than gasoline. §486H-10.4(c).

Thirty days after Act 257's enactment, Chevron sued the Governor and Attorney General of Hawaii in their official capacities (collectively Hawaii) in the United States District Court for the District of Hawaii, raising several federal constitutional challenges to the statute. As pertinent here, Chevron claimed that the statute's rent cap provision, on its face, effected a taking of Chevron's property in violation of the Fifth and Fourteenth Amendments. Chevron sought a declaration to this effect as well as an injunction against the application of the rent cap to its stations. Chevron swiftly moved for summary judgment on its takings claim, arguing that the rent cap does not substantially advance any legitimate government interest. Hawaii filed a cross-motion for summary judgment on all of Chevron's claims.

To facilitate resolution of the summary judgment motions, the parties jointly stipulated to certain relevant facts. They agreed that Act 257 reduces by about \$207,000 per year the aggregate rent that Chevron would otherwise charge on 11 of its 64 lessee-dealer stations. On the other hand, the statute allows Chevron to collect more rent than it would otherwise charge at its remaining 53 lessee-dealer stations, such that Chevron could increase its overall rental income from all 64 stations by nearly \$1.1 million per year. The parties further stipulated that, over the past 20 years, Chevron has not fully recovered the costs of maintaining lessee-dealer stations in any State through rent alone. Rather, the company recoups its expenses through a combination of rent and product sales. Finally, the joint stipulation states that Chevron has earned in the past, and anticipates that it will continue to earn under Act 257, a return on its investment in lessee-dealer stations in Hawaii that satisfies any constitutional standard.

The District Court granted summary judgment to Chevron, holding that "Act 257 fails to substantially advance a legitimate state interest, and as such, effects an unconstitutional taking in violation of the Fifth and Fourteenth Amendments." *Chevron U.S.A. Inc. v. Cayetano*, 57 F. Supp. 2d 1003, 1014 (1998). The District Court accepted Hawaii's argument that the rent cap was intended to prevent concentration of the retail gasoline market-and, more importantly, resultant high prices

for consumers-by maintaining the viability of independent lessee-dealers. *Id.*, at 1009-1010. The court concluded that the statute would not substantially advance this interest, however, because it would not actually reduce lessee-dealers' costs or retail prices. It found that the rent cap would allow incumbent lessee-dealers, upon transferring occupancy rights to a new lessee, to charge the incoming lessee a premium reflecting the value of the rent reduction. Accordingly, the District Court reasoned, the incoming lessee's overall expenses would be the same as in the absence of the rent cap, so there would be no savings to pass along to consumers. *Id.*, at 1010-1012. Nor would incumbent lessees benefit from the rent cap, the court found, because the oil company lessors would unilaterally raise wholesale fuel prices in order to offset the reduction in their rental income. *Id.*, at 1012-1014.

On appeal, a divided panel of the Court of Appeals for the Ninth Circuit held that the District Court had applied the correct legal standard to Chevron's takings claim. *Chevron U.S.A. Inc. v. Cayetano*, 224 F. 3d 1030, 1033-1037 (2000). The Court of Appeals vacated the grant of summary judgment, however, on the ground that a genuine issue of material fact remained as to whether the Act would benefit consumers. *Id.*, at 1037-1042. Judge William Fletcher concurred in the judgment, maintaining that the "reasonableness" standard applicable to "ordinary rent and price control laws" should instead govern Chevron's claim. *Id.*, at 1048.

On remand, the District Court entered judgment for Chevron after a 1-day bench trial in which Chevron and Hawaii called competing expert witnesses (both economists) to testify. 198 F. Supp. 2d 1182 (2002). Finding Chevron's expert witness to be "more persuasive" than the State's expert, the District Court once again concluded that oil companies would raise wholesale gasoline prices to offset any rent reduction required by Act 257, and that the result would be an increase in retail gasoline prices. *Id.*, at 1187-1189. Even if the rent cap did reduce lessee-dealers' costs, the court found, they would not pass on any savings to consumers. *Id.*, at 1189. The court went on to reiterate its determination that Act 257 would enable incumbent lessee-dealers to sell their leaseholds at a premium, such that incoming lessees would not obtain any of the benefits of the rent cap. *Id.*, at 1189-1190. And while it acknowledged that the rent cap could preclude oil companies from constructively evicting dealers through excessive rents, the court found no evidence that Chevron or any other oil company would attempt to charge such rents in the absence of the cap. *Id.*, at 1191. Finally, the court concluded that Act 257 would in fact decrease the number of lessee-dealer stations because the rent cap would discourage oil companies from building such stations. *Id.*, at 1191-1192. Based on these findings, the District Court held that "Act 257 effect[ed] an unconstitutional regulatory taking given its failure to substantially advance any legitimate state interest." *Id.*, at 1193.

The Ninth Circuit affirmed, holding that its decision in the prior appeal barred Hawaii from challenging the application of the "substantially advances" test to Chevron's takings claim or from

arguing for a more deferential standard of review. 363 F. 3d 846, 849-855 (2004). The panel majority went on to reject Hawaii's challenge to the application of the standard to the facts of the case. *Id.*, at 855-858. Judge Fletcher dissented, renewing his contention that Act 257 should not be reviewed under the "substantially advances" standard. *Id.*, at 859-861. We granted certiorari, 543 U. S. ____ (2004), and now reverse.

II

A

The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth, see *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226 (1897), provides that private property shall not "be taken for public use, without just compensation." As its text makes plain, the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U. S. 304, 314 (1987). In other words, it "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *Id.*, at 315 (emphasis in original). While scholars have offered various justifications for this regime, we have emphasized its role in "bar[ring] 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 also *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 325 (1893).

The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property. See, e.g., *United States v. Pewee Coal Co.*, 341 U. S. 114 (1951) (Government's seizure and operation of a coal mine to prevent a national strike of coal miners effected a taking); *United States v. General Motors Corp.*, 323 U. S. 373 (1945) (Government's occupation of private warehouse effected a taking). Indeed, until the Court's watershed decision in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 (1922), "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas v. South Carolina Coastal Council*, 505 U. S. 1003, 1014 (1992) (citations omitted and emphasis added; brackets in original); see also *id.*, at 1028, n. 15 ("[E]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all").

Beginning with *Mahon*, however, the Court recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster-and that such "regulatory takings" may be compensable under the Fifth Amendment. In Justice Holmes' storied but cryptic formulation, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U. S., at 415. The rub, of course, has been-and remains-how to discern how far is "too far." In answering that

question, we must remain cognizant that "government regulation-by definition-involves the adjustment of rights for the public good," *Andrus v. Allard*, 444 U. S. 51, 65 (1979), and that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Mahon*, *supra*, at 413.

Our precedents stake out two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her property-however minor-it must provide just compensation. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking). A second categorical rule applies to regulations that completely deprive an owner of "all economically beneficial us[e]" of her property. *Lucas*, 505 U. S., at 1019 (emphasis in original). We held in *Lucas* that the government must pay just compensation for such "total regulatory takings," except to the extent that "background principles of nuisance and property law" independently restrict the owner's intended use of the property. *Id.*, at 1026-1032.

Outside these two relatively narrow categories (and the special context of land-use exactions), regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U. S. 104 (1978). The Court in *Penn Central* acknowledged that it had hitherto been "unable to develop any 'set formula' " for evaluating regulatory takings claims, but identified "several factors that have particular significance." *Id.*, at 124. Primary among those factors are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Ibid.* In addition, the "character of the governmental action"-for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good"-may be relevant in discerning whether a taking has occurred. *Ibid.* The *Penn Central* factors-though each has given rise to vexing subsidiary questions-have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules. See, e.g., *Palazzolo v. Rhode Island*, 533 U. S. 606, 617-618 (2001); *id.*, at 632-634 (O'Connor, J., concurring).

Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property-

perhaps the most fundamental of all property interests. See *Dolan v. City of Tigard*, 512 U. S. 374, 384 (1994); *Nollan v. California Coastal Comm'n*, 483 U. S. 825, 831-832 (1987); *Loretto*, supra, at 433; *Kaiser Aetna v. United States*, 444 U. S. 164, 176 (1979). In the *Lucas* context, of course, the complete elimination of a property's value is the determinative factor. See *Lucas*, supra, at 1017 (positing that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation"). And the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests.

B

In *Agins v. City of Tiburon*, a case involving a facial takings challenge to certain municipal zoning ordinances, the Court declared that "[t]he 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)." 447 U. S., at 260. Because this statement is phrased in the disjunctive, *Agins*' "substantially advances" language has been read to announce a stand-alone regulatory takings test that is wholly independent of *Penn Central* or any other test. Indeed, the lower courts in this case struck down Hawaii's rent control statute as an "unconstitutional regulatory taking," 198 F. Supp. 2d, at 1193, based solely upon a finding that it does not substantially advance the State's asserted interest in controlling retail gasoline prices.. Although a number of our takings precedents have recited the "substantially advances" formula minted in *Agins*, this is our first opportunity to consider its validity as a freestanding takings test. We conclude that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence.

There is no question that the "substantially advances" formula was derived from due process, not takings, precedents. In support of this new language, *Agins* cited *Nectow v. Cambridge*, 277 U. S. 183, a 1928 case in which the plaintiff claimed that a city zoning ordinance "deprived him of his property without due process of law in contravention of the Fourteenth Amendment," *id.*, at 185. *Agins* then went on to discuss *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926), a historic decision holding that a municipal zoning ordinance would survive a substantive due process challenge so long as it was not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.*, at 395 (emphasis added); see also *Nectow*, supra, at 188 (quoting the same "substantial relation" language from *Euclid*).

When viewed in historical context, the Court's reliance on *Nectow* and *Euclid* is understandable. *Agins* was the Court's first case involving a challenge to zoning regulations in many decades, so it was natural to turn to these seminal zoning precedents for guidance. See Brief for United States as Amicus Curiae in *Agins v. City of Tiburon*, O. T. 1979, No. 602, pp. 12-13

(arguing that Euclid "set out the principles applicable to a determination of the facial validity of a zoning ordinance attacked as a violation of the Takings Clause of the Fifth Amendment"). Moreover, Agins' apparent commingling of due process and takings inquiries had some precedent in the Court's then-recent decision in Penn Central. See 438 U. S., at 127 (stating in dicta that "[i]t is ... implicit in Goldblatt [v. Hempstead, 369 U. S. 590 (1962),] 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"). But see Goldblatt, supra, at 594-595 (quoting " 'reasonably necessary' " language from Lawton v. Steele, 152 U. S. 133, 137 (1894), a due process case, and applying a deferential " 'reasonableness' " standard to determine whether a challenged regulation was a "valid exercise of the ... police power" under the Due Process Clause). Finally, when Agins was decided, there had been some history of referring to deprivations of property without due process of law as "takings," see, e.g., Rowan v. Post Office Dept., 397 U. S. 728, 740 (1970), and the Court had yet to clarify whether "regulatory takings" claims were properly cognizable under the Takings Clause or the Due Process Clause, see Williamson County Regional Planning Comm'n v. Hamilton Bank of Jefferson City, 473 U. S. 172, 197-199 (1985).

Although Agins' reliance on due process precedents is understandable, the language the Court selected was regrettably imprecise. The "substantially advances" formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause. See, e.g., County of Sacramento v. Lewis, 523 U. S. 833, 846 (1998) (stating that the Due Process Clause is intended, in part, to protect the individual against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective"). But such a test is not a valid method of discerning whether private property has been "taken" for purposes of the Fifth Amendment.

In stark contrast to the three regulatory takings tests discussed above, the "substantially advances" inquiry reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is distributed among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause.

Chevron appeals to the general principle that the Takings Clause is meant " '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.' " Brief for Respondent 17-21 (quoting Armstrong, 364 U. S., at 49). But that appeal is clearly misplaced, for the reasons just indicated. A

test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation. The owner of a property subject to a regulation that effectively serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an ineffective regulation. It would make little sense to say that the second owner has suffered a taking while the first has not. Likewise, an ineffective regulation may not significantly burden property rights at all, and it may distribute any burden broadly and evenly among property owners. The notion that such a regulation nevertheless "takes" private property for public use merely by virtue of its ineffectiveness or foolishness is untenable.

Instead of addressing a challenged regulation's effect on private property, the "substantially advances" inquiry probes the regulation's underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property "for public use." It does not bar government from interfering with property rights, but rather requires compensation "in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church*, 482 U. S., at 315 (emphasis added). Conversely, if a government action is found to be impermissible—for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.

Chevron's challenge to the Hawaii statute in this case illustrates the flaws in the "substantially advances" theory. To begin with, it is unclear how significantly Hawaii's rent cap actually burdens Chevron's property rights. The parties stipulated below that the cap would reduce Chevron's aggregate rental income on 11 of its 64 lessee-dealer stations by about \$207,000 per year, but that Chevron nevertheless expects to receive a return on its investment in these stations that satisfies any constitutional standard. See *supra*, at 4. Moreover, Chevron asserted below, and the District Court found, that Chevron would recoup any reductions in its rental income by raising wholesale gasoline prices. See *supra*, at 5. In short, Chevron has not clearly argued—let alone established—that it has been singled out to bear any particularly severe regulatory burden. Rather, the gravamen of Chevron's claim is simply that Hawaii's rent cap will not actually serve the State's legitimate interest in protecting consumers against high gasoline prices. Whatever the merits of that claim, it does not sound under the Takings Clause. Chevron plainly does not seek compensation for a taking of its property for a legitimate public use, but rather an injunction against the enforcement of a regulation that it alleges to be fundamentally arbitrary and irrational.

Finally, the "substantially advances" formula is not only doctrinally untenable as a takings test—its application as such would also present serious practical difficulties. The *Agins* formula can be read to demand heightened means-ends review of virtually any regulation of private property. If

so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited. Moreover, it would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies.

Although the instant case is only the tip of the proverbial iceberg, it foreshadows the hazards of placing courts in this role. To resolve Chevron's takings claim, the District Court was required to choose between the views of two opposing economists as to whether Hawaii's rent control statute would help to prevent concentration and supra-competitive prices in the State's retail gasoline market. Finding one expert to be "more persuasive" than the other, the court concluded that the Hawaii Legislature's chosen regulatory strategy would not actually achieve its objectives. See 198 F. Supp. 2d, at 1187-1193. Along the way, the court determined that the State was not entitled to enact a prophylactic rent cap without actual evidence that oil companies had charged, or would charge, excessive rents. See *id.*, at 1191. Based on these findings, the District Court enjoined further enforcement of Act 257's rent cap provision against Chevron. We find the proceedings below remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation. See, e.g., *Exxon Corp. v. Governor of Maryland*, 437 U. S. 117, 124-125 (1978); *Ferguson v. Skrupa*, 372 U. S. 726, 730-732 (1963). The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here.

For the foregoing reasons, we conclude that the "substantially advances" formula announced in *Agins* is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation. Since Chevron argued only a "substantially advances" theory in support of its takings claim, it was not entitled to summary judgment on that claim.

III

We emphasize that our holding today—that the "substantially advances" formula is not a valid takings test—does not require us to disturb any of our prior holdings. To be sure, we applied a "substantially advances" inquiry in *Agins* itself, see 447 U. S., at 261-262 (finding that the challenged zoning ordinances "substantially advance[d] legitimate governmental goals"), and arguably also in *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U. S. 470, 485-492 (1987) (quoting "'substantially advance[s]'" language and then finding that the challenged statute was intended to further a substantial public interest). But in no case have we found a compensable taking based on such an inquiry. Indeed, in most of the cases reciting the "substantially advances" formula, the Court has merely assumed its validity when referring to it in dicta. See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U. S. 302, 334 (2002); *Del*

Monte Dunes, 526 U. S., at 704; Lucas, 505 U. S., at 1016; Yee v. Escondido, 503 U. S. 519, 534 (1992); United States v. Riverside Bayview Homes, Inc., 474 U. S. 121, 126 (1985).

It might be argued that this formula played a role in our decisions in *Nollan v. California Coastal Comm'n*, 483 U. S. 825 (1987), and *Dolan v. City of Tigard*, 512 U. S. 374 (1994). See Brief for Respondent 21-23. But while the Court drew upon the language of *Agins* in these cases, it did not apply the "substantially advances" test that is the subject of today's decision. Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit. See *Dolan*, supra, at 379-380 (permit to expand a store and parking lot conditioned on the dedication of a portion of the relevant property for a "greenway," including a bike/pedestrian path); *Nollan*, supra, at 828 (permit to build a larger residence on beachfront property conditioned on dedication of an easement allowing the public to traverse a strip of the property between the owner's seawall and the mean high-tide line).

In each case, the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking. *Dolan*, supra, at 384; *Nollan*, supra, at 831-832. The question was whether the government could, without paying the compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny. The Court in *Nolan* answered in the affirmative, provided that the exaction would substantially advance the same government interest that would furnish a valid ground for denial of the permit. 483 U. S., at 834-837. The Court further refined this requirement in *Dolan*, holding that an adjudicative exaction requiring dedication of private property must also be " 'rough[ly] proportiona[l]' ... both in nature and extent to the impact of the proposed development." 512 U. S., at 391; see also *Del Monte Dunes*, supra, at 702 (emphasizing that we have not extended this standard "beyond the special context of [such] exactions").

Although *Nollan* and *Dolan* quoted *Agins*' language, see *Dolan*, supra, at 385; *Nollan*, supra, at 834, the rule those decisions established is entirely distinct from the "substantially advances" test we address today. Whereas the "substantially advances" inquiry before us now is unconcerned with the degree or type of burden a regulation places upon property, *Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings. In neither case did the Court question whether the exaction would substantially advance some legitimate state interest. See *Dolan*, supra, at 387-388; *Nollan*, supra, at 841. Rather, the issue was whether the exactions substantially advanced the same interests that land-use authorities asserted would allow them to deny the permit altogether. As the Court explained in *Dolan*, these cases involve a special application of the "doctrine of 'unconstitutional conditions,' " which provides that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a

discretionary benefit conferred by the government where the benefit has little or no relationship to the property." 512 U. S., at 385. That is worlds apart from a rule that says a regulation affecting property constitutes a taking on its face solely because it does not substantially advance a legitimate government interest. In short, Nollan and Dolan cannot be characterized as applying the "substantially advances" test we address today, and our decision should not be read to disturb these precedents.

* * *

Twenty-five years ago, the Court posited that a regulation of private property "effects a taking if [it] does not substantially advance [a] legitimate state interes[t]." *Agins*, supra, at 260. The lower courts in this case took that statement to its logical conclusion, and in so doing, revealed its imprecision. Today we correct course. We hold that the "substantially advances" formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence. In so doing, we reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above-by alleging a "physical" taking, a Lucas-type "total regulatory taking," a Penn Central taking, or a land-use exaction violating the standards set forth in Nollan and Dolan. Because Chevron argued only a "substantially advances" theory in support of its takings claim, it was not entitled to summary judgment on that claim. Accordingly, we reverse the judgment of the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice Kennedy, concurring.

This separate writing is to note that today's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process. *Eastern Enterprises v. Apfel*, 524 U. S. 498, 539 (1998) (Kennedy, J., concurring in judgment and dissenting in part). The failure of a regulation to accomplish a stated or obvious objective would be relevant to that inquiry. Chevron voluntarily dismissed its due process claim without prejudice, however, and we have no occasion to consider whether Act 257 of the 1997 Hawaii Session Laws "represents one of the rare instances in which even such a permissive standard has been violated." *Apfel*, supra, at 550. With these observations, I join the opinion of the Court.

Session 27. Disambiguating Lucas

FLORIDA ROCK INDUSTRIES, INC. v. THE UNITED STATES 18 F.3d 1560 (Fed. Cir. 1994)

Before NIES, Chief Judge, NEWMAN and PLAGER, Circuit Judges.

PLAGER, Circuit Judge.

This is a regulatory taking case. It arose when the plaintiff Florida Rock Industries Inc. (Florida Rock) sought a permit under §404 of the Clean Water Act from the Army Corps of Engineers (Corps) to mine the limestone which lay beneath a tract of wetlands. The Corps denied the permit on October 5, 1980. On May 25, 1982, Florida Rock filed suit in the United States Court of Federal Claims, seeking monetary compensation from the defendant United States (Government); Florida Rock alleged that the Corps' permit denial constituted an uncompensated taking of private property for public use in violation of the Fifth Amendment. The Court of Federal Claims agreed, *Florida Rock Indus., Inc. v. United States*, 8 Cl. Ct. 160 (1985) (Florida Rock I), and awarded Florida Rock \$1,029,000 plus attorney fees and simple interest. On appeal, this court vacated the judgment that a taking had occurred and remanded for further consideration. *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), cert. denied 479 U.S. 1053, 93 L. Ed. 2d 978, 107 S. Ct. 926 (1987) (Florida Rock II). On remand, the Court of Federal Claims found that the permit denial deprived Florida Rock of all value in its land, and so again concluded that there had been a taking and reinstated the \$1,029,000 damages award, this time with compound interest. *Florida Rock Indus., Inc. v. United States*, 21 Cl. Ct. 161 (1990) (Florida Rock III). The Government appeals both the damages award and the choice of compound rather than simple interest. We again find it necessary to vacate the judgment that there has been a taking, and remand for further consideration consistent with this opinion.

BACKGROUND

The detailed background of the case is described in the several opinions referred to above as Florida Rock I-III. We provide here only a brief overview before proceeding to the heart of the matter: whether the Corps' denial of the §404 permit effected a regulatory taking, thus requiring the Government to pay just compensation. The answer to that question depends on the impact the regulatory imposition had on the economic use, and hence value, of the property.

In 1972, shortly before the enactment of the Clean Water Act, Florida Rock purchased a 1,560 acre wetlands parcel in Dade County, Florida, to the west of suburban Miami. The purchase price was \$2,964,000 (an average of \$1,900 per acre). Florida Rock obtained the parcel in order to extract the underlying limestone- a process which destroys the surface wetlands.

During the 1970s, however, the ecological importance of wetlands was increasingly appreciated. The Corps in 1977 enacted regulations requiring owners of wetlands parcels to obtain permits under §404 of the Clean Water Act before engaging in dredging or filling activities. See generally *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123-24, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985). Not long after, Florida Rock began mining operations on the parcel, without having applied for a §404 permit. The Corps issued a cease and desist order on September 7, 1978. Florida Rock stopped mining, restored the area as best it could, and began negotiating with the Corps for the permit.

Initially, Florida Rock sought a permit for the entire 1,560 acres. The Corps responded that permits would be issued only for parcels of a size to suffice for three years of mining; in Florida Rock's case, 98 acres would serve its anticipated needs for three years. Florida Rock acquiesced in the Corps' demand and applied for a permit covering only the 98 acre parcel at issue here. After considering the revised application, the Corps concluded that the proposed mining would cause irreparable loss of an ecologically valuable wetland parcel and would create undesirable water turbidity. The permit application was denied on October 2, 1980.

Florida Rock, conceding the validity of the Corps' actions, filed suit in the United States Court of Federal Claims, alleging that the permit denial was an uncompensated regulatory taking of its land. In *Florida Rock I*, the Court of Federal Claims found that the value of the parcel before the taking was \$10,500 per acre and that the value after the taking was negligible because rock mining--in the view of the court, the only viable economic use --had been foreclosed. *Florida Rock I*, 8 Cl. Ct. at 164 (citing *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 295-96, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981)). The Court of Federal Claims concluded that the permit denial was a regulatory taking, for which the landowner must be compensated. *Florida Rock I*, 8 Cl. Ct. at 165.

On appeal to this court, that judgment was vacated in *Florida Rock II*. The Federal Circuit held that the Court of Federal Claims in determining the after- taking value of the affected property had erred in focusing on immediate use --the proper focus should instead have been on a determination of "fair market value." *Id.* 791 F.2d at 903. The case was remanded to the Court of Federal Claims for further proceedings.

On remand, the Court of Federal Claims entertained evidence seeking to establish the fair market value of the property subsequent to the permit denial. The Government presented two assessors, Mr. Slack and Mr. Cantwell, who had investigated contemporaneous land sales in the area. Using the standard comparable sales valuation method, one assessor concluded that the property had a fair market value of \$4,000 per acre, while the other found a value of \$4,615 per acre.

[The Court of Federal Claims] on the other hand, read Florida Rock II to require a detailed inquiry into the motivations and sophistication of buyers of the comparable properties upon which assessment was based. It crafted a survey—viewed to be “admittedly novel,” Florida Rock III, 21 Cl. Ct. at 173— and concluded that virtually all the buyers of the comparable properties were lacking in sufficient knowledge in order for their purchases to qualify as truly comparable sales. Florida Rock’s assessor, Mr. Failla, used the results of this survey to justify discarding evidence that the average retail price of parcels in the vicinity of Florida Rock’s land was \$6,100 per acre, and concluded that the actual fair market value of the tract following the permit denial was negligible. Implicit in this result is the assumption that no one with full knowledge of the regulatory regime would be willing to gamble that concern for the ecological importance of the wetlands would give way in the future to the economics of development pressure from nearby Miami. The Court of Federal Claims decided accordingly.

DISCUSSION

A

How to determine whether a regulatory taking under the Fifth Amendment has occurred is a subject of on-going debate.¹²⁶ The Supreme Court has provided various articulations, influenced, as could be expected, by the particular circumstances of the cases before it. One formula that has emerged and has been repeated in several cases requires that the court balance several pragmatic considerations in making its regulatory takings determination. These considerations include: the economic impact of the regulation on the claimant, the extent to which the regulation interferes with investment-backed expectations, and the character of the Government action. (The leading case is

¹²⁶ The literature is extensive; readers conversant with the field will be familiar with much of it. Among symposia and significant individual contributions in the last year are: Richard Ausness, *Wild Dunes and Serbonian Bogs: The Impact of the Lucas Decision on Shoreline Protection Programs*, 70 *Denv. U. L. Rev.* 437 (1993); Catholic University Law Review: *United States Court of Federal Claims Symposium*, *Cath. U. L. Rev.* 717 (contributions by James E. Brookshire, Dennis J. Coyle, John A. Humbach, Glynn S. Lunney, Jr., George W. Miller & Jonathan Abram, and Loren A. Smith) (1993); David Mandelker, *Of Nice and Missiles: A True Account of Lucas v. South Carolina Coastal Council*, 8 *J. Land Use & Envtl. L.* 285 (1993). Northwestern School of Law of Lewis and Clark College: *A Colloquium on Lucas*, 23 *Envtl. L.* 869 (contributions by Michael C. Blumm, William Funk, James L. Huffman, Donald Large, Edward Sullivan, and Lawrence Watters) (1993); Jed Rubenfeld, *Usings*, 102 *Yale L.J.* 1077 (1993); *Stanford Law Review: Symposium on Lucas v. South Carolina Coastal Council*, 45 *Stan. L. Rev.* 1369 (contributions by Richard Epstein, William W. Fisher, Richard Lazarus, and Joseph L. Sax) (1993); *Windfalls and Wipeouts: Environmental Regulation, Property, and the ‘Takings’ Clause after Lucas v. South Carolina Coastal Council*, 17 *Vt. L. Rev.* 645 (1993); Walker, *Common Law Rules and Land Use Regulations: Lucas and Future Takings Jurisprudence*, 3 *Seton Hall Const. L.J.* 3 (1993).

Penn Central Transp. Co. v. New York City, 438 U.S. 104, at 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978) (Penn Central)). In this appeal, it is the economic impact of the regulation that is at issue.

The recent Supreme Court decision in *Lucas v. South Carolina Coastal Council*, 120 L. Ed. 2d 798, 505 U.S. ___, 112 S. Ct. 2886 (1992) (Lucas), teaches that the economic impact factor alone may be determinative; in some circumstances, no balancing of factors is required. If a regulation categorically prohibits all economically beneficial use of land- destroying its economic value for private ownership -the regulation has an effect equivalent to a permanent physical occupation. There is, without more, a compensable taking.

If, however, a regulation prohibits less than all economically beneficial use of the land and causes at most a partial destruction of its value, the case does not come within the Supreme Court's 'categorical' taking rule. As we explain below, we reject the trial court's analysis that led to its conclusion that all economically beneficial use of the land was taken by the Government. We remand for determination of what economic use as measured by market value, if any, remained after the permit denial, and for consideration of whether, in light of the properly assessed value of the land, Florida Rock has a valid takings claim.

B

In *Florida Rock II* this court stated that, with regard to the property at issue, although "there may be a question what knowledgeable buyers would have paid, but that they would have paid some substantial figure seems certain." *Id.*, 791 F.2d 893 at 903. The trial court on remand was instructed: "if there is found to exist a solid and adequate fair market value (for the 98 acres) which Florida Rock could have obtained from others for that property, that would be a sufficient remaining use of the property to forestall a determination that a taking had occurred or that any just compensation had to be paid by the government." *Id.* We did not discuss what residual fair market value would be "adequate" to forestall a taking determination. In short, we understand *Florida Rock II* to hold that purchases which are made by market speculators as well as home builders and other developers are comparable sales, with the caveat that particular sales might be discarded by the assessor if those sales appear questionable in light of the market as a whole.

The Court of Federal Claims on remand in *Florida Rock III*, read *Florida Rock II* differently. Our passing reference to buyers being "correctly informed" was read to require a detailed inquiry into the motivation and sophistication of the buyers whose purchases comprised the comparable sales used in the fair market value assessment. The Court of Federal Claims rejected the testimony because [the government's assessor] assumed sufficient knowledge on the part of the purchasers. *Florida Rock II*, 21 Cl. Ct. at 172. Instead, the court accepted the testimony of Florida Rock's assessor, who rejected all of the comparable sales values on the principle that none of the purchasers were sufficiently sophisticated and knowledgeable. That was error—contrary to our instruction in

Florida Rock II, contrary to generally accepted understandings of market valuation, and finally, contrary to the working assumptions of a free market.

There is no disagreement as to the facts regarding the existence and nature of the market. Florida Rock's study identified in the immediate vicinity of the 98 acre tract 240 land sales during the period 1971 through 1987. A significant number of those sales occurred in the early 1980s, despite the intervening change in the regulatory environment. The average sales price per acre in 1980 was \$6,100. The price per acre varied predominantly as a function of the overall lot size; smaller lots commanded higher per acre prices. Florida Rock's survey indicated that roughly 80% of the buyers had purchased the land for 'investment' purposes and that, overall, the purchasers intended to hold the land for an average of 9 to 10 years.

Thus, there was an active though speculative investment market for Florida Rock's land at the time of and following the permit denial. Accord, *Bystrom*, 485 So. 2d at 447-48. The fair market price which Florida Rock could have commanded at that time remains, still, to be determined, but it was certainly much higher than the nominal \$500 per acre value accepted by the Court of Federal Claims.

A speculative market may exist in land that is regulated as well as in land that is not, and the precise content of regulations at any given time may not be particularly important to those active in the market. As this court observed in *Florida Rock II*, 791 F.2d 893 at 902-03, yesterday's Everglades swamp to be drained as a mosquito haven is today's wetland to be preserved for wildlife and aquifer recharge; who knows what tomorrow's view of public policy will bring, or how the market will respond to it.

We need not decide such speculative questions here. The uncontroverted evidence of an active real estate market compels the conclusion that the typical 'willing buyer-willing seller' requirement of fair market value had been met; it would be inappropriate for a court to substitute its own judgment of value for that of the market. While an assessor might be justified in adjusting the fair market value figure by discarding aberrational values based upon sales between related entities or fraudulent sales to widows and orphans, an assessor may not discard an entire market as aberrational. 'Aberrational' means outside the norm established by general activity. The fact that many players in the market chose to disregard the immediate potential for development in favor of a long-term perspective—hardly unusual behavior in Florida's history of real estate investment—does not make the market as a whole 'aberrational.' When the market provides a well-substantiated value for a property, a court may not substitute its own judgment as to what is a wise investment.

It was error to read *Florida Rock II* as requiring a detailed inquiry into the motivation and sophistication of the buyers of comparable parcels. Dollars are fungible; a speculative market provides a landowner with monetary compensation which is just as satisfactory as that provided by

any other market. Should a landowner wish to pick and choose her buyers, that luxury is not chargeable to the federal fisc. To conclude otherwise would be tantamount to concluding that there could never be a market fueled by speculation- a conclusion at odds both with common sense and with our directions in Florida Rock II.

C

Ultimately, the question that must be answered is whether, as a result of the denial of certain economic uses, there was a taking of Florida Rock's property by the Government. This question turns on "the economic impact of the regulation on the claimant," Penn Central, 438 U.S. at 124, measured by the change, if any, in the fair market value caused by the regulatory imposition. On the state of the record before us we are unable to answer the question. The Court of Federal Claims answered it with a straightforward 'yes' when the per acre value of the 98 acre parcel after the permit denial was found to be only a nominal \$500 per acre, as compared to the \$10,500 found by the trial court to be the per acre value prior to the permit denial. This represented a loss in value of roughly 95%. Florida Rock III, 21 Cl. Ct. at 175. The court in effect treated the permit denial as essentially a 'categorical' taking of all economic use. See Lucas, 112 S. Ct. at 2893. "The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land." *id.*

The Court of Federal Claims' analysis was correct in theory, but started from an incorrect premise-- that the value of the parcel after denial of the permit was a nominal \$500 per acre. When a figure closer to \$4,000 per acre is substituted, the correct outcome is no longer clear. On remand, with a fair market value calculated in accordance with this opinion, the Court of Federal Claims must again return to the approach dictated by Florida Rock II:

The court should consider, along with other relevant matters, the relationship of the owner's basis or investment, and the fair market value before the alleged taking to the fair market value after the alleged taking. In determining the severity of the economic impact, the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored. *Id.* 791 F.2d at 905.

The Court of Federal Claims must reconsider the assessments proffered by the parties and other evidence in the record, and determine a fair market value accordingly. Should that determination establish, as the evidence in the record suggests, that there was some (but not a total) reduction in the overall market value of plaintiff's property as a result of the regulatory imposition, the question will then be posed: does that reduction constitute a taking of property compensable under the Fifth Amendment?

In Lucas, the Supreme Court touched upon the question of a partial regulatory taking, see 120 L. Ed. 2d 798, 112 S. Ct. 2886, 2893-95, but, concluding on the facts before it that the case was

one in which the owner was called upon “to sacrifice all economically beneficial uses in the name of the common good,” *Id.* at 2895, the Court found a categorical taking and thus did not have to decide the partial taking question. *Id.* at 2896 n. 9.

The felt need for some kind of a special rule in regulatory takings cases may stem from the difficult line that has to be drawn between a partial regulatory taking and the mere ‘diminution in value’ that often accompanies otherwise valid regulatory impositions. As expressed by Justice Holmes in *Pennsylvania Coal*,

“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.” *Id.* 260 U.S. at 413.

Gone as well, it is almost superfluous to add, would be the constraints imposed on the Government by the takings clause.

The trial court will find itself with little direct case law guidance. As *Pennsylvania Coal* and subsequent appellate court decisions have recognized, the question of when a regulatory taking occurs cannot be answered as a matter of absolute doctrine, but instead requires case by case adjudication: “the question depends upon the particular facts.” *Id.* 260 U.S. 393 at 413. But recourse to the facts hardly solves the basic problem at hand—there simply is no bright line dividing compensable from non-compensable exercises of the Government’s power when a regulatory imposition causes a partial loss to the property owner. What is necessary is a classic exercise of judicial balancing of competing values.

When there is reciprocity of advantage, paradigmatically in a zoning case, see, e.g., *Euclid v. Ambler Co.*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926), then the claim that the Government has taken private property has little force: the claimant has in a sense been compensated by the public program “adjusting the benefits and burdens of economic life to promote the common good.” *Penn Central*, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646. Thus shared economic impacts resulting from certain types of land use controls have been held to be non-compensable. *Agins v. Tiburon*, 447 U.S. 255, 262-63, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980) (shared ‘benefits and burdens’ of a zoning ordinance); *Penn Central*, 438 U.S. 104 at 131, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (same).

That the purpose and function of the regulatory imposition is relevant to drawing the line between mere diminution and partial taking should not be read to suggest that when Government

acts in pursuit of an important public purpose, its actions are excused from liability¹²⁷. To so hold would eviscerate the plain language of the Takings Clause, and would be inconsistent with Supreme Court guidance. It is necessary that the Government act in a good cause, but it is not sufficient. The takings clause already assumes the Government is acting in the public interest: “nor shall private property be taken for public use without just compensation” (emphasis added).

It is for the trial court as an initial matter to determine whether the Government acted within its proper role in the circumstances presented by the case of Florida Rock. Marketplace decisions should be made under the working assumption that the Government will neither prejudice private citizens, unfairly shifting the burden of a public good onto a few people, nor act arbitrarily or capriciously, that is, will not act to disappoint reasonable investment-backed expectations. The Government, in a word, must act fairly and reasonably, so that private parties can pursue their interests. At the same time, when Government acts as the intermediary between private interests to provide a mutually beneficial environment from which all benefit and in which all can thrive, the shared diminution of free choice that results may not rise to the level of constitutionally required compensation.

In addition, then, to a demonstration of loss of economic use to the property owner as a result of the regulatory imposition- a fact yet to be properly determined in this case -the trial court must consider: are there direct compensating benefits accruing to the property, and others similarly situated, flowing from the regulatory environment? Or are benefits, if any, general and widely shared through the community and the society, while the costs are focused on a few? Are alternative permitted activities economically realistic in light of the setting and circumstances, and are they realistically available? In short, has the Government acted in a responsible way, limiting the constraints on property ownership to those necessary to achieve the public purpose, and not allocating to some number of individuals, less than all, a burden that should be borne by all?

Admittedly this is not a bright line, simply drawn. Property owners and regulators, attempting to predict whether a governmental regulation has gone too far, will still need to use judgment and exercise care in making decisions. In this sense our decision today continues the

¹²⁷ Identification of a specific property interest to be transferred to the Government should pose little problem for property lawyers. Property interests are about as diverse as the human mind can conceive. Property interests may be real and personal, tangible and intangible, possessory and non-possessory. They can be defined in terms of sequential rights to possession (present interests –life estates and various types of fees-- and future interests), and in terms of shared interests (such as the various kinds of co-ownership). There are specially structured property interests (such as those of a mortgagee, lessee, bailee, adverse possessor), and there are interests in special kinds of things (such as water, and commercial contracts). And property interests play across the entire range of legal ideas: see, e.g., *Tompkins v. Superior Court of San Francisco*, 59 Cal. 2d 65, 378 P.2d 113, 27 Cal. Rptr. 889 (Cal. Sup. Ct. 1963) (did joint occupancy of an apartment give one occupant the kind of possessory property interest that carried with it the power to grant to police legal entry to search without a warrant for the other occupant’s marijuana stash).

tradition of ad hoc judicial decision-making in this area. Over time, however, enough cases will be decided with sufficient care and clarity that the line will more clearly emerge.

CONCLUSION

The judgment of the Court of Federal Claims is vacated and the matter is remanded for further proceedings consistent with this opinion.

Vacated and Remanded.

Nies, Chief Judge, dissenting.

I respectfully dissent from the majority's remand for a determination of whether the United States must pay compensation under the Fifth Amendment to the extent that the 98 acres in issue lost a substantial part, but not essentially all, of its economic use or value. The majority's theory is contrary to Fifth Amendment "takings" jurisprudence as delineated by the Supreme Court and this court. Labelling its lost use/value theory a "partial taking" (*ipse dixit*) does not give it any legitimacy.

Inverse condemnation of land, like the affirmative exercise of the power of eminent domain, requires the transfer of the property found to be taken to the United States. Value is not a transferable interest. Thus, a claim for loss of value does not constitute a takings claim within the meaning of the Fifth Amendment.

LOVELADIES HARBOR, INC. v. UNITED STATES
28 F.3d 1171 (Fed.Cir.1994)

Before Plager, Clevenger, and Rader, Circuit Judges.

PLAGER, Circuit Judge.

This is a regulatory, taking case. It arose when the plaintiffs (Loveladies) sought a fill permit under §404 of the Clean Water Act from the Army Corps of Engineers (Corps) to complete the final stage of an ongoing real estate development project. The Corps denied the permit on May 5, 1982. Loveladies challenged the validity of that permit denial in a proceeding in Federal District Court under §554 of the Administrative Procedure Act. *Loveladies Harbor, Inc. and Loveladies Harbor, Unit D, Inc. v. Baldwin*, Civ. No. 82-1948 (filed June 15, 1982). The challenge proved unsuccessful. *Loveladies Harbor, Inc. and Loveladies Harbor, Unit D, Inc. v. Baldwin*, Civ. No. 82-1948 (D.N.J. Apr. 3, 1984), *aff'd* 751 F.2d 376 (3d Cir. 1984) (table).

Loveladies then proceeded with a suit in the Court of Federal Claims, which they had filed sometime earlier, *Loveladies Harbor, Inc. and Loveladies Harbor, Unit D, Inc. v. United States*, No. 243-83 L (filed Apr. 14, 1983), seeking monetary compensation from the United States (Government). That court denied cross motions for summary judgment, *Loveladies Harbor, Inc. and Loveladies Harbor, Unit D, Inc. v. United States*, 15 Cl. Ct. 381 (1988) (Loveladies 1), and after trial on the merits awarded Loveladies \$2,658,000 plus interest in compensation. *Loveladies Harbor, Inc. and Loveladies Harbor, Unit D, Inc. v. United States*, 21 Cl. Ct. 153 (1990) (Loveladies 2). The Government here appeals this award.

Subsequent to the time this case was briefed and argued on appeal, [a] significant legal developments occurred which directly bear on the issues of the case. [It] was the decision by the United States Supreme Court in *Lucas v. South Carolina Coastal Council*, 120 L. Ed. 2d 798, 505 U.S. ___, 112 S. Ct. 2886 (1992). We turn then to the effect of the Supreme Court's decision in *Lucas* on the outcome of the case.

BACKGROUND

The property at issue in this dispute is a 12.5 acre parcel (the parcel) consisting of 11.5 acres of wetlands and one acre of filled land, located on Long Beach Island, Ocean County, New Jersey. Barnegat Bay bounds the wetlands on the west, while single-family homes bound it on the east and southeast. The 12.5 acres is part of a 51 acre parcel owned by Loveladies, which in turn is part of an original 250 acre tract which Loveladies had acquired in 1958. The balance of the 250 acres—199 acres—had been developed before 1972 and the enactment of §404 of the Clean Water Act.

In order to develop the remaining 51 acre parcel for residential use, Loveladies needed to fill 50 acres, the one acre having been previously filled, and that in turn required Loveladies to obtain permission from both the New Jersey Department of Environmental Protection (NJDEP) and the Corps. That process proved to be lengthy and contentious, marked by several years of negotiation (with Loveladies submitting progressively less ambitious and less environmentally objectionable proposals), a 1977 permit denial, appeal of that denial to the Commissioner of NJDEP, and judicial review in state court.

During the course of the proceedings, NJDEP offered, as a compromise, permission for Loveladies to develop 12.5 of the 51 acres. Loveladies initially declined that offer. Eventually Loveladies acquiesced to the 12.5 acre limitation, the dispute was resolved, and the permit, on September 9, 1981, issued.¹²⁸ See *In re Loveladies Harbor, Inc.*, 176 N.J. Super. 69, 422 A.2d 107 (N.J. Super. Ct. App. Div. 1980), cert. denied 85 N.J. 501, 427 A.2d 588 (N.J. 1981). The permit granted permission to fill and develop 11.5 acres in addition to the one acre which had been filled previously—this is the 12.5 acre parcel at issue—and to construct 35 single family homes thereon.

Loveladies then sought the requisite federal permit for the development project. As required, the Corps sought the views of the counterpart state agency, the NJDEP. NJDEP in its response acknowledged that they had issued Loveladies the permit as they were obligated to do under the terms of the settlement, but denied that the permit approval was in compliance with the state's requirements. The response went on to explain that the 12.5 acre development would be "anachronistic," a "throwback to the 1950's-1960's style of shore development," and closed by noting, "[a] denial of the federal permit appears appropriate under this Division's understanding of the pertinent federal law."

The Corps rejected Loveladies' §404 permit application on May 5, 1982. Loveladies again resorted to the courts. As previously noted, the §404 permit denial was challenged in Federal District Court under §554 of the APA, and that challenge was unsuccessful. *Loveladies Harbor, Inc. and Loveladies Harbor, Unit D, Inc., v. Baldwin*, supra. Between the time the District court made its decision and the appeal was decided, Loveladies filed a claim in the Court of Federal Claims for just compensation under the Fifth Amendment. That case proceeded to trial following issuance of the Third Circuit's affirmance of the district court's rejection of Loveladies' APA claims.

Following a full hearing, factual issues were resolved in favor of Loveladies. *Loveladies 2*, 21 Cl. Ct. at 153. The court found that the fair market value of the parcel prior to the permit denial was \$2,658,000 whereas the value after the permit denial was \$12,500. This greater than 99%

¹²⁸ The permit was issued subject to several conditions, including a requirement that Loveladies submit a "deed restriction or conservation easement which insures that the site's remaining wetlands, lagoons, creeks, and bay bottom will not be filled or used for non-water dependent uses."

diminution of value, "coupled with the court's earlier determination of a lack of a countervailing substantial legitimate state interest," led the court to conclude that there had been a taking. *Loveladies 2*, 21 Cl. Ct. at 160 (referring to *Loveladies 1*, 15 Cl. Ct. at 388-90). The Government appeals the judgment of the Court of Federal Claims.

DISCUSSION

At the outset we wish to make clear exactly what is at issue, and what is not. What is not at issue is whether the Government can lawfully prevent a property owner from filling or otherwise injuring or destroying vital wetlands. The importance of preserving the environment, the authority of state and federal governments to protect and preserve ecologically significant areas, whether privately or publicly held, through appropriate regulatory mechanisms is not here being questioned. There can be no doubt today that every effort must be made individually and collectively to protect our natural heritage, and to pass it to future generations unspoiled. The destruction of ancient civilizations by human misuse of the environment, such as that at Ephesus, teaches the need for public policies that work within the natural environment, rather than attempt radically to alter it.

The question at issue here is, when the Government fulfills its obligation to preserve and protect the public interest, may the cost of obtaining that public benefit fall solely upon the affected property owner, or is it to be shared by the community at large. In the final analysis the answer to that question is one of fundamental public policy. It calls for balancing the legitimate claims of the society to constrain individual actions that threaten the larger community, on the one side, and, on the other, the rights of the individual and our commitment to private property as a bulwark for the protection of those rights.¹²⁹ It requires us to decide which collective rights are to be obtained at collective cost, in order better to preserve collectively the rights of the individual. The role of the court is to implement and enforce that public policy as it appears in governing law, in this case in the words of the Constitution and the controlling pronouncements of the Supreme Court.

June 29, 1992 marked the decision in *Lucas v. South Carolina Coastal Council*, 120 L. Ed. 2d 798, 505 U.S. ___, 112 S. Ct. 2886 (1992). The only real question was whether the state's policy for preservation of the ocean-front ecology trumped Lucas' property rights in such a manner that Lucas should bear the full cost of the application of that policy to his property. The trial court said no. If the state wished to pursue the policy in that manner, cost to property owners must be shared

¹²⁹ The only dependable foundation of personal liberty is the personal economic security of private property . . . There is no surer way to give men the courage to be free than to insure them a competence upon which they can rely. Men cannot be made free by laws unless they are in fact free because no man can buy and no man can coerce them. That is why the Englishman's belief that his home is his castle and that the king cannot enter it . . . [is] the very essence of the free man's way of life. Walter Lippmann, *The Method of Freedom* 100-102 (1934).

by all, not just the relatively few persons on whom the policy happened adversely to impact. The trial court awarded Lucas 1.1 million dollars for the taking.

The Supreme Court of South Carolina, in a split decision, reversed. That court held that the determination by the South Carolina legislature to preserve and protect the state's oceanfront ecology reflected a paramount public policy which, when balanced against the private property rights of the individual, required that the property rights yield. Thus there was no governmental taking under the Fifth Amendment, and no compensation was owed. *Lucas v. South Carolina Coastal Council*, 304 S.C. 376, 404 S.E.2d 895 (S.C. 1991).

When the Supreme Court accepted Lucas' appeal, the case was understood to confront the Court with a much-heralded opportunity to clarify how courts were to balance public interest claims against liberty claims of private property owners, and to do it in a case in which the issue was sharply focused on fundamental ecological and environmental values. Instead, the Court recast the issue. The question, said the Court, was not one of balance between competing public and private claims. Rather the question is simply one of basic property ownership rights: within the bundle of rights which property lawyers understand to constitute property, is the right or interest at issue, as a matter of law, owned by the property owner or reserved to the state?

The Court explained that the basis for the state's reservation lies in the principles of common law nuisance. Property rights as a matter of law since Blackstone's day have been understood to be subject to the power of the state to abate nuisances. If the imposed restraint would have been justified under the state's traditional nuisance law, then the property owner's bundle of rights did not include the right claimed, and no taking could occur. The Court remanded the case to the South Carolina Supreme Court to determine, under that state's nuisance laws, whether the interest at issue was the state's or the property owner's.¹³⁰

In sum, then, to restate the law of regulatory taking as currently applicable to the case before us:

- a) A property owner who can establish that a regulatory taking of property has occurred is entitled to a monetary recovery for the value of the interest taken, measured by what is just compensation.

¹³⁰In a summary opinion, published November 20, 1992, in response to the Supreme Court's remand, the South Carolina Supreme Court concluded "we have reviewed the record and heard arguments from the parties regarding whether [the state] possesses the ability under the common law to prohibit Lucas from constructing a habitable structure on his land. [The state] has not persuaded us that any common law basis exists by which it could restrain Lucas' desired use of his land; nor has our research uncovered any such common law principle." *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484, 486 (S.C. 1992).

b) With regard to the interest alleged to be taken, there has been a regulatory taking if

(1) there was a denial of economically viable use of the property as a result of the regulatory imposition;

(2) the property owner had distinct investment-backed expectations; and (3) it was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

The effect, then, of Lucas was to dramatically change the third criterion, from one in which courts, including federal courts, were called upon to make ad hoc balancing decisions, balancing private property rights against state regulatory policy, to one in which state property law, incorporating common law nuisance doctrine, controls. This sea change removed from regulatory takings the vagaries of the balancing process, so dependent on judicial perceptions with little effective guidance in law. It substituted instead a referent familiar to property lawyers everywhere, and one which will have substantial (though varying from state to state) likelihood of predictability for both property owners and regulators.

With regard to the second criterion—investment-backed expectations— it is not disputed that Loveladies purchased the land involved with the reasonable expectation and intention of developing it over time for sale to purchasers of the improved lots; that the regulation constitutes an interference with their investment-backed expectations cannot be denied. There is, however, less agreement between the parties with regard to the first and third criteria. We will address each in turn.

A. Denial of Economically Viable Use and the Denominator Problem

On the facts of the case before us, the question of whether there has been a partial or total loss of economic use (in the latter case a 'categorical' taking, see Lucas), depends on what is the specific property that was affected by the permit denial.

* * *

The relevant property for the takings analysis is the 12.5 acres, for which the trial court found the remaining value to be de minimis. This is not, then, a case of a partial taking, involving linedrawing between non-compensable 'mere diminution' and compensable partial taking. See *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (1994). Rather, this is a case in which the owner of the relevant parcel was deprived of all economically feasible use. The trial court's conclusion that the permit denial was effectively a total taking of the property owner's interest in these acres is fully supported in the record; there is no clear error in that conclusion.

B. The Nuisance Question

What remains, then, in light of *Lucas* is consideration of the third criterion--the question of whether, under controlling law, the regulatory imposition goes beyond the Government's powers under common law nuisance doctrine, and thus constitutes a taking. On the facts of this case, we need not examine this question exhaustively, and can leave to another day and to other cases the working out of the full scope of this new requirement.

The question of whether filling of the 11.5 acres of unfilled wetlands would constitute a nuisance arose at trial. The Government argued that allowing the fill would constitute a nuisance. The *Lucas* test is a matter of ascertaining the continuing boundary between private ownership and government reach, and inheres in the title of every piece of property without necessarily being defined with regard to a particular use or activity of the owner.

At trial, in view of the Government's having raised the issue, the scope of nuisance law was explored at some length, and the record contains the parties' developed views on whether the common law of nuisance would justify the denial of the permit to develop the 12.5 acre tract. The trial court concluded that the Government had failed to carry its burden of showing that that law could have been invoked to prevent the fill. Our review of the record leads us to the same conclusion.

It is important to note that Loveladies purchased the property with the intent to develop it long before these particular state and federal regulatory programs came into effect. Furthermore, the state did not include in its original conditions for development of the property any restrictions on the filling of the 12.5 acres at issue here. The fill restrictions did not arise until long after the development project was undertaken.

In other words, nothing in the state's conduct reflected a considered determination that certain defined activities would violate the state's understanding of its nuisance powers. Cf. *Euclid*, 272 U.S. at 387-88 ("the law of nuisances . . . may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the [police] power.") Nor did Loveladies have the opportunity to decide, at the beginning, whether its investment backed expectations could be realized under the regulatory environment the state later attempted to impose.

CONCLUSION

For all these reasons, we find that, on the particular facts of this case, no error was committed by the trial judge in determining that a taking occurred when the Federal Government denied the §404 permit. The judgment of the trial court is

AFFIRMED.

PALM BEACH ISLES ASSOCIATES v. UNITED STATES
208 F.3d 1374 (Fed. Cir. 2000)

PLAGER, Circuit Judge.

This is an inverse condemnation–regulatory taking–case, on appeal from the United States Court of Federal Claims. Palm Beach Isles Associates, (PBIA) claim that the United States (the “Government”) effected a regulatory taking of their property in Florida when the Army Corps of Engineers (the “Corps”) refused to grant a permit to dredge and fill the property. The Court of Federal Claims granted the Government’s motion for summary judgment of no liability. See *Palm Beach Isles Assocs. v. United States*, 42 Fed. Cl. 340 (1998).

PBIA appeals the ruling of the Court of Federal Claims. Because a genuine issue of material fact regarding the applicability of the federal navigational servitude is in dispute, an issue on which the outcome of the case hinges, summary judgment was improvidently granted. The judgment of the Court of Federal Claims is vacated, and the case is remanded for further proceedings consistent with this opinion.

BACKGROUND

In 1956, a group of investors bought 311.7 acres of land in Florida for \$380,190. With various transfers through the years, primarily by devise and inheritance, this group eventually became PBIA. The property is located north of Palm Beach on a long spit of land which sits between the Atlantic Ocean on the east and Lake Worth on the west. A road traverses the spit from north to south, and splits the property into two parcels. Of the 311.7 acres, 261 acres are east of the road, and constitute upland oceanfront property. This parcel was sold in 1968 to a developer for some \$1 million; it is not as such involved in this law suit.

The remaining 50.7 acres are located west of the road. This 50.7 acre parcel consists of 1.4 acres of shoreline wetlands adjacent to the road, and 49.3 acres of submerged land adjacent to the wetlands. The submerged acreage lies below the mean high water mark, in the bed of Lake Worth. It is this 50.7 acre parcel that is the subject of this action.

Lake Worth is a long, narrow, shallow body of water having a north-south orientation. At one time the lake was a landlocked freshwater lake, but years ago a cut, Lake Worth Inlet, was made across the spit that separates the lake from the ocean, and as a result the lake is now a tidal water with direct access to the ocean. Lake Worth serves as a segment of the Atlantic Intracoastal Waterway (“ICW”). A channel has been dredged along the western shore of the lake to provide a readily-navigable passage for vessels. As a part of the ICW, Lake Worth is considered a navigable water of the United States, and thus the submerged portion of PBIA’s property lies in the bed of a navigable water of the United States.

Shortly after purchasing the property, in 1957, PBIA applied for and received from the Corps the necessary permits to dredge and fill the 50.7 acres. The permits were renewed in 1960. However, PBIA never performed the work and the permits expired in 1963.

Some twenty-five years later, in 1988, PBIA applied to the State of Florida Department of Environmental Regulation (“DER”) for a permit, as now required by state law, to dredge and fill the submerged lake bottom it owned, along with the adjoining wetlands. After the DER in 1990 denied the permit on environmental grounds, PBIA sued the DER and the Trustees of the Internal Improvement Fund of the State of Florida, the state agency from whom PBIA derived its title to the property.¹³¹ Eventually a settlement of the suit was reached. The State acknowledged that, pursuant to the deed from the Trustees, PBIA had the legal right to erect a bulkhead around the submerged land and fill the 50.7 acres. The settlement stipulated that the State would not interfere with PBIA’s efforts to obtain permits from the Corps.

PBIA again applied to the Corps for the dredge and fill permits required by the Rivers & Harbors Act. Meanwhile, however, in 1972, Congress had passed the Clean Water Act (codified at 33 U.S.C. §§1251-1376 (1994 & Supp. III 1997)). Section 404 of the Clean Water Act, 33 U.S.C. §1344 (1994), also requires a permit from the Corps for dredging and filling navigable waters of the United States, and requires that environmental concerns be taken into account in deciding whether to grant such a permit. After consulting with the State of Florida, the Corps denied the permits.

The Corps’ denial letter made clear that the denial was primarily predicated on environmental grounds and the requirements of the Clean Water Act, but the Memorandum accompanying the denial letter also stated:

(11) Navigation: Shallow water depths that already exist in the proposed project area have limited boating activities to shallow draft vessels. Therefore, other than the elimination of [49.3] acres of navigable waters, the project should not have a significant adverse impact on navigation, in general.

After the denial of the permits, PBIA filed suit in the Court of Federal Claims, claiming that the denial of the permits prevents any economically viable use of the 50.7 acres and therefore constitutes a regulatory taking of the parcel. PBIA requested more than \$10 million as compensation for the taking.

¹³¹ Title to the beds of navigable waters of the United States is either in the state in which the waters are located, as a matter of state sovereignty, or in the owners of the land bordering the waters. Whether in the one or the other is a question of state law. See *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 60, 57 L. Ed. 1063, 33 S. Ct. 667 (1913). In Florida, title to the beds of navigable waterbodies is held by the state in public trust; the Trustees of the Internal Improvement Fund administer the trust, and in general have power to convey submerged lands to private owners if the sale is not contrary to the public interest. In the early years of Florida’s development, much of the State’s sovereignty land was so conveyed. See F.E. Maloney, S.J. Plager, & F.N. Baldwin, *Water Law and Administration: The Florida Experience* §§120-128 (1968) (ch. 12: Title to Beds Under Navigable Waters).

The Court of Federal Claims found that the 49.3 acres, which lie below the mean high water mark, are part of the bed of Lake Worth and are subject to the federal navigational servitude, citing *United States v. Rands*, 389 U.S. 121, 19 L. Ed. 2d 329, 88 S. Ct. 265 (1967), and *Owen v. United States*, 851 F.2d 1404 (Fed. Cir. 1988) (en banc). Citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), the Court of Federal Claims ruled that the navigational servitude was a “pre-existing limitation upon the landowner’s title,” 505 U.S. at 1029, and therefore “the proscribed use interests were not part of [the owner’s] title to begin with,” *id.* at 1027. In this circumstance, concluded the court, there was no taking despite the total loss of value for the land.

With regard to the 1.4 adjacent acres of wetlands, the Court of Federal Claims again found no taking on three grounds. First, it determined that the 1.4 acres should be viewed not as a separate parcel in itself, but rather as a part of the whole initial 311.7 acre parcel, for which PBI A had received adequate compensation when it sold the 261 acres for \$1 million. Second, the Court of Federal Claims held that PBI A knew when it bought the property that it would need permits to develop the land (as evidenced by its 1957 and 1960 filings), and thus the existing statutory regime precluded any reasonable investment-backed expectation of being able to develop the property. Finally, the court found that the 1.4-acre section by itself is insufficient for building homes, and PBI A had not established that all other uses were foreclosed. The Government’s summary judgment motion was granted.

DISCUSSION

The analytical method for examining a regulatory taking claim is set forth in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994). *Loveladies Harbor* extensively reviewed the law of regulatory takings as it stood prior to the Supreme Court’s decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), and then explained the impact of *Lucas* on that body of law. As a result of this analysis, *Loveladies Harbor* described the law of regulatory takings in the following manner:

a) A property owner who can establish that a regulatory taking of property has occurred is entitled to a monetary recovery for the value of the interest taken, measured by what is just compensation.

b) With regard to the interest alleged to be taken, there has been a regulatory taking if

(1) there was a denial of economically viable use of the property as a result of the regulatory imposition;

(2) the property owner had distinct investment-backed expectations; and

(3) it was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

28 F.3d at 1179.

Subsequently, again citing *Lucas*, this court explained in *Florida Rock Indus. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), that “if a regulation categorically prohibits all economically viable use of the land—destroying its economic value for private ownership—the regulation has an effect equivalent to a permanent physical occupation. There is, without more, a compensable taking.” *Id.* at 1564-65. *Florida Rock* went on to point out that even when the taking is considered ‘categorical,’ *Lucas* preserved for the Government a nuisance defense to such a taking claim. See *id.* at 1565 n.10. Thus, when the analysis of prong (1) reveals that the regulatory imposition has deprived the owner of all economically viable use of the property (a ‘categorical taking’), then the only remaining issue is the Government’s defense under prong (3).

I. Denial of Economically Viable Use and the Denominator Problem

Because the analysis of a regulatory takings claim differs depending on whether there has been an alleged total deprivation of economically viable use or only a partial deprivation, we first address the question whether the Corps’ permit denials preclude all economically viable use of the property. If that is so, then, as we have noted, we are dealing with a categorical taking, and the Government’s available defense to the takings claim lies in showing that the property owner’s rights are subject, as a matter of basic property law, to the Government’s asserted regulatory imposition. Whether the asserted imposition causes a total wipeout or something less (see *Florida Rock* for a discussion of the implications of ‘something less’) depends in a case such as this on what is the economically relevant parcel—the ‘denominator problem.’¹³² We must decide if the whole 311.7 acre parcel is the relevant denominator, as argued by the Government and found by the Court of Federal Claims, or whether the relevant parcel is the 50.7 acres for which the permit was denied, as argued by PBIA. This is a conclusion of law, based on the facts of the case.

The Government argues that since the land was purchased together, it should all be treated as one parcel. PBIA should not be allowed to sever the part that is subject to regulation from the part that is not. The value of the part sold in 1968 should be considered as part of the denominator in assessing the proportionate value of the 50.7 acres.

¹³² The problem is referred to as the denominator problem because, in comparing the value that has been taken from the property by the imposition 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.” *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987) (internal quotes and citation omitted).

PBIA counters that the two parcels have never been part of a common development scheme; their only link was that they were purchased at the same time. PBIA points out that the two parts are separated by a road, they are different types of property, subject to different zoning, and PBIA applied for its original permits only for the lakeside property because PBIA never planned to develop the entire property as a unit. PBIA also notes that the oceanfront property was sold in 1968, before the now-existing regulatory fabric came into place.

In the instant case, the Court of Federal Claims found the relevant parcel to be the 311.7 acres. The court based its conclusion, *inter alia*, on the Government's assertion that the regulatory structure under the Rivers and Harbors Act that led to the permit denials was in place before the 261 acres were sold in 1968, and therefore they should be included in the denominator.

The timing of property acquisition and development, compared with the enactment and implementation of the governmental regimen that led to the regulatory imposition, is a factor, but only one factor, to be considered in determining the proper denominator for analysis. In a given case, other factors may be more compelling.

In this case, PBIA never planned to develop the parcels as a single unit. Furthermore, PBIA bought the land in 1956 and sold the 261 acres in 1968, both events occurring before the environmental considerations contained in the Clean Water Act came into play, beginning in 1972. It is inappropriate to consider those transactions to have occurred in the context of the substance of a regulatory structure that was not in place at the relevant times.

The regulatory imposition that infected the development plans for the 50.7 acres was unrelated to PBIA's plans for and disposition of the 261 acres of beachfront upland on the east side of the road. The development of that property was physically and temporally remote from, and legally unconnected to, the 50.7 acres of wetlands and submerged lake bed on the lake side of the spit. Combining the two tracts for purposes of the regulatory takings analysis involved here, simply because at one time they were under common ownership, or because one of the tracts sold for a substantial price, cannot be justified. The trial court's conclusion to the contrary was error.

Once the proper parcel is defined as the 50.7 acres, it becomes clear that, without the dredge and fill permits, the entire 50.7 acres, including the 1.4 acres of wetlands, have no or minimal value. Thus, the facts are uncontrovertible that the permit denial has the effect of denying the property owner all economically viable use of the property, and, since the State has stipulated that the property owner under state law has the right to dredge and fill, the denial by the Corps of the permits constitutes a categorical taking of the 50.7 acres by the Federal Government. The Court of Federal Claims erred in holding otherwise.

Since there is a categorical taking of the 50.7 acres, the issue of PBIA's investment-backed expectations under prong (2) of the Loveladies Harbor analysis is not applicable. We move to the Government's asserted defense under prong (3).

II. The Government's Power to Regulate and the Navigational Servitude

The key issue here is whether the navigational servitude defense is available to the Government in this case.

A

The question to be addressed first in this context is whether the submerged 49.3 acres are subject to the navigational servitude. The 'navigational servitude' derives from the Commerce Clause of the Constitution, and gives the United States Government a 'dominant servitude'—a power to regulate and control the waters of the United States in the interest of commerce. See *United States v. Rands*, 389 U.S. 121, 122-23, 19 L. Ed. 2d 329, 88 S. Ct. 265 (1967).

PBIA argues that the water depth over the 49.3 acres (1-3 feet) is insufficient to support commercial navigation, and thus does not implicate the navigational servitude. Under this view, the underlying land would not be subject to it. According to PBIA, the fact that Lake Worth as a whole is navigable is irrelevant; only the navigability of the 49.3 acre portion matters. The Government counters that navigation need not be 'commercial' to implicate the navigational servitude, and the mere ability of the water to support even small boats is sufficient to implicate it; since Lake Worth as a whole is navigable, the entire body up to the mean high water mark is subject to the navigational servitude, regardless of particular depths.

A review of the relevant authorities and precedent indicates that the Government's understanding of the concept of federal navigability is closer to correct than is PBIA's,¹³³ and that the property is subject to the navigational servitude. In *Rands* the Supreme Court noted that the navigational servitude "extends to the entire [navigable] stream and the stream bed below ordinary high-water mark." 389 U.S. at 123. This court later cited *Rands* and other Supreme Court precedent and said that "land or property within the bed [of a navigable waterbody] are always subject to (or burdened with) the potential exercise of the navigational servitude," and that "the Supreme Court has left no doubt that the high-water mark bounds the bed of the [navigable body]." *Owen v. United States*, 851 F.2d 1404, 1409 (Fed. Cir. 1988) (en banc). Thus, since the parcel at issue lies below the high water mark, is part of the bed of Lake Worth, and Lake Worth is a navigable water of the United States, the parcel is subject to the navigational servitude. The particular water depth over PBIA's land is not controlling.

¹³³ See generally Maloney, Plager, & Baldwin, *supra*, §22: The Navigability Concept.

B

The next question is the application of the navigational servitude to a purported regulatory taking. This is an issue of first impression in this court. We therefore review the relevant precedent on the application of the navigational servitude and fit it into the analytical framework of controlling Supreme Court law regarding regulatory takings, as enunciated in that Court's decision in *Lucas*.

1

The Supreme Court's seminal decision in *Lucas* refined and clarified the structure for analyzing regulatory takings. As explained in *Loveladies Harbor*, the third prong of the takings analysis derived from the Supreme Court's *Lucas* decision provides the Government with a defense to what would otherwise be a regulatory taking. The Supreme Court described the defense as follows:

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed interests were not part of his title to begin with.

505 U.S. at 1027.

The Court tied this exception to the common law of nuisance, saying that confiscatory regulations

. . . must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally . . .

Id. at 1029.

The Court went on to explain further the rationale for this nuisance defense, as well as its application. The common law of nuisance makes unlawful certain conduct by property owners, and the State may convert these implicit background principles into explicit laws without thereby effecting a taking. See *id.* at 1030. When a regulation that forbids all economically beneficial uses of the land goes beyond these background principles, however, the Government must pay compensation. See *id.* Thus, in order to assert this defense, the Government must “identify background principles of nuisance and property law that prohibit the uses he now intends in the

circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all beneficial uses, the [regulatory action] is taking nothing.” Id. at 1031-32.

The Court also mentioned the navigational servitude in this context, stating “we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner’s title. . . . *Scranton v. Wheeler*, 179 U.S. 141, 163, 45 L. Ed. 126, 21 S. Ct. 48 (1900) (interests of ‘riparian owner in the submerged lands . . . bordering on a public navigable water’ held subject to Government’s navigational servitude).” 505 U.S. at 1028-29. Thus, the Supreme Court seems to suggest that, though much of the discussion in *Lucas* focused on property rights as defined by state law, the United States Government could assert the federal navigational servitude as a defense against a regulatory takings claim.

In light of our understanding of *Lucas* and the other cases we have considered, we hold that the navigational servitude may constitute part of the “background principles” to which a property owner’s rights are subject, and thus may provide the Government with a defense to a takings claim. As noted by the Supreme Court, the navigational servitude is “a pre-existing limitation on the landowner’s title.” Id. In a case in which the navigational servitude applies, a denial of permits to dredge and fill may “do no more than duplicate the result that could have been obtained by the courts.” 505 U.S. at 1029.

2

The effect of the Government’s invocation of the navigational servitude as a defense to a regulatory taking, in a case in which it properly applies, is to give the Government a defense to the alleged taking. As the Supreme Court said in *Rands*:

“The proper exercise of [the navigational servitude] power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject.” 389 U.S. at 123.

With regard to what constitutes “proper exercise” of the navigational servitude, the Government takes the position here that the servitude is absolute, and that essentially there never can be a taking of property that is in a waterbody subject to the navigational servitude. The Government concedes that in the case before us its stated rationale for denying the permits was environmental, but it asserts that it also had a navigational purpose, and therefore even if the navigational servitude is not absolute there was no taking. PBIA counters that the navigational servitude only protects the Government when it regulates the use of private property if the purpose

of the regulation is related to navigation. In the present case, PBIA argues, the permit denials were predicated on environmental grounds, not navigational grounds.

The precedents clearly establish that the Government's purpose must be related to navigation if it wishes to avoid paying compensation for the regulation or control of private property. In a straightforward declaration on this point, the Supreme Court said:

The right of the United States in the navigable waters within the several States is, however, "limited to the control thereof for purposes of navigation." *Port of Seattle v. Oregon [& Wash. R. Co.]*, 255 U.S. 56, 63, 65 L. Ed. 500, 41 S. Ct. 237 [(1921)]. And while Congress, in the exercise of this power, may adopt, in its judgment, any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, *United States v. Chandler-Dunbar Co.* [229 U.S. 53, 62, 33 S. Ct. 667, 57 L. Ed. 1063 (1913)], it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end.

United States v. River Rouge Improvement Co., 269 U.S. 411, 419, 70 L. Ed. 339, 46 S. Ct. 144 (1926); see also *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 737, 94 L. Ed. 1231, 70 S. Ct. 955 (1950) (rejecting the Government's claim of immunity for the Central Valley Project under the navigational servitude rubric, finding that the project's purpose was reclamation, not navigation: "Claimants . . . observe that this court has never permitted the Government to pervert its navigational servitude into a right to destroy riparian interests without reimbursement where no navigation purpose existed."); cf. *United States v. Twin City Power Co.*, 350 U.S. 222, 100 L. Ed. 240, 76 S. Ct. 259 (1956) (project whose purposes included power generation along with flood control and improving low-water flows for navigation held to be subject to the navigational servitude: "If the interests of navigation are served, it is constitutionally irrelevant that other purposes may also be advanced."); *Kaiser Aetna v. United States*, 444 U.S. 164, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979) (Government could not require public access to privately owned waterbody without paying just compensation, even if water-body otherwise within definition of "navigable waters of the United States").

In *Owen*, this court noted the issue, commenting that "no compensation is owed when the government takes such land or property [i.e., land or property subject to the navigational servitude] as the result of aiding the navigability of the stream." 851 F.2d at 1409 (emphasis added).

Thus it is clear that in order to assert a defense under the navigational servitude, the Government must show that the regulatory imposition was for a purpose related to navigation; absent such a showing, it will have failed to "identify background principles . . . that prohibit the uses [the landowner] now intends." *Lucas*, 505 U.S. at 1031.

In the present case, we are unable to determine whether the Government has made a sufficient showing of a navigational purpose behind the permit denial. The denial letter itself refers only to the “elimination of 50.7 acres of important Lake Worth shallow water habitat”; it makes no mention of navigation. The Memorandum accompanying the denial letter does discuss navigation, but its findings are contradictory. The Memorandum states that the project area currently allows “limited boating activities to shallow draft vessels” and granting the permit would result in “the elimination of [49.3] acres of navigable waters,” language which appears to support a finding of a navigational purpose. However, the Memorandum goes on to conclude that “the project should not have a significant adverse impact on navigation, in general.”

Because there is a disputed issue of material fact, we vacate the judgment of the trial court, and remand the case for further development of this issue. On remand, the Court of Federal Claims should determine whether the Government had bona fide navigational grounds for its permit denial. If so, the Government will have sustained its defense under Lucas, and there will be no taking. If, on the other hand, the Government cannot demonstrate that it denied the permit on navigational grounds, then its defense under the navigational servitude fails.

We have focused this discussion on the 49.3 acres of submerged land, though addressing in general the entire 50.7 acres. The trial court concluded that, without development of the 49.3 acres of submerged land, the 1.4 acres of adjoining wetlands would be of little, if any, value. Upon full examination of the record, we see no error in that conclusion. If there is a taking by the Government of the 49.3 acres, then there also must be a taking of the adjoining wetlands as well, and PBIA will be entitled to compensation therefor; if there is no taking because of the navigational servitude, the developmental value of the adjacent wetlands strip standing alone would be at most nominal—the attorney for PBIA admitted as much in oral argument—and in any event PBIA has failed to establish that no other uses are available to it.

CONCLUSION

The decision of the Court of Federal Claims is VACATED AND REMANDED.

PALM BEACH ISLES ASSOCIATES v. UNITED STATES
231 F.3d 1354 (Fed. Cir. 2000)

Before PLAGER, LOURIE, and CLEVINGER, Circuit Judges.

PLAGER, Circuit Judge.

1

In the original opinion in this regulatory takings case, the court (1) held that there was a categorical taking of the 50.7 acres at issue; (2) stated its understanding of the law that when there is a categorical taking, i.e., a deprivation of all economically viable use of the subject property, the question of investment-backed expectations drops out of the analysis; and (3) concluded that, under the proper analysis of nuisance-type legal defenses remaining to the Government, the federal navigation servitude qualified as such a defense, assuming that protection of navigation was the purpose for the Government's regulatory imposition. See *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374 (Fed. Cir. 2000). We remanded the case to the trial court for fact-finding with regard to the Government's purpose for imposing the regulatory constraint.

The Government has filed a petition for rehearing. The main issue presented ... is whether the court failed to follow its own controlling precedent when it stated that, if a taking is 'categorical,' that determination removes from the analytical equation the question of investment-backed expectations. In its original opinion, the panel, assuming that the law on this point was already well established, and quoting from the court's earlier opinion in *Florida Rock Industries v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), stated in summary fashion "that 'if a regulation categorically prohibits all economically viable use of the land--destroying its economic value for private ownership--the regulation has an effect equivalent to a permanent physical occupation. There is, without more, a compensable taking.'" *Palm Beach Isles*, 208 F.3d at 1379 (quoting *Florida Rock*, 18 F.3d at 1564-65).. We went on to note that, of course, the statement in *Florida Rock* was subject to the Government's nuisance defense preserved for it by the Supreme Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992).

A 'categorical' taking is, by accepted convention, one in which all economically viable use, i.e., all economic value, has been taken by the regulatory imposition. Such a taking is distinct from a taking that is the consequence of a regulatory imposition that prohibits or restricts only some of the uses that would otherwise be available to the property owner, but leaves the owner with substantial viable economic use. In the original opinion in this case, the court, following what it believed to be established law, treated the categorical regulatory taking for purposes of the case before it as akin to a physical taking. In a physical taking context, the question is not why the owner acquired the property taken, but only did she own it at the time of the taking. Questions of whether

the owner had reasonable investment-backed expectations at the time the property was first acquired are simply not part of the analysis.

Government points to the contrary statement in *Good v. United States*, 189 F.3d 1355, 1360 (Fed. Cir. 1999) that "reasonable investment-backed expectations are an element of every regulatory takings case." *Id.* The Government argues that on this issue Florida Rock is not controlling, that the statement in *Good* is consistent with the prior law of this court, specifically *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), and therefore the panel in this case was bound to follow *Loveladies Harbor* and *Good*.

Since the Government has made this issue its central ground for relief, and since there seems to be doubt in the minds of others, we grant the Government's petition for rehearing by the panel for the purpose of adding this Order as an addendum to the original opinion of the court; in all other respects the opinion and judgment of the court is reaffirmed.

2

The Government places much weight on this court's earlier opinion in *Loveladies Harbor*, stating that "*Good's* carefully-reasoned holding follows directly from this Court's analysis in *Loveladies*." The "holding" referred to by the Government is the above-quoted statement in *Good* that "reasonable investment-backed expectations are an element of every regulatory takings case." Since the Government's position is premised on our *Loveladies Harbor* decision, we examine that case first.

Loveladies Harbor, as does this case, involved a categorical taking. The issue in *Loveladies Harbor* was the proper application of the Supreme Court's *Penn Central* test, the established analytical test for regulatory takings, to determine whether the trial court was correct that a taking had occurred. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978). As we explained in the *Loveladies Harbor* opinion, the original *Penn Central* test set out three criteria for determining whether a regulatory taking had occurred: (1) Was there a denial of economically viable use of the property as a result of the regulatory imposition? (2) Were there investment-backed expectations? (3) What was the right balance between private rights and government need? See *Loveladies Harbor*, 28 F.3d at 1176-77 (citing *Penn Central*, 438 U.S. at 124).

Between the time the trial court rendered its decision in *Loveladies Harbor*, decided on the basis of these three original *Penn Central* criteria, and the time the case was before us on appeal, the Supreme Court handed down its seminal opinion in the case of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992). In *Lucas*, the Court, among other things, redefined the third *Penn Central* criterion, the balancing step. The *Loveladies Harbor* appeal presented us with the task of clarifying how *Lucas* impacted on the three-part *Penn Central*

test, and of applying the revised test to the case at hand. To do this, we set out the three criteria from Penn Central, re-stated the criteria with the Lucas gloss, and decided the case accordingly.

In Loveladies Harbor our concern was with the third of the Penn Central criteria, and to a lesser extent the first. As we noted in the opinion, on the facts before us there was no need to address the second criterion, investment-backed expectations, since the parties appeared to be in agreement regarding that issue. See 28 F.3d at 1179. After making note of that fact, we specifically pointed out that "there is less agreement between the parties with regard to the first and third criteria." *Id.* Application of the first criterion, the question of denial of economically viable use, turned on the so-called denominator issue. See *id.* at 1179-82. With regard to the application of the third criterion, the critical issue in the case, we were required to substitute the new Lucas-created nuisance law defense for the original Penn Central balancing requirement. See *id.* at 1182-83.

The opinion in Loveladies Harbor contains an extensive examination of the first and third criteria and their application to the facts of the case. It is clear from a careful reading of Loveladies Harbor that the references to investment-backed expectations in the discussion of the three Penn Central criteria, as they were stated both before and after Lucas, was for completeness. This court's focus was, first, on the denominator question, which decided the issue of whether there had been a sufficient denial of economically viable use, and, second and most importantly, on the "sea change" in takings law brought about by Lucas, which "dramatically changed the third criterion, from one in which courts . . . were called upon to make ad hoc balancing decisions . . . to one in which state property law, incorporating common law nuisance doctrine, controls." *Id.* at 1179.

With regard to the question now before us--are investment-backed expectations a part of every regulatory takings case, even categorical takings cases--that was not an issue squarely presented to the court in Loveladies Harbor, nor was it addressed or necessary to the decision there. It would be improper to read into the opinion in Loveladies Harbor a decision on a question of such importance that was not consciously addressed by the court.

The question was addressed, however, in the case that preceded Loveladies Harbor that year, Florida Rock, and it is to that case that we now turn. Florida Rock contains the statement, quoted in the original opinion in this case and set out above, to the effect that when there has been a prohibition of all economically viable use of land, there is, without more, a compensable taking. See Florida Rock, 18 F.3d at 1564-65. Read in context, that statement clearly means that a categorical taking is akin to a physical taking, and the reasons why the owner acquired the property are not a relevant part of the taking analysis.

The Government's brief seeking rehearing concerned itself with Loveladies Harbor and Florida Rock. There have been several other cases in this court since Florida Rock and Loveladies Harbor that are relevant to the issue, but were not discussed by the Government in its brief.

In *Avenal v. United States*, 100 F.3d 933 (Fed. Cir. 1996), the issue was whether a government freshwater diversion project that impacted on the plaintiffs' oyster beds created a compensable taking. The trial court held that plaintiffs had no protected property rights in their state-granted oyster bed leases. We concluded that the oyster bed leases did constitute "property" under the Fifth Amendment, but that plaintiffs knew when they acquired the leases that their rights to use the bottom-lands for oystering were subject to the inevitable changes that the long-anticipated government project would bring about. See *id.* at 936-38. In short, they did not have reasonable investment-backed expectations. See *id.* at 937.

We noted in the opinion that the record established that the government project had substantially reduced the value of plaintiffs' property "well beyond the level of 'mere diminution,'" the assumption being that there was probably at least a partial taking. See *id.* at 937. Nowhere was the taking described as 'categorical.' The plaintiffs retained the use of their leaseholds; it was not the plaintiffs who were ousted by the government project, but the oysters. On these facts, we found no compensable taking by the Government.

3

We are left then with a situation in which no decision by this court has authoritatively answered the question posed. For the answer to this question, we turn to *Lucas*.

The facts of *Lucas* are familiar to all those interested in takings law. Under its Beachfront Management Act, the State of South Carolina prevented Mr. Lucas from building on his beachfront property. The case was treated by all courts involved as a total wipeout of Lucas's investment in the property— what the U.S. Supreme Court in its opinion in the case called a 'categorical' taking. The state trial court awarded Lucas over one million dollars on his takings claim against the state. The state supreme court reversed, holding that under the balancing test (the third criterion) of *Penn Central*, the state was not liable. The U.S. Supreme Court granted certiorari, and in turn reversed the state supreme court.

A major issue in the case was the application of the three criteria in the traditional *Penn Central* analysis, in particular the third, which called for balancing private rights against state needs. As discussed above, the decision in *Lucas* dramatically changed this third criterion. But to ignore the impact of *Lucas* on other aspects of takings law is to deny the authority of the Supreme Court to develop further the parameters of the jurisprudence.

The Court's opening discussion in its Lucas opinion cited and referred to the leading takings law cases, including the Penn Central case. Had the court intended to make analysis of a categorical regulatory taking different from the categorical physical taking, for example regarding the question of investment-backed expectations, surely somewhere in the opinion there would be a hint of it. There is not. The Court well understood that, in takings law involving a 'physical' taking of land by the government, the reason the owner acquired the land in the first instance is of no concern; that is, the owner's investment-backed expectations, or lack of them, are not a consideration. In light of the Court's repeated juxtaposition of physical takings with 'categorical' regulatory takings, and the Court's repeated unqualified statements that the latter deserve the same compensation without more, we can only conclude that the Court's purpose was to convey the principle that, when there is a physical taking of land, or a regulatory taking that constitutes a total wipeout, investment-backed expectations play no role.

The rationale behind asking about investment-backed expectations in the typical case of a regulatory imposition (for example, barring gasoline stations from an area zoned for residential uses) is not difficult to understand. The purchaser who buys a parcel with a known and valid regulatory restriction on certain uses cannot complain that she thereafter sustains an economic loss when the restriction is enforced. If the purchaser paid more than the property with the restriction on it is worth, the loss is the result of an error in market judgment, not a result of the restriction as such. In the parlance of takings law, the purchaser does not have reasonable expectations that the property can be used for the prohibited purpose; to assess the government for such a loss is to give the purchaser a windfall to which she is not entitled.

A different case arises when government, though purporting to regulate the uses of a property, in fact imposes restrictions that have the same effect as a physical seizure and occupation for public purposes--leaving the owner with essentially no viable economic uses whatever and no rights except bare legal title. A purchaser who pays a substantial price for a parcel can be assumed to have expectations that the parcel can be used for some lawful purpose. When government seizes the entire estate for government purposes, whether by physical occupation or categorical regulatory taking, it is not necessary to explore what those expectations may have been. The purchaser may have had no particular expectations regarding immediate use, but only purchased for long-term investment. Or the purchaser's expectations may have been wholly unrealistic, and she may have paid more than the property is worth. It matters not. The Government is not obligated to pay for her expectations, but only to pay for the property interest taken. The Government's cost for the taking--the just compensation the Constitution imposes--is measured by the fair market value of the parcel, not the owner's hopes regarding its use. See generally 4 Julius Sackman, Nichols on Eminent Domain §§12.01-12C.03 (perm. ed. rev. vol. 1999).

This does not mean that use restrictions are irrelevant to the takings calculus, even in categorical takings cases. Once a taking has been found, the use restrictions on the property are one of the factors that are taken into account in determining damages due the owner. See *id.* §12C.03[1]. It does mean that in the initial analysis of whether a taking has occurred, when it is determined that the effect of the regulatory imposition is to eliminate all economic viability of the property alleged to have been taken, the owner's expectations regarding future use of the property are not a factor in deciding whether the imposition requires a remedy.

As the Supreme Court noted, it is "the extraordinary circumstance when no productive or economically beneficial use of land is permitted" *Lucas*, 505 U.S. at 1017. This is because most land use restrictions do not deny the owner of the regulated property all economically viable uses of it. In the relatively few cases when they do, we have no doubt that both law and sound constitutional policy entitle the owner to just compensation without regard to the nature of the owner's initial investment-backed expectations.

In sum, we conclude that, in accord with *Lucas*, and not inconsistent with any prior holdings of this court, when a regulatory taking, properly determined to be 'categorical,' is found to have occurred, the property owner is entitled to a recovery without regard to consideration of investment-backed expectations. In such a case, "reasonable investment-backed expectations" are not a proper part of the analysis, just as they are not in physical takings cases. The statement in the original opinion in this case to that effect is a correct statement of the law. The right to recovery is of course subject to the government's defenses under the general rubric of nuisance enunciated in *Lucas* and explained in *Loveladies Harbor*, and as further explained in the original opinion in this case.

Session 28. Dimension of Property

BABBITT v. YOUPEE **519 U.S. 234 (1997)**

JUSTICE GINSBURG delivered the opinion of the Court.

In this case, we consider for a second time the constitutionality of an escheat-to-tribe provision of the Indian Land Consolidation Act (ILCA). 96 Stat. 2519, as amended, 25 U.S.C. §2206. Specifically, we address §207 of the ILCA, as amended in 1984. Congress enacted the original provision in 1983 to ameliorate the extreme fractionation problem attending a century-old allotment policy that yielded multiple ownership of single parcels of Indian land. Pub. L. 97-459, §207, 96 Stat. 2519. Amended §207 provides that certain small interests in Indian lands will transfer-- or “escheat” --to the tribe upon the death of the owner of the interest. Pub. L. 98-608, 98 Stat. 3173. In *Hodel v. Irving*, 481 U.S. 704, 95 L. Ed. 2d 668, 107 S. Ct. 2076 (1987), this Court held that the original version of §207 of the ILCA effected a taking of private property without just compensation, in violation of the Fifth Amendment to the United States Constitution. 481 U.S. at 716-718. We now hold that amended §207 does not cure the constitutional deficiency this Court identified in the original version of §207.

I

In the late Nineteenth Century, Congress initiated an Indian land program that authorized the division of communal Indian property. Pursuant to this allotment policy, some Indian land was parcelled out to individual tribal members. Lands not allotted to individual Indians were opened to non-Indians for settlement. See General Allotment Act of 1887, ch. 119, 24 Stat. 388. Allotted lands were held in trust by the United States or owned by the allottee subject to restrictions on alienation. On the death of the allottee, the land descended according to the laws of the State or Territory in which the land was located. 24 Stat. 389. In 1910, Congress also provided that allottees could devise their interests in allotted land. Act of June 25, 1910, ch. 431, §2, 36 Stat. 856, codified as amended, 25 U.S.C. §373.

The allotment policy “quickly proved disastrous for the Indians.” *Irving*, 481 U.S. at 707. The program produced a dramatic decline in the amount of land in Indian hands. F. Cohen, *Handbook of Federal Indian Law* 138 (1982) (hereinafter Cohen). And as allottees passed their interests on to multiple heirs, ownership of allotments became increasingly fractionated, with some parcels held by dozens of owners. 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., 77 (1984)* (hereinafter Lawson). A number of factors augmented the problem: Because Indians often died without wills, many interests passed to multiple heirs, H. R. Rep. No. 97-908, p. 10 (1982);

Congress' allotment acts subjected trust lands to alienation restrictions that impeded holders of small interests from transferring those interests, Lawson 78-79; Indian lands were not subject to state real estate taxes, Cohen 406, which ordinarily serve as a strong disincentive to retaining small fractional interests in land. The fractionation problem proliferated with each succeeding generation as multiple heirs took undivided interests in allotments.

The administrative difficulties and economic inefficiencies associated with multiple undivided ownership in allotted lands gained official attention as early as 1928. See L. Meriam, Institute for Government Research, *The Problem of Indian Administration* 40-41 (1928). Governmental administration of these fractionated interests proved costly, and individual owners of small undivided interests could not make productive use of the land. Congress ended further allotment in 1934. See Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. §461 et seq. But that action left the legacy in place. As most owners had more than one heir, interests in lands already allotted continued to splinter with each generation. In the 1960's, congressional studies revealed that approximately half of all allotted trust lands were held in fractionated ownership; for over a quarter of allotted trust lands, individual allotments were held by more than six owners to a parcel. See Irving, 481 U.S. at 708-709 (citing Senate Committee on Interior and Insular Affairs, *Indian Heirship Land Survey*, 86th Cong., 2d Sess., pt. 2, p. x (Comm. Print 1960-1961)).

In 1983, Congress adopted the ILCA in part to reduce fractionated ownership of allotted lands. Pub. L. 97-459, tit. II, 96 Stat. 2517. Section 207 of the Act-- the "escheat" provision --prohibited the descent or devise of small fractional interests in allotments. 96 Stat. 2519. Instead of passing to heirs, such fractional interests would escheat to the tribe, thereby consolidating the ownership of Indian lands. Congress defined the targeted fractional interest as one that both constituted 2 percent or less of the total acreage in an allotted tract and had earned less than \$100 in the preceding year. Section 207 made no provision for the payment of compensation to those who held such interests.

In *Hodel v. Irving*, this Court invalidated §207 on the ground that it effected a taking of property without just compensation, in violation of the Fifth Amendment. 481 U.S. at 716-718. The appellees in *Irving* were, or represented, heirs or devisees of members of the Oglala Sioux Tribe. But for §207, the appellees would have received 41 fractional interests in allotments; under §207, those interests would escheat to the Tribe. 481 U.S. at 709-710. This Court tested the legitimacy of §207 by considering its economic impact, its effect on investment-backed expectations, and the essential character of the measure. See *id.*, at 713-718; see also *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978). Turning first to the economic impact of §207, the Court in *Irving* observed that the provision's income-generation test might fail to capture the actual economic value of the land. 481 U.S. at 714. The Court next indicated that §207 likely did not interfere with investment-backed expectations. *Id.*, at 715. Key to

the decision in *Irving*, however, was the “extraordinary” character of the Government regulation. *Id.*, at 716. As this Court noted, §207 amounted to the “virtual abrogation of the right to pass on a certain type of property.” *Ibid.* Such a complete abrogation of the rights of descent and devise could not be upheld. *Id.*, at 716-717.

II

In 1984, while *Irving* was still pending in the Court of Appeals for the Eighth Circuit, Congress amended §207. Pub. L. 96-608, §1(4), 98 Stat. 3173. Amended §207 differs from the original escheat provision in three relevant respects. First, an interest is considered fractional if it both constitutes 2 percent or less of the total acreage of the parcel and “is incapable of earning \$100 in any one of the five years [following the] decedent’s death”-- as opposed to one year before the decedent’s death in the original §207. 25 U.S.C. §2206(a). If the interest earned less than \$100 in any one of five years prior to the decedent’s death, “there shall be a rebuttable presumption that such interest is incapable of earning \$100 in any one of the five years following the death of the decedent.” *Ibid.* Second, in lieu of a total ban on devise and descent of fractional interests, amended §207 permits devise of an otherwise escheatable interest to “any other owner of an undivided fractional interest in such parcel or tract” of land. 25 U.S.C. §2206(b). Finally, tribes are authorized to override the provisions of amended §207 through the adoption of their own codes governing the disposition of fractional interests; these codes are subject to the approval of the Secretary of the Interior. 25 U.S.C. §2206(c). In *Irving*, “we expressed no opinion on the constitutionality of §207 as amended.” 481 U.S. at 710, n. 1.

Under amended §207, the interests in this case would escheat to tribal governments. The initiating plaintiffs, respondents here, are the children and potential heirs of William Youpee. An enrolled member of the Sioux and Assiniboine Tribes of the Fort Peck Reservation in Montana, William Youpee died testate in October 1990. His will devised to respondents, all of them enrolled tribal members, his several undivided interests in allotted trust lands on various reservations in Montana and North Dakota. These interests, as the Ninth Circuit reported, were valued together at \$1,239. 67 F.3d 194, 199 (CA9 1995). Each interest was devised to a single descendant. Youpee’s will thus perpetuated existing fractionation, but it did not splinter ownership further by bequeathing any single fractional interest to multiple devisees.

In 1992, in a proceeding to determine the heirs to and claims against William Youpee’s estate, an administrative law judge (ALJ) in the Department of the Interior found that interests devised to each of the respondents fell within the compass of amended §207 and should therefore escheat to the tribal governments of the Fort Peck, Standing Rock, and Devils Lake Sioux Reservations. App. to Pet. for Cert. 27a-40a. Respondents, asserting the unconstitutionality of amended §207, appealed the ALJ’s order to the Department of the Interior Board of Indian Appeals.

The Board, stating that it did not have jurisdiction to consider respondents' constitutional claim, dismissed the appeal.

Respondents then filed suit in the United States District Court for the District of Montana, naming the Secretary of the Interior as defendant, and alleging that amended §207 of the ILCA violates the Just Compensation Clause of the Fifth Amendment. The District Court agreed with respondents and granted their request for declaratory and injunctive relief. 857 F. Supp. 760, 766 (Mont. 1994).

The Court of Appeals for the Ninth Circuit affirmed. 67 F.3d 194 (1995). That court carefully inspected the 1984 revisions to §207. Hewing closely to the reasoning of this Court in *Irving*, the Ninth Circuit determined that amended §207 did not cure the deficiencies that rendered the original provision unconstitutional. In particular, the Ninth Circuit observed that amended §207 "continued to completely abolish one of the sticks in the bundle of rights [constituting property] for a class of Indian landowners." 67 F.3d at 200. The Ninth Circuit noted that "Congress may pursue other options to achieve consolidation of . . . fractional interests," including Government purchase of the land, condemnation for a public purpose attended by payment of just compensation, or regulation to impede further fractionation. *Ibid.* But amended §207 could not stand, the Ninth Circuit concluded, for the provision remained "an extraordinary and impermissible regulation of Indian lands and effected an unconstitutional taking without just compensation." *Ibid.*

On the petition of the United States, we granted certiorari, 517 U.S. (1996), and now affirm.

III

In determining whether the 1984 amendments to §207 render the provision constitutional, we are guided by *Irving*.¹³⁴ The United States maintains that the amendments, though enacted three years prior to the *Irving* decision, effectively anticipated the concerns expressed in the Court's opinion. As already noted, amended §207 differs from the original in three relevant respects: it looks back five years instead of one to determine the income produced from a small interest, and creates a rebuttable presumption that this income stream will continue; it permits devise of otherwise escheatable interests to persons who already own an interest in the same parcel; and it authorizes tribes to develop their own codes governing the disposition of fractional interests. These modifications, according to the United States, rescue amended §207 from the fate of its predecessor. The Government maintains that the revisions moderate the economic impact of the provision and

¹³⁴ In *Irving* we relied on *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978). Because we find *Irving* dispositive, we do not reach respondents' argument that amended §207 effects a "categorical" taking, and is therefore subject to the more stringent analysis employed in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992).

temper the character of the Government’s regulation; the latter factor weighed most heavily against the constitutionality of the original version of §207.

The narrow revisions Congress made to §207, without benefit of our ruling in *Irving*, do not warrant a disposition different than the one this Court announced and explained in *Irving*. Amended §207 permits a five-year window rather than a one-year window to assess the income-generating capacity of the interest. As the Ninth Circuit observed, however, argument that this change substantially mitigates the economic impact of §207 “misses the point.” 67 F.3d at 199. Amended §207 still trains on income generated from the land, not on the value of the parcel. The Court observed in *Irving* that “even if . . . the income generated by such parcels may be properly thought of as *de minimis*,” the value of the land may not fit that description. 481 U.S. at 714. The parcels at issue in *Irving* were valued by the Bureau of Indian Affairs at \$2,700 and \$1,816, amounts we found “not trivial.” *Ibid.* The value of the disputed parcels in this case is not of a different order; as the Ninth Circuit reported, the value of decedent Youpee’s fractional interests was \$1,239. 67 F.3d at 199. In short, the economic impact of amended §207 might still be palpable.

Even if the economic impact of amended §207 is not significantly less than the impact of the original provision, the United States correctly comprehends that *Irving* rested primarily on the “extraordinary” character of the governmental regulation. *Irving* stressed that the original §207 “amounted to virtually the abrogation of the right to pass on a certain type of property—the small undivided interest—to one’s heirs.” 481 U.S. at 716; see also *id.*, at 717 (“both descent and devise are completely abolished”). The *Irving* Court further noted that the original §207 “effectively abolished both descent and devise [of fractional interests] even when the passing of the property to the heir might result in consolidation of property.” *Id.*, at 716. As the United States construes *Irving*, Congress cured the fatal infirmity in §207 when it revised the section to allow transmission of fractional interests to successors who already own an interest in the allotment.

Congress’ creation of an ever-so-slight class of individuals equipped to receive fractional interests by devise does not suffice, under a fair reading of *Irving*, to rehabilitate the measure. Amended §207 severely restricts the right of an individual to direct the descent of his property. Allowing a decedent to leave an interest only to a current owner in the same parcel shrinks drastically the universe of possible successors. And, as the Ninth Circuit observed, the “very limited group [of permissible devisees] is unlikely to contain any lineal descendants.” 67 F.3d at 199-200. Moreover, amended §207 continues to restrict devise “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.” *Irving*, 481 U.S. at 718. William Youpee’s will, the United States acknowledges, bequeathed each fractional interest to one heir. Giving effect to Youpee’s directive, therefore, would not further fractionate Indian land holdings.

The United States also contends that amended §207 satisfies the Constitution’s demand because it does not diminish the owner’s right to use or enjoy property during his lifetime, and does not affect the right to transfer property at death through non-probate means. These arguments did not persuade us in *Irving* and they are no more persuasive today. See 481 U.S. at 716-178.

For the reasons stated, the judgment of the Court of Appeals for the Ninth Circuit is
Affirmed.

JUSTICE STEVENS, dissenting.

Section 207 of the Indian Land Consolidation Act, 25 U.S.C. §2206, did not, in my view, effect an unconstitutional taking of William Youpee’s right to make a testamentary disposition of his property. As I explained in *Hodel v. Irving*, 481 U.S. 704, 719-720, 95 L. Ed. 2d 668, 107 S. Ct. 2076 (1987) (STEVENS, J., concurring in judgment), the Federal Government, like a State, has a valid interest in removing legal impediments to the productive development of real estate. For this reason, the Court has repeatedly “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.” *Texaco, Inc. v. Short*, 454 U.S. 516, 529, 70 L. Ed. 2d 738, 102 S. Ct. 781 (1982). I remain convinced that “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 be abandoned.” *Hodel*, 481 U.S. at 732 (STEVENS, J., concurring in judgment). The federal interest in minimizing the fractionated ownership of Indian lands—and thereby paving the way to the productive development of their property—is strong enough to justify the legislative remedy created by §207, provided, of course, that affected owners have adequate notice of the requirements of the law and an adequate opportunity to adjust their affairs to protect against loss. See *ibid*.

In my opinion, William Youpee did have such notice and opportunity. With regard to notice, the requirements of §207 are set forth in the United States Code. “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. . . . It is well established that persons owning property within a [jurisdiction] are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property.” *Texaco*, 454 U.S. 516 at 531-532, 70 L. Ed. 2d 738, 102 S. Ct. 781. Unlike the landowners in *Hodel*, Mr. Youpee also had adequate opportunity to comply. More than six years passed from the time §207 was amended until Mr. Youpee died on October 19, 1990 (this period spans more than seven years if we count from the date §207 was originally enacted). During this time, Mr. Youpee could have realized the value of his fractional interests (approximately \$1,239) in a variety of ways, including selling the property, giving it to his children as a gift, or putting it in trust for them. I assume that he failed to do so because he was not aware of the requirements of §207. This loss is unfortunate. But I believe Mr. Youpee’s failure to

pass on his property is the product of inadequate legal advice rather than an unconstitutional defect in the statute.

Accordingly, I respectfully dissent.

DISTRICT INTOWN PROPERTIES LTD. v. DISTRICT OF COLUMBIA
198 F.3d 874 (D.C. Cir. 1999)

EDWARDS, Chief Judge: In 1961, District Intown Limited Properties Partnership ("District Intown") purchased Cathedral Mansions South, an apartment building and landscaped lawn on Connecticut Avenue across from the National Zoo. District Intown subdivided this property into nine contiguous lots in 1988. In March 1989, all nine lots were declared historic landmarks. In July 1992, the Mayor of the District of Columbia denied District Intown's request for construction permits to build eight townhouses on eight of the nine lots, finding that the construction was incompatible with the property's landmark status. Alleging that the District of Columbia's denial constituted a taking, District Intown and its general partners sued under 42 U.S.C. §1983 (1994) for just compensation under the Takings Clause of the Fifth Amendment.

Upon cross motions for summary judgment, the District Court granted summary judgment for the District of Columbia. See *District Intown Properties Ltd. Partnership v. District of Columbia*, 23 F. Supp. 2d 30 (D.D.C. 1998). The District Court held that the relevant parcel for the purposes of determining whether a taking had occurred consisted of the entire property, including the apartment building, not the eight individual lots that District Intown sought to develop. The court then analyzed the alleged taking under the Supreme Court's holdings in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978). The District Court found that there was no categorical taking under *Lucas*, because District Intown had not been deprived of all economic value in the relevant parcel. The trial court further held that District Intown could not make out a claim under *Penn Central*, because its reasonable investment-backed expectations had not been disappointed and it continued to receive economic benefits from the property.

We hold that the District Court correctly found that the relevant parcel for the takings analysis consisted of the entire property held by District Intown, i.e., the property as it was originally purchased in 1961 and as it was held for 27 years prior to the 1988 subdivision. All relevant objective and subjective factors support this conclusion. When the property is viewed as a single parcel, there is no doubt that it has not been rendered valueless. Indeed, even if each subdivided parcel is considered separately, District Intown has not shown a "total taking" under *Lucas*. In addition, the record here does not show that District Intown's investment-backed expectations were disappointed. This is not surprising, because District Intown could not have had any reasonable investment-backed expectations of development given the background regulatory structure at the time of subdivision. Accordingly, we hold that District Intown did not present any genuine issue of material fact in support of a takings claim under *Penn Central* or *Lucas*. We therefore affirm the District Court's judgment.

WILLIAMS, Circuit Judge, concurring in the judgment: The District of Columbia's Historic Preservation Board imposed historic landmark status not only on an apartment building

named Cathedral Mansions South but also on a substantial stretch of adjacent lawn bordering the sidewalks of Connecticut Avenue. District Intown, the owner of both, claims that as applied to the lawn the landmarking effects a taking of its property in violation of the Takings Clause of the Fifth Amendment. The majority's disposition is--with one important exception--in general accord with the current opinions of the Supreme Court. Those decisions are of course binding. At the same time, however, it is not inappropriate to identify ways in which the prevailing analysis elevates formal concepts over economic reality and tends to strip the Clause of its potential for fulfilling the framers' likely purposes.

The economist's justification for the Takings Clause is that it provides a check on government's likely tendency to waste resources by treating private property as a free good. See Richard A. Posner, *Economic Analysis of Law* 58 (4th ed. 1992) ("The simplest economic explanation for the requirement of just compensation is that it prevents the government from overusing the taking power."). This is just an application of the general principle that if a firm can externalize costs (e.g., the health costs of polluting the air), it will use more of the unpriced resource (in this example, air as a waste sink) than it would if required to pay. And it will tend to overproduce the goods or services whose production uses the superficially "free" good--i.e., it will produce them at a level where the true value of the extra inputs exceeds the true value of the extra output. See generally Robert Cooter & Thomas Ulen, *Law and Economics* 45-46 (1988). As applied to government regulation, similar oversupply can be expected--here, production of regulations that impose more costs than they afford benefits, that do more harm than good.

The framers, though not articulating the purpose of the Clause in economic terms, evidently did view it as aimed at correcting the incentives of the political branches. There is evidence, for example, that James Madison saw electoral power slipping into the hands of a non-landholding majority, which in a "leveling" mode could be expected to invade landowners' rights. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 *Colum. L. Rev.* 782, 849 (1995). Late twentieth century America, of course, displays a far greater range of purposes than "leveling" for reallocation of rights. While the resulting proposals are naturally advanced in the name of the public good, many are surely driven by interest-group purposes, commonly known as "rent-seeking." Among these proposals, at least some inflict aggregate costs considerably outweighing their aggregate benefits, paralleling the wasteful production associated with private firms' externalization of costs. The Takings Clause serves to curb such inefficiencies. See, e.g., Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 281 (1985) ("The Takings Clause is designed to control rent seeking and political faction. It is those practices, and only those practices, that it reaches.").

A Takings Clause construction that was dedicated without qualification to preventing such government externalization would require compensation whenever regulation reduced the value of anyone's property, however slightly. Balanced against that goal is an array of considerations. Most obvious is the cost of calculating and administering compensation, which

would tend to sink many a beneficent statute. "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." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 67 L. Ed. 322, 43 S. Ct. 158 (1922)). (The compensation cost itself would be only a weak countervailing factor, for most beneficent regulation would presumably generate gains large enough to pay the losers if identification and calculation were costless.) My goal here is not to pinpoint the appropriate balance between these competing considerations, much less to suggest that the correct reading is one under which all regulation materially adversely affecting a property's value would be compensable. Rather, it is simply to note the ways in which modern interpretation of the Takings Clause, as exemplified in today's decision, impairs its role as a disincentive to wasteful government activities.

* * *

The majority applies an apparent presumption that contiguous parcels under common ownership should be treated as one parcel for purposes of the takings analysis. This presumption tends to reduce the likelihood that courts will order compensation. The larger the parcel, the greater the chance that the regulated land will retain an economically viable use. From the perspective of ensuring that the government not engage in wasteful behavior, however, the focus on the uses of the land that remain is misplaced: "What is decisive is that which is taken, not that which is retained." Epstein, *Takings*, *supra*, at 58. Whether the landowner is left with a limited use of the land or none at all is hardly relevant to that issue. And as the regulating government delineates the scope of regulation, the opportunity for strategic behavior is obvious.

The majority's cursory application of the Penn Central factors further broadens the gap between the two modes of analysis, reinforcing the seemingly predetermined conclusion: in partial takings cases, the government wins. The majority states that District Intown has not shown the land "unprofitable to maintain,"; it is unimaginable, however, absent an extraordinary tax liability, that a parcel could retain an economically viable use yet have a net negative value. The majority goes on to say that District Intown has failed to show that the land does not "bring in a sufficient return," *id.*, but does not answer the all-important question: a return on what? on out-of-pocket costs? on initial purchase price? on fair market value? Moreover, the majority provides no guidance as to how "sufficient" the return must be, except to cite Penn Central, in which the Court found that a 75% diminution in value did not constitute a compensable taking. See *id.*

Similarly, in its consideration of District Intown's "reasonable investment-backed expectations," the majority's analysis begs the question whether any landowner, in a world where zoning regulations are prevalent, could ever argue that a particular regulation was "unexpected." The presumption is insurmountable: Although the Takings Clause is meant to curb inefficient takings, such a notion of "reasonable investment-backed expectations" strips it of any

constraining sense: except for a regulation of almost unimaginable abruptness, all regulation will build on prior regulation and hence be said to defeat any expectations. Thus regulation begets regulation.

Although the presumption in favor of looking at the parcel as a whole, and in turn the increased reliance on the partial takings mode of analysis, is at odds with the underlying principle of the Takings Clause, it is perhaps the best construction of the Supreme Court's limited guidance. The Court has never squarely addressed the question of how courts should define the relevant geographic parcel of land, also known as "horizontal severance." Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 Rutgers L.J. 663, 705 (1996). In *Nectow v. City of Cambridge*, 277 U.S. 183, 72 L. Ed. 842, 48 S. Ct. 447 (1928), the Court considered whether the city council had effectuated a taking of plaintiff's land by zoning as "residential" a 100-foot strip on plaintiff's 140,000 square foot parcel. Although the Court appeared to treat the relevant parcel as encompassing only the fractional strip, this was in no respect relevant to the Court's decision. In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978), the Court applied a very weak form of horizontal severance, focusing exclusively on the landmarked building itself without treating the owner's neighboring--but not adjacent--property as part of the greater parcel, as had the New York Court of Appeals. See *Penn Central Transportation Co. v. New York City*, 42 N.Y.2d 324, 366 N.E.2d 1271, 1276-77, 397 N.Y.S.2d 914 (N.Y. 1977). But *Penn Central* tells little, as the properties were not all contiguous, had been put to different uses, and had never been treated as a unified whole by the owners or the City.

Penn Central's handling of "vertical severance," however, is informative, if only by analogy. Using language seemingly broad enough to encompass horizontal severance, the Court made clear that it would not consider the air rights above Grand Central separately from the land rights: "'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." *Penn Central*, 438 U.S. at 130; see also *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496-502, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987) (refusing to regard either coal that statute required miners to leave in place (about 2% of total coal), or the "support estate," as distinct property for ascertaining whether statute denied owners all economically viable uses).

The Court has expressed similar reluctance to engage in "conceptual severance" more generally (i.e., the treatment of any specific property right as a single unit). In *Andrus v. Allard*, 444 U.S. 51, 62 L. Ed. 2d 210, 100 S. Ct. 318 (1979), the Court refused to treat extinction of the right to sell any part of a lawfully killed bald eagle as a total taking. See *id.* at 65-66 ("At least 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."). The Court arguably evidenced a retreat from this strong position in *Hodel v. Irving*, 481 U.S. 704, 717-18, 95 L. Ed. 2d 668, 107 S. Ct. 2076 (1987), in which it found a taking in legislation that "completely abolished" certain landowners' rights to dispose of their property by descent or

devise, even though they retained complete rights to possess and to make inter vivos transfers. The Court has not, however, reached agreement on the scope of this retreat. Compare *id.* at 719 (Scalia, J., concurring) (saying the decision "effectively limits Allard to its facts"), with *id.* at 718 (Brennan, J., concurring) (saying that the case was "unusual" and thus had no impact on Allard). Overall, I think the majority is correct in its implicit understanding that the Supreme Court is reluctant to carve a landowner's parcel into smaller units for which compensation might be more likely.

But the factors that the majority applies in making the decision, drawn from decisions of the Federal Circuit and Claims Court and characterized by the majority as "eminently sound," strike me as uninformative and largely irrelevant. The factors considered are: (1) whether the neighboring parcels are contiguous, (2) whether they were acquired simultaneously, (3) whether they have been treated as a single unit, and (4) the extent to which the restricted lot benefits the neighboring lot. *Maj. Op.* at 8-9.

The first factor, contiguity, is clearly necessary but in no way sufficient. The next two factors--simultaneity of acquisition and unity of use--are more troublesome. Both elevate history--either the historical purchase or the historical use--over the real-world present relationship between the tracts. Compare Laura M. Schleich, *Takings: The Fifth Amendment, Government Regulation, and the Problem of the Relevant Parcel*, 8 *J. Land Use & Envtl. L.* 381 (1993) (proposing that courts look to the "moment of regulation" when defining the relevant parcel). The majority's focus on the property's use prior to regulation tells us nothing about the value producing opportunities foreclosed at the time of regulation. "It is, of course, irrelevant that [the government] interfered with or destroyed property rights that [plaintiff] 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.' "). *Penn Central*, 438 U.S. at 143 n.6 (Rehnquist, J., dissenting, quoting *Boom v. Patterson*, 98 U.S. 403, 408, 25 L. Ed. 206 (1879)).

The majority mentions but brushes aside a fourth factor--the extent to which the regulated parcel benefits the neighboring lot. Yet this appears the most relevant. The more a burdened tract in its regulated use benefits contiguous property, the less likely that the regulation has a net negative impact. In the extreme case a property interest may be worthless except in conjunction with another. Thus in *Keystone Bituminous Coal Ass'n*, the Court pointed out that the "support estate" had "value only insofar as it protects or enhances the value of the estate with which it is associated [i.e., the mineral estate]," 480 U.S. at 501, and therefore refused to treat the "support estate" as a separate interest at all. Similarly, small parcels of land, either in the interior or around the edges of greater parcels, commonly are valuable only when they combine with the greater parcel to create a more valuable whole; for regulation of the exterior (such as setback requirements), then, it makes sense to measure the impact in conjunction with the "primary" parcel. Looking to the property owner's benefit from these internal synergies parallels use of "average reciprocity of advantage," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 67 L.

Ed. 322, 43 S. Ct. 158 (1922), which considers the benefit that each burdened owner— as in ordinary zoning or historic districting—receives from the similar restriction of his neighbors.

Of course there will be some synergy between almost any two neighboring parcels under common ownership, since unified ownership creates options for the sole owner that multiple landowners could achieve only by contracting. But synergy is a matter of degree, and mere contiguity should not be enough. One commentator proposes a rather demanding synergy test, arguing that the regulated tract should be considered as its own parcel so long as not all of its value derives from synergies with neighboring land; in such cases, the parcel would have an independent economically viable use, which if destroyed by regulation would be compensable under Lucas. See John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535, 1557-58 (1994). One need not go so far to see the skimpiness of the synergy here.

To be sure, Cathedral Mansions is more than several contiguous parcels. According to the decision of the Historic Preservation Review Board, "The buildings are sited imaginatively to provide the greatest possible integration of living space with well-landscaped open space." Joint Appendix ("J.A.") 320. (Passersby who observe the rather bare lawn will have to reach their own judgments on the adjective "well landscaped.") Integration there doubtless is--almost any lawn around a building will manifest a degree of integration. But there is no explicit showing that these synergies depend on the entire lawn remaining undeveloped. The proposed townhouses would cover only the portion of the lawn abutting Connecticut Avenue, still leaving the interior portion, approximately half the lawn, undeveloped. Common sense would suggest that at some distance from the building marginal synergies created by extra lawn space become slight, and thus that the part of the lawn beyond that line should be treated as its own parcel for takings purposes. Further, although District rent-control law evidently allows the owner to earn a return on the tax-assessed value of land in a single tract with a rent-controlled building (here the owner could apparently recover that status by undoing the formalities of subdivision), that value is likely to be only a tiny fraction of the value absent the historic landmarking.

In fact, it may well be completely different synergies--ones between the lawn and adjacent Connecticut Avenue--that have driven the landmarking decision. The Board observed that the lawn "contributes significantly to the unique open space character of Connecticut Avenue. " J.A. 320. A cynic might suspect that the alleged relationship between the lawn and the Cathedral Mansions apartments is little more than a cloak by which the citizens of Upper Northwest Washington have secured some parkland on the cheap. Parks are good, but the Fifth Amendment says that taking them is not.

Of course, there is another synergy between the two parcels and adjacent Connecticut Avenue, namely the historical value that inheres in the preservation of a building as it was initially constructed (i.e., with an expansive lawn beside it). Uncompensated landmark preservation seems to rest on this synergy. The Court in *Penn Central* embraced the view 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." 438 U.S. at 134. This broad language seems to redefine "reciprocity of advantage" in such a way that no government act could ever require compensation, as the afflicted owner would be a member of the taking polity and thus in receipt of offsetting advantages, artificially presumed to be adequate.

Apart from obliterating takings law, such a view has peculiarly perverse effects in the realm of historic preservation. Although such laws try to preserve for society the positive externalities created by buildings like Cathedral Mansions, inflicting the entire cost on the creator of the landmark (or his successor in interest) is bound to discourage investment in first-class design. Moreover, while insurance markets can achieve the risk-spreading (or anti-"demoralization") goals that some attribute to the Takings Clause, compare Posner, *Economic Analysis of law*, supra, at 58, they cannot offset non-compensation's disincentive to good design. Historic landmark preservation, after all, is imposed selectively on those who went out of their way to secure architectural distinction. The higher the quality, the higher the premium for takings insurance; the disincentive is inescapable.

Having found that the lawn and apartment parcels should be treated as a unit, the majority nevertheless considers whether compensation would be due even if the lawn were analyzed separately; in doing so, it gratuitously takes an even harsher stance against compensation than does present law. The majority finds that District Intown has failed to offer evidence that the regulation denies it "economically viable use of [the] land," *Lucas*, 505 U.S. at 1016, even though the Mayor's own agent found that "any construction that destroyed the lawn would be incompatible with the lawn's status as an historic landmark." Thus, so long as the lawn is untouched, "economically viable" uses are permissible. It is hard to imagine what "economically viable" use that constraint leaves, unless the majority means that the very barest thread of value, yielded by some thoroughly bucolic use, is enough to defeat a total takings claim. By this standard, no regulation can ever effect a total taking, and at best will be tested only under the far weaker partial takings rubric.

* * *

The prevailing Federal Circuit-Claims Court method of defining the relevant parcel, followed by the panel here, focuses on marginal issues and largely overlooks the more critical concern of synergies; the focus on the landowner's historical, rather than proposed, use further skews the analysis. But the Supreme Court's general approach seems to militate in favor of looking to the parcel as a whole. Similarly, although resting uncompensated landmark preservation on the idea of reciprocal advantage stretches the concept into meaninglessness, and the denial of compensation discourages ex ante what it hopes to foster ex post, the current cases give these arguments little purchase. Accordingly, I concur in the majority's decision to affirm.

RITH ENERGY v. UNITED STATES
247 F.3d 1355 (Fed. Cir.2001)

Before MAYER, Chief Judge, LOURIE, and BRYSON, Circuit Judges.

BRYSON, Circuit Judge.

In 1985, Rith Energy, Inc., purchased two coal mining leases in Tennessee. It subsequently applied for, and obtained, a federal permit to conduct mining operations on the leased property. After Rith had mined for a period of time, the Office of Surface Mining Reclamation and Enforcement of the United States Department of the Interior (OSM) concluded that a portion of the property on which Rith was mining contained high levels of potentially toxic materials that could pollute the groundwater in the area through a process known as “acid mine drainage.” OSM therefore suspended Rith’s permit and prohibited it from mining most of the coal covered by the mining leases until Rith devised a plan to address the problem of acid mine drainage at its mining site. When Rith was unable to devise a plan that satisfied OSM, Rith’s request to revise its mining permit was denied and Rith was unable to conduct any more mining at the site.

After several unsuccessful administrative and judicial challenges to OSM’s actions, Rith sued the United States in the Court of Federal Claims, contending that its property had been taken without compensation, in violation of the Takings Clause of the Fifth Amendment. The Court of Federal Claims granted summary judgment for the government, and Rith appealed. Because the government’s conduct at issue in this case did not result in a categorical taking of Rith’s property, and because Rith did not have reasonable investment-backed expectations that it would be permitted to mine in a way that would create a high risk of acid mine drainage, we affirm.

I

The Surface Mining Control and Reclamation Act of 1977 (“SMCRA”), 30 U.S.C. §§1201-1328, established a “nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.” 30 U.S.C. §1202(a). Pursuant to SMCRA, coal mine operators such as Rith must obtain a permit in order to conduct any mining operations. 30 U.S.C. §1256. Any permit issued under SMCRA must comply with certain environmental performance standards. 30 U.S.C. §1265. SMCRA also authorizes the Department of the Interior to prohibit mining operations that create an imminent danger to the health and safety of the public or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. 30 U.S.C. §1271.

The environmental performance standards set forth in SMCRA require, among other things, that the mine operator:

minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation by–

avoiding acid or other toxic mine drainage by such measures as, but not limited to–

preventing or removing water from contact with toxic producing deposits;

treating drainage to reduce toxic content which adversely affects downstream water upon being released to water courses;

casing, sealing, or otherwise managing boreholes, shafts, and wells and keeping acid or other toxic drainage from entering ground and surface waters[.] 30 U.S.C. §1265(b).

Acid mine drainage is an environmental problem long associated with mining activity. It occurs when certain types of acidic soil are exposed to air and water. Once acid mine drainage begins, the chemical reaction that creates the toxic product becomes self-sustaining and can continue for years, long after all mining activity has ceased. See *Rith Energy, Inc. v. United States*, 44 Fed. Cl. 108, 111 n.3 (1999); see also 30 C.F.R. §701.5 (defining acid mine drainage).

The coal leases at issue are located in the Cumberland Plateau region of Tennessee. Prior to April 1984, the State of Tennessee had administered SMCRA in that region. In the wake of failures by the State to implement, administer, maintain and enforce the state program adequately, OSM took over the administration of SMCRA in Tennessee. OSM promulgated a federal program for Tennessee in October 1984. See 49 Fed. Reg. 15,496 (Apr. 18, 1984); 49 Fed. Reg. 38,874 (Oct. 1, 1984).

In June 1985, long after SMCRA was enacted and shortly after the federal takeover of SMCRA enforcement in Tennessee, Rith acquired the mineral leases at issue in this case. The two leases covered 250 acres in Bledsoe County, Tennessee, and cost Rith approximately \$33,500. The leases included warnings regarding the uncertainties of obtaining mining permits and removing coal. After acquiring the leases, Rith applied to OSM for a permit to surface mine coal from two coal seams within the leased property, the Sewanee and Richland seams. At the time, there was extensive evidence that acid mine drainage was endemic to the Sewanee coal seam. That coal seam is situated above the Sewanee Conglomerate aquifer, a source of drinking water for area residents.

Rith planned to mine the leased property in three stages, with the first stage to cover the 89-acre area identified in the permit application. Rith estimated that a total of 385,000 tons of coal was located within the 250-acre leasehold; of that amount, Rith stated in its permit

application that it anticipated obtaining 250,000 tons of coal from the 89-acre area covered by the permit.

As required by SMCRA, Rith submitted a determination of the probable hydrologic consequences of mining and reclamation operations in the subject area, supported by soil test results. The test results showed that the sampled materials were of low acidity and that the surrounding soils had buffering capabilities, thereby greatly reducing the risk of acid mine drainage. Based in part on those test results, OSM issued Rith a permit to mine in January 1986.

In response to several complaints, OSM visited Rith's mine site in March 1986 and obtained additional soil samples. Those samples showed the presence of a thick zone of acidic material in the shale overburden of the Sewanee coal seam. The OSM samples indicated that the potential acidity of the overburden at Rith's site was some 250 percent greater than had been represented by Rith, and that the neutralization capacity of the soil was near zero. OSM directed Rith to provide further soil samples. Based on those samples, OSM concluded that the overburden posed a threat to the hydrological balance outside the permit area. In light of the "diametrically opposite" test results and what it characterized as a greatly heightened risk of acid mine drainage, OSM suspended Rith's permit in June 1986. Rith did not appeal OSM's decision to suspend its permit.

OSM invited Rith to submit a toxic materials handling plan that would take into account the heightened risk of acid mine drainage at the Sewanee coal seam. Rith submitted a number of plans in an effort to have the suspension lifted, but none satisfied OSM that Rith had adequately addressed the concerns OSM had raised. From shortly after the issuance of the suspension order until May 1987, however, Rith was permitted to continue mining portions of the Richland coal seam where the risk of acid mine drainage was not as great. Rith ultimately extracted approximately 35,700 tons of coal from the Sewanee and Richland coal seams, which resulted in a profit of approximately \$14 per ton.

In September 1988, OSM rejected Rith's final proposed toxic materials handling plan and denied a permit to resume mining in the disputed area. Rith then filed an administrative appeal pursuant to 30 U.S.C. §1264. In the administrative appeal, Rith challenged OSM's actions on a number of grounds, including its contention that acid mine drainage was unlikely to occur at the mine site and that its toxic materials handling plan was sufficient to prevent hydrologic damage outside the permit area if acid mine drainage did occur.

After a hearing, an administrative law judge from the Interior Department's Office of Hearings and Appeals sustained OSM's rejection of Rith's plan. The administrative law judge concluded that "the overburden on the north side of [Rith's] permit was undeniably of a highly acidic nature" and that it "had a high propensity to produce acid mine drainage." Absent an adequate toxic materials handling plan, the administrative law judge found, there was "a high probability that there would be acid mine drainage into the Sewanee Conglomerate aquifer." Finally, the administrative law judge concluded that Rith's toxic materials handling plan "would

not accomplish the necessary reclamation of the site, nor would it prevent damage to the hydrologic balance.” Rith appealed the decision of the administrative law judge to the Interior Board of Land Appeals (IBLA), which upheld the administrative law judge’s findings and affirmed his ruling.

Both before and after the conclusion of the administrative proceedings, Rith instituted several actions in the United States District Court for the Eastern District of Tennessee challenging OSM’s conduct with respect to Rith’s mining permit, including an action seeking review of the IBLA ruling. In August 1990, Rith moved to dismiss the action in which it sought review of the IBLA decision. The district court granted that motion and dismissed the appeal with prejudice. After most of the claims in the other proceedings were dismissed on jurisdictional grounds, the only remaining claim from the various district court actions was Rith’s claim for damages of \$5 million against the United States. The district court transferred that claim to the United States Court of Federal Claims in May 1992.

In the Court of Federal Claims, Rith filed an amended complaint that included a takings claim. On cross-motions for summary judgment, the court ruled that no taking had occurred and accordingly entered judgment for the United States. The court found that “OSM’s denial of a mining permit to plaintiff, because of the high probability of acid mine draining into the Sewanee Conglomerate aquifer, represented an exercise of regulatory authority indistinguishable in purpose and result from that to which plaintiff was always subject under Tennessee nuisance law.” Rith Energy, 44 Fed. Cl. at 115. The fact that Rith was granted a surface water discharge permit by the state regulatory body was not persuasive evidence that Rith’s mining activities were consistent with state law, the court explained, because:

the information plaintiff submitted to the state officials no more informed them of the high probability of harm to the Sewanee aquifer than did that same data when presented to the federal officials. We can justifiably assume, however, that even as the federal officials were persuaded to reexamine the validity of the permit they initially had issued, so too would the state officials. A high probability of pollution of an aquifer is not within the tolerances of either regulatory scheme—the Tennessee Water Quality Control Act or SMCRA. *Id.*

In an order denying a motion for reconsideration, the trial court added that the property use that was denied in this case—“the conduct of a surface mining operation that held out a ‘high probability’ of introducing acid mine drainage into the Sewanee Conglomerate aquifer”—is not a property use that Rith “could legitimately claim it had a right to pursue in consonance with relevant state property and nuisance principles.” Rith Energy, Inc. v. United States, 44 Fed. Cl. 366, 367 (1999).

II

Rith asserts that by preventing it from mining on the property covered by its coal leases, the government took its property without compensation, in violation of the Fifth Amendment. The Court of Federal Claims rejected Rith's takings claim on the ground that under Tennessee nuisance law, Rith had no right to mine in a way that was likely to produce acid mine drainage, and that its property right in the coal leases therefore did not include the right to mine the Sewanee seam in the way that it wanted to. The court's analysis was based on the so-called "nuisance defense" to takings claims described by the Supreme Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), where the Court held that to avoid constituting a taking, a regulatory restraint that prohibits all economically beneficial use of land "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029. The Court in *Lucas* explained that when a regulation "that declares 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it." *Id.* at 1030.

Rith argues that its activities would not have been contrary to Tennessee nuisance law and that OSM's restraint on Rith's mining activities, which deprived Rith of all economic value in the coal leases, therefore constituted a compensable taking of its property interest in those leases. We need not reach the question whether Rith's mining activities would have been prohibited by Tennessee nuisance law, however, because we conclude that when Rith purchased its coal leases it did not have any reason to expect that it would be permitted to mine in a way that was likely to produce acid mine drainage.

A

Under the current state of takings law, it is often important to determine at the outset whether a particular claimed taking was "categorical" or not. A categorical taking has been defined as one in which "all economically viable use, i.e., all economic value, has been taken by the regulatory imposition." *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1357 (Fed. Cir.), modifying 208 F.3d 1374 (Fed. Cir. 2000). A categorical taking is distinct from a taking "that is the consequence of a regulatory imposition that prohibits or restricts only some of the uses that would otherwise be available to the property owner, but leaves the owner with substantial viable economic use." *Id.* In *Palm Beach Isles*, this court held that one significant difference between a categorical taking and a non-categorical taking is that in the former case, analyzing whether compensation is due does not require an inquiry into whether the plaintiff had reasonable investment-backed expectations that were defeated by the regulatory measure that gave rise to the takings claim.

We agree with the government that the regulatory restraint at issue in this case did not result in a categorical taking. During the period that Rith was permitted to mine coal under the permit that OSM issued in January 1986, it extracted approximately 15,900 tons of coal from the leased property. Even after OSM suspended Rith's permit in June 1986, OSM permitted Rith to

continue mining coal from one of the two coal seams on the property, and Rith extracted an additional 19,800 tons of coal from that seam. Although Rith stated in its permit application that it expected to extract a total of approximately 250,000 tons of coal from the property covered by the permit (and later stated that it expected to extract approximately 385,000 tons of coal from the entire 250-acre area), Rith acknowledges that the 35,700 tons of coal that it extracted before it terminated its mining activities produced a profit of approximately \$14 per ton, or a total profit of approximately \$500,000, for Rith's investors. Because Rith purchased the coal leases for a total of \$33,500, it was able to recover its investment and considerably more in spite of the permitting restrictions imposed by OSM.

Rith argues that in determining whether the government action in this case constituted a categorical taking, the loss to Rith must be measured as of September 1988, when OSM refused to accept Rith's last version of its toxic materials handling plan. After that date, Rith was unable to mine any more coal from the leased property, and Rith contends that as of that time it was deprived of all remaining economic value in the coal leases.

In measuring the regulatory burden on Rith's mining activities, it is appropriate to look at the extent to which Rith was able to exploit its leases throughout the permitting period. By focusing on its inability to mine any coal under its permit after September 1988, Rith ignores the fact that it was allowed to extract a substantial amount of coal under its mining permit prior to that date. If the permit had provided at the outset that Rith could mine 35,700 tons of coal on the 89 acres that were covered by its permit, it would not be accurate to characterize the regulatory restraint as categorical. The analysis is not different simply because OSM imposed a condition on the permit during the course of Rith's mining activities that had the effect of preventing Rith from extracting any more than the 35,700 tons it had already mined. If, for example, OSM's restraints had been made effective after Rith had removed half the coal from the leased property, it could hardly be said that the restraint gave rise to a categorical taking because OSM's prohibition on further mining took the entire remaining value of the leases as of that time. See *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 643-44, 124 L. Ed. 2d 539, 113 S. Ct. 2264 (1993) ("a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable"); *Keystone Bituminous Coal Co. v. DeBenedictis*, 480 U.S. 470, 498-99, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987).

Because Rith applied for a permit to mine all of the coal within the 89-acre area identified in the application, the impact of OSM's action must be measured, at minimum, by the entire coal reserve covered by the permit, not the portion that remained at the time Rith was forced to stop mining. The regulatory program began with the issuance of the permit in January 1986, extended through the period in which the permit was suspended, starting in June 1986, and ended when Rith abandoned further efforts to devise a satisfactory toxic materials handling plan in September 1988. During the first six months of that period, Rith was able to mine under the authority of the permit, and even during the period following the permit suspension, Rith was allowed to

continue mining coal from one of the two seams on the leased property. Viewing the impact of the regulatory program as a whole, OSM's restraints significantly limited Rith's rights to mine, but even within those limits Rith was able to mine a significant amount of coal that earned Rith a substantial profit on its investment in the leases.

In determining whether a taking is categorical, "the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored." *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 905 (Fed. Cir. 1986); see *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1367 (Fed. Cir. 1999) (the fact that, despite the challenged regulatory restraint, the value of the subject property increased more than three-fold in 11 years "itself undermines Forest's contention that its property was taken"). While the \$500,000 in profit that Rith earned on the extracted coal was far less than it hoped to earn from the coal leases, the sum was considerably more than the \$33,500 that Rith invested in the leases. Thus, the 35,700 tons, although only about 14 percent of the amount Rith hoped to extract under its permit, cannot be regarded as merely a "nominal" recovery, see *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1567 (Fed. Cir. 1994), reflecting the "total wipe-out" that accompanies a categorical taking, see *Palm Beach Isles*, 208 F.3d at 1380. For that reason, it is not appropriate to characterize OSM's restraints as "a prohibition of all economically viable use" of the property in question, see *Florida Rock*, 18 F.3d at 1564-65. The restraint in this case therefore did not result in one of "the relatively rare situations where the government has deprived a landowner of all economically beneficial uses." *Lucas*, 505 U.S. at 1018.B.

Under this court's decision in *Palm Beach Isles*, the consequence of concluding that there was no categorical taking in this case is that in order to establish that OSM's regulatory restraints constituted a compensable taking, Rith must show that it had a reasonable investment-backed expectation that it would not be subject to such restraints when it acquired the coal leases. Our precedents make clear that Rith could not have had such expectations. SMCRA was enacted eight years before Rith purchased the coal leases. Its provisions include environmental performance standards that directly address acid mine drainage and make clear that surface mining will not be permitted unless the permittee minimizes the "disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems . . . by avoiding acid or other toxic mine drainage . . ." 30 U.S.C. §1265(b)(10). In light of that statutory provision, Rith could not reasonably have expected that it would be free from regulatory oversight with regard to the potential for acid mine drainage, and it could not reasonably have expected that it would not be required to adopt potentially expensive measures to avoid acid mine drainage if OSM determined that its mining activities could result in the release of those or other toxins. As this court explained in *M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995), at the time Rith acquired its mining rights, "it knew or should have known that it could not mine in such a way as to endanger public health or safety and that any state authorization it may have received was subordinate to the national standards that were established by SMCRA and enforced by OSM." See generally

Good v. United States, 189 F.3d 1355, 1362 (Fed. Cir. 1999) (holding that the property owner had no reasonable investment-backed expectations because he “had both constructive and actual knowledge that either state or federal regulations could ultimately prevent him from building on the property”); Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994)(stating that one who buys with knowledge of regulatory restrictions on the use of property “assumes the risk of economic loss. In such a case, the owner presumably paid a discounted price for the property. Compensating him for a ‘taking’ would confer a windfall.”).

Section 521(a)(2) of SMCRA, 30 U.S.C. §1271(a)(2), provides that when the Secretary determines that any condition exists that creates “an imminent danger to the health or safety of the public or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources,” the Secretary may order the immediate cessation of surface coal mining operations relating to that condition. Although OSM did not explicitly invoke section 521(a)(2) when it suspended Rith’s permit in June 1986, that was the apparent source of its authority to issue the suspension order. Because Rith did not appeal the suspension of its permit, it was not necessary for the administrative law judge to address directly whether the standard of section 521(a)(2) was satisfied, but the administrative law judge’s findings in the appeal from the denial of the revision to Rith’s permit support the suspension—particularly his findings that absent an effective toxic materials handling plan, there was “a high probability that there would be acid mine drainage into the Sewanee Conglomerate aquifer” resulting in damage to the hydrologic balance. In support of his findings, the administrative law judge cited testimony from an OSM employee that Rith’s mine site “contained one of the highest levels of acid material that he had ever seen, nationwide, in nine years of looking at hundreds of permits.” The Court of Federal Claims, moreover, noted that it is well known that acid mine drainage can destroy aquatic life and create serious problems for domestic and public water supplies, and that acid mine drainage can continue for years, even after mining operations have been halted. Rith Energy, 44 Fed. Cl. at 111 n.3. For those reasons, the court agreed with the administrative law judge that if OSM had failed to act, there was a high probability that acid mine drainage would have occurred, severely polluting the Sewanee Conglomerate and endangering domestic and public water supplies.

Although Rith attacks the lawfulness of OSM’s rejection of its toxic materials handling plan, that challenge is not properly before us. Like the coal mine operator in M & J Coal, Rith had the opportunity to challenge the lawfulness of OSM’s actions, including the suspension of its permit, the rejection of its toxic materials handling plan, and the ultimate denial of its permit in administrative proceedings and through judicial review in a United States district court. In fact, Rith challenged the rejection of its toxic materials handling plan administratively, and lost. Like the coal mine operator in M & J Coal, Rith appealed that decision to the IBLA. After losing before the IBLA, Rith sought judicial review in federal district court, but dismissed that action. In a similar setting, we held in M & J Coal that “neither the Court of Federal Claims nor this

court may entertain a collateral challenge to the validity of OSM's actions," 47 F.3d at 1154, and we see no reason to depart from that holding here.

In this case, having forgone its challenge to OSM's administrative actions, Rith is not free to renew its challenge to those actions under the cover of a takings claim in the Court of Federal Claims. Rith is thus required to litigate its takings claim on the assumption that the administrative action was both authorized and lawful. On the facts of this case, the consequence of assuming the lawfulness of OSM's actions, i.e., that OSM was correct in concluding that Rith's mining activities constituted an unacceptable threat of acid mine drainage and the consequent pollution of groundwater in the area surrounding the mine operations, is to limit the issue before us to whether prohibiting Rith from mining under those circumstances constitutes a taking. And on that issue, as we have explained, the absence of a reasonable investment-backed expectation on Rith's part that it would be permitted to mine while producing acid mine discharge in violation of SMCRA defeats its takings claim. We therefore uphold the judgment of the Court of Federal Claims.

AFFIRMED.

**TAHOE-SIERRA PRESERVATION COUNCIL, INC. v. TAHOE REGIONAL
PLANNING AGENCY**
535 U.S. 302 (2002)

STEVENS, J., delivered the opinion of the Court, in which O’CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which SCALIA, J., and THOMAS, J., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined.

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a per se taking of property requiring compensation under the Takings Clause of the United States Constitution. This case actually involves two moratoria ordered by respondent Tahoe Regional Planning Agency (TRPA) to maintain the status quo while studying the impact of development on Lake Tahoe and designing a strategy for environmentally sound growth. The first, Ordinance 81-5, was effective from August 24, 1981, until August 26, 1983, whereas the second more restrictive Resolution 83-21 was in effect from August 27, 1983, until April 25, 1984. As a result of these two directives, virtually all development on a substantial portion of the property subject to TRPA’s jurisdiction was prohibited for a period of 32 months.

I

The relevant facts are undisputed. The Court of Appeals, while reversing the District Court on a question of law, accepted all of its findings of fact, and no party challenges those findings. All agree that Lake Tahoe is “uniquely beautiful,” that President Clinton was right to call it a “national treasure that must be protected and preserved,” and that Mark Twain aptly described the clarity of its waters as “not merely transparent, but dazzlingly, brilliantly so,” (emphasis added) (quoting M. Twain, *Roughing It* 174-175 (1872)).

Lake Tahoe’s exceptional clarity is attributed to the absence of algae that obscures the waters of most other lakes. Historically, the lack of nitrogen and phosphorous, which nourish the growth of algae, has ensured the transparency of its waters. Unfortunately, the lake’s pristine state has deteriorated rapidly over the past 40 years; increased land development in the Lake Tahoe Basin (Basin) has threatened the “noble sheet of blue water” beloved by Twain and countless others. Given this trend, the District Court predicted that “unless the process is stopped, the lake will lose its clarity and its trademark blue color, becoming green and opaque for eternity.”

Those areas in the Basin that have steeper slopes produce more runoff; therefore, they are usually considered “high hazard” lands. Moreover, certain areas near streams or wetlands known as “Stream Environment Zones” (SEZs) are especially vulnerable to the impact of development because, in their natural state, they act as filters for much of the debris that runoff carries.

Because “the most obvious response to this problem . . . is to restrict development around the lake—especially in SEZ lands, as well as in areas already naturally prone to runoff,” conservation efforts have focused on controlling growth in these high hazard areas.

In the 1960’s, when the problems associated with the burgeoning development began to receive significant attention, jurisdiction over the Basin, which occupies 501 square miles, was shared by the States of California and Nevada, five counties, several municipalities, and the Forest Service of the Federal Government. In 1968, the legislatures of the two States adopted the Tahoe Regional Planning Compact. The compact set goals for the protection and preservation of the lake and created TRPA as the agency assigned “to coordinate and regulate development in the Basin and to conserve its natural resources.” *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 394, 59 L. Ed. 2d 401, 99 S. Ct. 1171 (1979).

Pursuant to the compact, in 1972 TRPA adopted a Land Use Ordinance that divided the land in the Basin into seven “land capability districts,” based largely on steepness but also taking into consideration other factors affecting runoff. Each district was assigned a “land coverage coefficient—a recommended limit on the percentage of such land that could be covered by impervious surface.” Those limits ranged from 1% for districts 1 and 2 to 30% for districts 6 and 7. Land in districts 1, 2, and 3 is characterized as “high hazard” or “sensitive,” while land in districts 4, 5, 6, and 7 is “low hazard” or “non-sensitive.” The SEZ lands, though often treated as a separate category, were actually a subcategory of district 1.

Eventually the two States, with the approval of Congress and the President, adopted an extensive amendment to the compact that became effective on December 19, 1980. The 1980 Tahoe Regional Planning Compact (Compact) redefined the structure, functions, and voting procedures of TRPA, and directed it to develop regional “environmental threshold carrying capacities”—a term that embraced “standards for air quality, water quality, soil conservation, vegetation preservation and noise.” The Compact provided that TRPA “shall adopt” those standards within 18 months, and that “within 1 year after” their adoption (i.e., by June 19, 1983), it “shall” adopt an amended regional plan that achieves and maintains those carrying capacities. The Compact also contained a finding by the Legislatures of California and Nevada “that in order to make effective the regional plan as revised by [TRPA], it is necessary to halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan.” Accordingly, for the period prior to the adoption of the final plan (“or until May 1, 1983, whichever is earlier”), the Compact itself prohibited the development of new subdivisions, condominiums, and apartment buildings, and also prohibited each city and county in the Basin from granting any more permits in 1981, 1982, or 1983 than had been granted in 1978.

Despite the fact that TRPA performed these obligations in “good faith and to the best of its ability,” after a few months it concluded that it could not meet the deadlines in the Compact. On June 25, 1981, it therefore enacted Ordinance 81-5 imposing the first of the two moratoria on

development that petitioners challenge in this proceeding. The ordinance provided that it would become effective on August 24, 1981, and remain in effect pending the adoption of the permanent plan required by the Compact.

The District Court made a detailed analysis of the ordinance, noting that it might even prohibit hiking or picnicking on SEZ lands, but construed it as essentially banning any construction or other activity that involved the removal of vegetation or the creation of land coverage on all SEZ lands, as well as on class 1, 2, and 3 lands in California. Some permits could be obtained for such construction in Nevada if certain findings were made. It is undisputed, however, that Ordinance 81-5 prohibited the construction of any new residences on SEZ lands in either State and on class 1, 2, and 3 lands in California.

Given the complexity of the task of defining “environmental threshold carrying capacities” and the division of opinion within TRPA’s governing board, the District Court found that it was “unsurprising” that TRPA failed to adopt those thresholds until August 26, 1982, roughly two months after the Compact deadline. Under a liberal reading of the Compact, TRPA then had until August 26, 1983, to adopt a new regional plan. “Unfortunately, but again not surprisingly, no regional plan was in place as of that date.” TRPA therefore adopted Resolution 83-21, “which completely suspended all project reviews and approvals, including the acceptance of new proposals,” and which remained in effect until a new regional plan was adopted on April 26, 1984. Thus, Resolution 83-21 imposed an 8-month moratorium prohibiting all construction on high hazard lands in either State. In combination, Ordinance 81-5 and Resolution 83-21 effectively prohibited all construction on sensitive lands in California and on all SEZ lands in the entire Basin for 32 months, and on sensitive lands in Nevada (other than SEZ lands) for eight months. It is these two moratoria that are at issue in this case.

On the same day that the 1984 plan was adopted, the State of California filed an action seeking to enjoin its implementation on the ground that it failed to establish land-use controls sufficiently stringent to protect the Basin. The District Court entered an injunction that was upheld by the Court of Appeals and remained in effect until a completely revised plan was adopted in 1987. Both the 1984 injunction and the 1987 plan contained provisions that prohibited new construction on sensitive lands in the Basin. As the case comes to us, however, we have no occasion to consider the validity of those provisions.

II

Approximately two months after the adoption of the 1984 Plan, petitioners filed parallel actions against TRPA and other defendants in federal courts in Nevada and California that were ultimately consolidated for trial in the District of Nevada. The petitioners include the Tahoe Sierra Preservation Council, a nonprofit membership corporation representing about 2,000 owners of both improved and unimproved parcels of real estate in the Lake Tahoe Basin, and a class of some 400 individual owners of vacant lots located either on SEZ lands or in other parts of districts 1, 2, or 3. Those individuals purchased their properties prior to the effective date of

the 1980 Compact, primarily for the purpose of constructing “at a time of their choosing” a single-family home “to serve as a permanent, retirement or vacation residence.” When they made those purchases, they did so with the understanding that such construction was authorized provided that “they complied with all reasonable requirements for building.”¹³⁵

Petitioners’ complaints gave rise to protracted litigation that has produced four opinions by the Court of Appeals for the Ninth Circuit and several published District Court opinions. For present purposes, however, we need only describe those courts’ disposition of the claim that three actions taken by TRPA—Ordinance 81-5, Resolution 83-21, and the 1984 regional plan—constituted takings of petitioners’ property without just compensation. Indeed, the challenge to the 1984 plan is not before us because both the District Court and the Court of Appeals held that it was the federal injunction against implementing that plan, rather than the plan itself, that caused the post-1984 injuries that petitioners allegedly suffered, and those rulings are not encompassed within our limited grant of certiorari. Thus, we limit our discussion to the lower courts’ disposition of the claims based on the 2-year moratorium (Ordinance 81-5) and the ensuing 8-month moratorium (Resolution 83-21).

The District Court began its constitutional analysis by identifying the distinction between a direct government appropriation of property without just compensation and a government regulation that imposes such a severe restriction on the owner’s use of her property that it produces “nearly the same result as a direct appropriation.” The court noted that all of the claims in this case “are of the ‘regulatory takings’ variety.” Citing our decision in *Agins v. City of Tiburon*, 447 U.S. 255, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980), it then stated that a “regulation will constitute a taking when either: (1) it does not substantially advance a legitimate state interest; or (2) it denies the owner economically viable use of her land.” 34 F. Supp. 2d at 1239. The District Court rejected the first alternative based on its finding that “further development on high hazard lands such as [petitioners’] would lead to significant additional damage to the lake.” *Id.* at 1240. With respect to the second alternative, the court first considered whether the analysis adopted in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978), would lead to the conclusion that TRPA had effected a “partial taking,”¹³⁶ and then whether those actions had effected a “total taking.”

Emphasizing the temporary nature of the regulations, the testimony that the “average holding time of a lot in the Tahoe area between lot purchase and home construction is twenty-

¹³⁵ As explained above, the petitioners who purchased land after the 1972 compact did so amidst a heavily regulated zoning scheme. Their property was already classified as part of land capability districts 1, 2, and 3, or SEZ land. And each land classification was subject to regulations as to the degree of artificial disturbance the land could safely sustain.

¹³⁶ The *Penn Central* analysis involves “a complex of factors including the regulation’s economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.” *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 150 L. Ed. 2d 592, 121 S. Ct. 2448 (2001).

five years,” and the failure of petitioners to offer specific evidence of harm, the District Court concluded that “consideration of the Penn Central factors clearly leads to the conclusion that there was no taking.” In the absence of evidence regarding any of the individual plaintiffs, the court evaluated the “average” purchasers’ intent and found that such purchasers “did not have reasonable, investment-backed expectations that they would be able to build single-family homes on their land within the six-year period involved in this lawsuit.”¹³⁷

The District Court had more difficulty with the “total taking” issue. Although it was satisfied that petitioners’ property did retain some value during the moratoria, it found that they had been temporarily deprived of “all economically viable use of their land.” The court concluded that those actions therefore constituted “categorical” takings under our decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992). It rejected TRPA’s response that Ordinance 81-5 and Resolution 83-21 were “reasonable temporary planning moratoria” that should be excluded from Lucas’ categorical approach. The court thought it “fairly clear” that such interim actions would not have been viewed as takings prior to our decisions in *Lucas* and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987), because “zoning boards, cities, counties and other agencies used them all the time to ‘maintain the status quo pending study and governmental decision making.’” After expressing uncertainty as to whether those cases required a holding that moratoria on development automatically effect takings, the court concluded that TRPA’s actions did so, partly because neither the ordinance nor the resolution, even though intended to be temporary from the beginning, contained an express termination date. 34 F. Supp. 2d at 1250-1251. Accordingly, it ordered TRPA to pay damages to most petitioners for the 32-month period from August 24, 1981, to April 25, 1984, and to those owning class 1, 2, or 3 property in Nevada for the 8-month period from August 27, 1983, to April 25, 1984.

Both parties appealed. TRPA successfully challenged the District Court’s takings determination, and petitioners unsuccessfully challenged the dismissal of their claims based on the 1984 and 1987 plans. Petitioners did not, however, challenge the District Court’s findings or conclusions concerning its application of *Penn Central*. With respect to the two moratoria, the Ninth Circuit noted that petitioners had expressly disavowed an argument “that the regulations constitute a taking under the ad hoc balancing approach described in *Penn Central*” and that they did not “dispute that the restrictions imposed on their properties are appropriate means of securing the purpose set forth in the Compact.” Accordingly, the only question before the court was “whether the rule set forth in *Lucas* applies—that is, whether a categorical taking occurred

¹³⁷ 34 F. Supp. 2d at 1241. The court stated that petitioners “had plenty of time to build before the restrictions went into effect—and almost everyone in the Tahoe Basin knew in the late 1970s that a crackdown on development was in the works.” In addition, the court found “the fact that no evidence was introduced regarding the specific diminution in value of any of the plaintiffs’ individual properties clearly weighs against a finding that there was a partial taking of the plaintiffs’ property.” *Ibid.*

because Ordinance 81-5 and Resolution 83-21 denied the plaintiffs’ ‘all economically beneficial or productive use of land.’” 216 F.3d 764, 773 (2000). Moreover, because petitioners brought only a facial challenge, the narrow inquiry before the Court of Appeals was whether the mere enactment of the regulations constituted a taking.

Contrary to the District Court, the Court of Appeals held that because the regulations had only a temporary impact on petitioners’ fee interest in the properties, no categorical taking had occurred. It reasoned:

“Property interests may have many different dimensions. For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest). At base, the plaintiffs’ argument is that we should conceptually sever each plaintiff’s fee interest into discrete segments in at least one of these dimensions—the temporal one—and treat each of those segments as separate and distinct property interests for purposes of takings analysis. Under this theory, they argue that there was a categorical taking of one of those temporal segments.” 216 F.3d at 774.

Putting to one side “cases of physical invasion or occupation,” the court read our cases involving regulatory taking claims to focus on the impact of a regulation on the parcel as a whole. In its view a “planning regulation that prevents the development of a parcel for a temporary period of time is conceptually no different than a land-use restriction that permanently denies all use on a discrete portion of property, or that permanently restricts a type of use across all of the parcel.” 216 F.3d at 776. In each situation, a regulation that affects only a portion of the parcel—whether limited by time, use, or space—does not deprive the owner of all economically beneficial use.¹³⁸

¹³⁸ The Court of Appeals added:

“Each of these three types of regulation will have an impact on the parcel’s value, because each will affect an aspect of the owner’s ‘use’ of the property—by restricting when the ‘use’ may occur, where the ‘use’ may occur, or how the ‘use’ may occur. Prior to *Agin v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)], the Court had already rejected takings challenges to regulations eliminating all ‘use’ on a portion of the property, and to regulations restricting the type of ‘use’ across the breadth of the property. See *Penn Central*, 438 U.S. at 130-31; *Keystone Bituminous Coal Ass’n*, 480 U.S. at 498-99; *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 397, 71 L. Ed. 303, 47 S. Ct. 114 . . . (1926) (75% diminution in value caused by zoning law); see also *William C. Haas & Co. v. City & County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979) (value reduced from \$2,000,000 to \$100,000). In those cases, the Court ‘uniformly rejected the proposition that diminution in property value, standing alone, can establish a “taking.”’ *Penn Central*, 438 U.S. at 131 . . . ; see also *Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645, 124 L. Ed. 2d 539, 113 S. Ct. 2264 . .

The Court of Appeals distinguished Lucas as applying to the “‘relatively rare’” case in which a regulation denies all productive use of an entire parcel, whereas the moratoria involve only a “temporal ‘slice’” of the fee interest and a form of regulation that is widespread and well established. It also rejected petitioners’ argument that our decision in *First English* was controlling. According to the Court of Appeals, *First English* concerned the question whether compensation is an appropriate remedy for a temporary taking and not whether or when such a taking has occurred. Faced squarely with the question whether a taking had occurred, the court held that *Penn Central* was the appropriate framework for analysis. Petitioners, however, had failed to challenge the District Court’s conclusion that they could not make out a taking claim under the *Penn Central* factors.

Over the dissent of five judges, the Ninth Circuit denied a petition for rehearing en banc. 228 F.3d 998 (2000). In the dissenters’ opinion, the panel’s holding was not faithful to this Court’s decisions in *First English* and *Lucas*, nor to Justice Holmes admonition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, 67 L. Ed. 322, 43 S. Ct. 158 (1922), 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.’” 228 F.3d at 1003. Because of the importance of the case, we granted certiorari limited to the question stated at the beginning of this opinion. 533 U.S. 948, 121 S. Ct. 2589, 150 L. Ed. 2d 749 (2001). We now affirm.

III

Petitioners make only a facial attack on Ordinance 81-5 and Resolution 83-21. They contend that the mere enactment of a temporary regulation that, while in effect, denies a property owner all viable economic use of her property gives rise to an unqualified constitutional obligation to compensate her for the value of its use during that period. Hence, they “face an uphill battle,” *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987), that is made especially steep by their desire for a categorical rule requiring compensation whenever the government imposes such a moratorium on development. Under their proposed rule, there is no need to evaluate the landowners’ investment-backed expectations, the actual impact of the regulation on any individual, the importance of the public interest served by the regulation, or the reasons for imposing the temporary restriction. For petitioners, it is enough that a regulation imposes a temporary deprivation—no matter how brief—of all economically viable use to trigger a per se rule that a taking has occurred. Petitioners assert that our opinions in *First English* and *Lucas* have already endorsed their view, and that it is a logical application of the principle that the Takings Clause was “designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be

. (1993). There is no plausible basis on which to distinguish a similar diminution in value that results from a temporary suspension of development.” 216 F.3d at 776-777.

borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960).

We shall first explain why our cases do not support their proposed categorical rule—indeed, fairly read, they implicitly reject it. Next, we shall explain why the *Armstrong* principle requires rejection of that rule as well as the less extreme position advanced by petitioners at oral argument. In our view the answer to the abstract question whether a temporary moratorium effects a taking is neither “yes, always” nor “no, never”; the answer depends upon the particular circumstances of the case. We conclude that the circumstances in this case are best analyzed within the *Penn Central* framework.

IV

The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by “essentially *ad hoc*, factual inquiries,” *Penn Central*, 438 U.S. at 124 .

When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary. *United States v. General Motors Corp.*, 323 U.S. 373, 89 L. Ed. 311, 65 S. Ct. 357 (1945). Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982); or when its planes use private airspace to approach a government airport, *United States v. Causby*, 328 U.S. 256, 90 L. Ed. 1206, 66 S. Ct. 1062 (1946), it is required to pay for that share no matter how small. But a government regulation that merely prohibits landlords from evicting tenants unwilling to pay a higher rent, *Block v. Hirsh*, 256 U.S. 135, 65 L. Ed. 865, 41 S. Ct. 458 (1921); that bans certain private uses of a portion of an owner’s property, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987); or that forbids the private use of certain airspace, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978), does not constitute a categorical taking. “The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual

assessments of the purposes and economic effects of government actions.” *Yee v. Escondido*, 503 U.S. 519, 523, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992).

This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a “regulatory taking,” and vice versa. For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims. Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as per se takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights.¹³⁹ “This case does not present the ‘classic taking’ in which the government directly appropriates private property for its own use,” *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522, 141 L. Ed. 2d 451, 118 S. Ct. 2131 (1998); instead the interference with property rights “arises from some public program adjusting the benefits and burdens of economic life to promote the common good,” *Penn Central*, 438 U.S. at 124.

Perhaps recognizing this fundamental distinction, petitioners wisely do not place all their emphasis on analogies to physical takings cases. Instead, they rely principally on our decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992)—a regulatory takings case that, nevertheless, applied a categorical rule—to argue that the *Penn Central* framework is inapplicable here. A brief review of some of the cases that led to our

¹³⁹ According to the Chief Justice’s dissent, even a temporary, use-prohibiting regulation should be governed by our physical takings cases because, under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), “from the landowner’s point of view,” the moratorium is the functional equivalent of a forced leasehold. Of course, from both the landowner’s and the government’s standpoint there are critical differences between a leasehold and a moratorium. Condemnation of a leasehold gives the government possession of the property, the right to admit and exclude others, and the right to use it for a public purpose. A regulatory taking, by contrast, does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others.

The Chief Justice stretches *Luca* “equivalence” language too far. For even a regulation that constitutes only a minor infringement on property may, from the landowner’s perspective, be the functional equivalent of an appropriation. *Lucas* carved out a narrow exception to the rules governing regulatory takings for the “extraordinary circumstance” of a permanent deprivation of all beneficial use. The exception was only partially justified based on the “equivalence” theory cited by his dissent. It was also justified on the theory that, in the “relatively rare situations where the government has deprived a landowner of all economically beneficial uses,” it is less realistic to assume that the regulation will secure an “average reciprocity of advantage,” or that government could not go on if required to pay for every such restriction. 505 U.S. at 1017-1018. But as we explain, *infra*, at 35-38, these assumptions hold true in the context of a moratorium.

decision in *Lucas*, however, will help to explain why the holding in that case does not answer the question presented here.

As we noted in *Lucas*, it was Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 67 L. Ed. 322, 43 S. Ct. 158 (1922),¹⁴⁰ that gave birth to our regulatory takings jurisprudence.¹⁴¹

In subsequent opinions we have repeatedly and consistently endorsed Holmes' observation that "if regulation goes too far it will be recognized as a taking." Justice Holmes did not provide a standard for determining when a regulation goes "too far," but he did reject the view expressed in Justice Brandeis' dissent that there could not be a taking because the property remained in the possession of the owner and had not been appropriated or used by the public. After *Mahon*, neither a physical appropriation nor a public use has ever been a necessary component of a "regulatory taking."

In the decades following that decision, we have "generally eschewed" any set formula for determining how far is too far, choosing instead to engage in "essentially ad hoc, factual inquiries." *Lucas*, 505 U.S. at 1015 (quoting *Penn Central*, 438 U.S. at 124). Indeed, we still resist the temptation to adopt per se rules in our cases involving partial regulatory takings, preferring to examine "a number of factors" rather than a simple "mathematically precise" formula. Justice Brennan's opinion for the Court in *Penn Central* did, however, make it clear that even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on "the parcel as a whole":

'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

¹⁴⁰ The case involved "a bill in equity brought by the defendants in error to prevent the Pennsylvania Coal Company from mining under their property in such way as to remove the supports and cause a subsidence of the surface and of their house." *Mahon*, 260 U.S. at 412. *Mahon* sought to prevent Pennsylvania Coal from mining under his property by relying on a state statute, which prohibited any mining that could undermine the foundation of a home. The company challenged the statute as a taking of its interest in the coal without compensation.

¹⁴¹ In *Lucas*, we explained: "Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 67 L. Ed. 322, 43 S. Ct. 158 (1922), it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, *Legal Tender Cases*, 79 U.S. 457, 12 Wall. 457, 551, 20 L. Ed. 287, (1871), or the functional equivalent of a 'practical ouster of [the owner's] possession,' *Transportation Co. v. Chicago*, 99 U.S. 635, 642, 25 L. Ed. 336 (1879) . . . Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 U.S. at 414-415. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared.' *Id.* at 415. These considerations gave birth in that case to the oft-cited maxim that, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' *Ibid.* 505 U.S. at 1014 (citation omitted).

nature and extent 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.

This requirement that “the aggregate must be viewed in its entirety” explains why, for example, a regulation that prohibited commercial transactions in eagle feathers, but did not bar other uses or impose any physical invasion or restraint upon them, was not a taking. *Andrus v. Allard*, 444 U.S. 51 (1979). It also clarifies why restrictions on the use of only limited portions of the parcel, such as set-back ordinances, *Gorieb v. Fox*, 274 U.S. 603 (1927), or a requirement that coal pillars be left in place to prevent mine subsidence, *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. at 498, were not considered regulatory takings. In each of these cases, we affirmed that “where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking.” *Andrus*, 444 U.S. at 65-66.

While the foregoing cases considered whether particular regulations had “gone too far” and were therefore invalid, none of them addressed the separate remedial question of how compensation is measured once a regulatory taking is established. In his dissenting opinion in *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 636, 67 L. Ed. 2d 551, 101 S. Ct. 1287 (1981), Justice Brennan identified that question and explained how he would answer it:

“The constitutional rule I propose requires that, once a court finds that a police power regulation has effected a ‘taking,’ the government entity must pay just compensation for the period commencing on the date the regulation first effected the ‘taking,’ and ending on the date the government entity chooses to rescind or otherwise amend the regulation.” *Id.* at 658.

Justice Brennan’s proposed rule was subsequently endorsed by the Court in *First English*, 482 U.S. at 315, 318, 321. *First English* was certainly a significant decision, and nothing that we say today qualifies its holding. Nonetheless, it is important to recognize that we did not address in that case the quite different and logically prior question whether the temporary regulation at issue had in fact constituted a taking.

In *First English*, the Court unambiguously and repeatedly characterized the issue to be decided as a “compensation question” or a “remedial question.” (“The disposition of the case on these grounds isolates the remedial question for our consideration”. And the Court’s statement of its holding was equally unambiguous: “We merely hold that where the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.” In fact, *First English* expressly disavowed any ruling on the merits of the takings issue because the California courts had decided the remedial question on the assumption that a taking had been alleged. (“We reject appellee’s suggestion that . . . we must independently evaluate the adequacy of the complaint and resolve the takings claim on the merits before we can reach the remedial question”). After our remand, the California courts concluded that there had not been a taking, *First English Evangelical Church of Glendale v. County of Los Angeles*, 210 Cal. App.

3d 1353, 258 Cal. Rptr. 893 (1989), and we declined review of that decision, 493 U.S. 1056 (1990).

To the extent that the Court in *First English* referenced the antecedent takings question, we identified two reasons why a regulation temporarily denying an owner all use of her property might not constitute a taking. First, we recognized that “the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State’s authority to enact safety regulations.” 482 U.S. at 313. Second, we limited our holding “to the facts presented” and recognized “the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the] like which [were] not before us.” Thus, our decision in *First English* surely did not approve, and implicitly rejected, the categorical submission that petitioners are now advocating.

Similarly, our decision in *Lucas* is not dispositive of the question presented. Although *Lucas* endorsed and applied a categorical rule, it was not the one that petitioners propose. *Lucas* purchased two residential lots in 1988 for \$975,000. These lots were rendered “valueless” by a statute enacted two years later. The trial court found that a taking had occurred and ordered compensation of \$1,232,387.50, representing the value of the fee simple estate, plus interest. As the statute read at the time of the trial, it effected a taking that “was unconditional and permanent.” 505 U.S. at 1012. While the State’s appeal was pending, the statute was amended to authorize exceptions that might have allowed *Lucas* to obtain a building permit. Despite the fact that the amendment gave the State Supreme Court the opportunity to dispose of the appeal on ripeness grounds, it resolved the merits of the permanent takings claim and reversed. Since “*Lucas* had no reason to proceed on a ‘temporary taking’ theory at trial,” we decided the case on the permanent taking theory that both the trial court and the State Supreme Court had addressed. *Ibid.*

The categorical rule that we applied in *Lucas* states that compensation is required when a regulation deprives an owner of “all economically beneficial uses” of his land. Under that rule, a statute that “wholly eliminated the value” of *Lucas*’ fee simple title clearly qualified as a taking. But our holding was limited to “the extraordinary circumstance when no productive or economically beneficial use of land is permitted.” The emphasis on the word “no” in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%. Anything less than a “complete elimination of value,” or a “total loss,” the Court acknowledged, would require the kind of analysis applied in *Penn Central*.

Certainly, our holding that the permanent “obliteration of the value” of a fee simple estate constitutes a categorical taking does not answer the question whether a regulation prohibiting any economic use of land for a 32-month period has the same legal effect. Petitioners seek to bring this case under the rule announced in *Lucas* by arguing that we can effectively sever a 32-

month segment from the remainder of each landowner's fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria. Of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings. Petitioners' "conceptual severance" argument is unavailing because it ignores Penn Central's admonition that in regulatory takings cases we must focus on "the parcel as a whole." We have consistently rejected such an approach to the "denominator" question. See *Keystone*, 480 U.S. at 497. See also, *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 644, 124 L. Ed. 2d 539, 113 S. Ct. 2264 (1993) ("To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question"). Thus, the District Court erred when it disaggregated petitioners' property into temporal segments corresponding to the regulations at issue and then analyzed whether petitioners were deprived of all economically viable use during each period. The starting point for the court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then Penn Central was the proper framework.

An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. See *Restatement of Property* §§7-9 (1936). Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted. ("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 decision-making, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense'") (quoting *Danforth v. United States*, 308 U.S. 271, 285, 84 L. Ed. 240, 60 S. Ct. 231 (1939)).

Neither *Lucas*, nor *First English*, nor any of our other regulatory takings cases compels us to accept petitioners' categorical submission. In fact, these cases make clear that the categorical rule in *Lucas* was carved out for the "extraordinary case" in which a regulation permanently deprives property of all value; the default rule remains that, in the regulatory taking context, we require a more fact specific inquiry. Nevertheless, we will consider whether the interest in protecting individual property owners from bearing 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, justifies creating a new rule for these circumstances.

Considerations of “fairness and justice” arguably could support the conclusion that TRPA’s moratoria were takings of petitioners’ property based on any of seven different theories. First, even though we have not previously done so, we might now announce a categorical rule that, in the interest of fairness and justice, compensation is required whenever government temporarily deprives an owner of all economically viable use of her property. Second, we could craft a narrower rule that would cover all temporary land-use restrictions except those “normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like” which were put to one side in our opinion in *First English*, 482 U.S. at 321. Third, we could adopt a rule like the one suggested by an amicus supporting petitioners that would “allow a short fixed period for deliberations to take place without compensation—say maximum one year—after which the just compensation requirements” would “kick in.” Fourth, with the benefit of hindsight, we might characterize the successive actions of TRPA as a “series of rolling moratoria” that were the functional equivalent of a permanent taking. Fifth, were it not for the findings of the District Court that TRPA acted diligently and in good faith, we might have concluded that the agency was stalling in order to avoid promulgating the environmental threshold carrying capacities and regional plan mandated by the 1980 Compact. Sixth, apart from the District Court’s finding that TRPA’s actions represented a proportional response to a serious risk of harm to the lake, petitioners might have argued that the moratoria did not substantially advance a legitimate state interest. Finally, if petitioners had challenged the application of the moratoria to their individual parcels, instead of making a facial challenge, some of them might have prevailed under a *Penn Central* analysis.

As the case comes to us, however, none of the last four theories is available. The “rolling moratoria” theory was presented in the petition for certiorari, but our order granting review did not encompass that issue; the case was tried in the District Court and reviewed in the Court of Appeals on the theory that each of the two moratoria was a separate taking, one for a 2-year period and the other for an 8-month period. And, as we have already noted, recovery on either a bad faith theory or a theory that the state interests were insubstantial is foreclosed by the District Court’s unchallenged findings of fact. Recovery under a *Penn Central* analysis is also foreclosed both because petitioners expressly disavowed that theory, and because they did not appeal from the District Court’s conclusion that the evidence would not support it. Nonetheless, each of the three *per se* theories is fairly encompassed within the question that we decided to answer.

With respect to these theories, the ultimate constitutional question is whether the concepts of “fairness and justice” that underlie the Takings Clause will be better served by one of these categorical rules or by a *Penn Central* inquiry into all of the relevant circumstances in particular cases. From that perspective, the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained. Petitioners’ broad submission would apply to numerous “normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like,” 482 U.S. at 321, as well as to orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-

damaged buildings, or other areas that we cannot now foresee. Such a rule would undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power. As Justice Holmes warned in *Mahon*, “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.” 260 U.S. at 413. A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decision-making. Such an important change in the law should be the product of legislative rulemaking rather than adjudication.¹⁴²

In rejecting petitioners’ per se rule, we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other.

A narrower rule that excluded the normal delays associated with processing permits, or that covered only delays of more than a year, would certainly have a less severe impact on prevailing practices, but it would still impose serious financial constraints on the planning process. Unlike the “extraordinary circumstance” in which the government deprives a property owner of all economic use, moratoria like Ordinance 81-5 and Resolution 83-21 are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy. In fact, the consensus in the planning community appears to be that moratoria, or “interim development controls” as they are often called, are an essential tool of successful development. Yet even the weak version of petitioners’ categorical rule would treat these interim measures as takings regardless of the good faith of the planners, the reasonable expectations of the landowners, or the actual impact of the moratorium on property values.

The interest in facilitating informed decision-making by regulatory agencies counsels against adopting a per se rule that would impose such severe costs on their deliberations. Otherwise, the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether. To the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth. A finding in the 1980 Compact itself, which presumably was endorsed by all three legislative bodies that participated in its enactment, attests to the importance of that concern. 94 Stat. 3243 (“The legislatures of the States of California and Nevada find that in order to make effective the regional plan as revised by the agency, it is necessary to halt temporarily works of development in the region which might otherwise absorb

¹⁴² In addition, we recognize the anomaly that would be created if we were to apply *Penn Central* when a landowner is permanently deprived of 95% of the use of her property, *Lucas*, 505 U.S. at 1019, n. 8, and yet find a per se taking anytime the same property owner is deprived of all use for only five days. Such a scheme would present an odd inversion of Justice Holmes’ adage: “A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.” *Block v. Hirsh*, 256 U.S. 135, 157, 65 L. Ed. 865, 41 S. Ct. 458 (1921).

the entire capability of the region for further development or direct it out of harmony with the ultimate plan”).

We would create a perverse system of incentives were we to hold that landowners must wait for a taking claim to ripen so that planners can make well-reasoned decisions while, at the same time, holding that those planners must compensate landowners for the delay. Indeed, the interest in protecting the decisional process is even stronger when an agency is developing a regional plan than when it is considering a permit for a single parcel. In the proceedings involving the Lake Tahoe Basin, for example, the moratoria enabled TRPA to obtain the benefit of comments and criticisms from interested parties, such as the petitioners, during its deliberations. Since a categorical rule tied to the length of deliberations would likely create added pressure on decision-makers to reach a quick resolution of land-use questions, it would only serve to disadvantage those landowners and interest groups who are not as organized or familiar with the planning process. Moreover, with a temporary ban on development there is a lesser risk that individual landowners will be “singled out” to bear a special burden that should be shared by the public as a whole. At least with a moratorium there is a clear “reciprocity of advantage,” *Mahon*, 260 U.S. at 415, because it protects the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted. “While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.” *Keystone*, 480 U.S. at 491. In fact, there is reason to believe property values often will continue to increase despite a moratorium. Such an increase makes sense in this context because property values throughout the Basin can be expected to reflect the added assurance that Lake Tahoe will remain in its pristine state. Since in some cases a 1-year moratorium may not impose a burden at all, we should not adopt a rule that assumes moratoria always force individuals to bear a special burden that should be shared by the public as a whole.

It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism. But given the fact that the District Court found that the 32 months required by TRPA to formulate the 1984 Regional Plan was not unreasonable, we could not possibly conclude that every delay of over one year is constitutionally unacceptable. Formulating a general rule of this kind is a suitable task for state legislatures. In our view, the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim, but with respect to that factor as with respect to other factors. We conclude, therefore, that the interest in “fairness and justice” will be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical.

Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

For over half a decade petitioners were prohibited from building homes, or any other structures, on their land. Because the Takings Clause requires the government to pay compensation when it deprives owners of all economically viable use of their land, see *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), and because a ban on all development lasting almost six years does not resemble any traditional land-use planning device, I dissent.

I

“A court cannot determine whether a regulation has gone ‘too far’ unless it knows how far the regulation goes.” *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348, 91 L. Ed. 2d 285, 106 S. Ct. 2561 (1986). In failing to undertake this inquiry, the Court ignores much of the impact of respondent’s conduct on petitioners. Instead, it relies on the flawed determination of the Court of Appeals that the relevant time period lasted only from August 1981 until April 1984. During that period, Ordinance 81-5 and Regulation 83-21 prohibited development pending the adoption of a new regional land-use plan. The adoption of the 1984 Regional Plan (hereinafter Plan or 1984 Plan) did not, however, change anything from the petitioners’ standpoint. After the adoption of the 1984 Plan, petitioners still could make no use of their land.

The Court of Appeals disregarded this post-April 1984 deprivation on the ground that respondent did not “cause” it. In a §1983 action, “the plaintiff must demonstrate that the defendant’s conduct was the actionable cause of the claimed injury.” 216 F.3d 764, 783 (CA9 2000). Applying this principle, the Court of Appeals held that the 1984 Regional Plan did not amount to a taking because the Plan actually allowed permits to issue for the construction of single-family residences. Those permits were never issued because the District Court immediately issued a temporary restraining order, and later a permanent injunction that lasted until 1987, prohibiting the approval of any building projects under the 1984 Plan. Thus, the Court of Appeals concluded that the “1984 Plan itself could not have constituted a taking,” because it was the injunction, not the Plan, that prohibited development during this period. 216 F.3d at 784. The Court of Appeals is correct that the 1984 Plan did not cause petitioners’ injury. But that is the right answer to the wrong question. The causation question is not limited to whether the 1984 Plan caused petitioners’ injury; the question is whether respondent caused petitioners’ injury.

Respondent is surely responsible for its own regulations, and it is also responsible for the Compact as it is the governmental agency charged with administering the Compact. Compact, Art. I(c), 94 Stat 3234. It follows that respondent was the “moving force” behind petitioners’ inability to develop its land from April 1984 through the enactment of the 1987 plan. Without the environmental thresholds established by the Compact and Resolution 82-11, the 1984 Plan

would have gone into effect and petitioners would have been able to build single-family residences. And it was certainly foreseeable that development projects exceeding the environmental thresholds would be prohibited; indeed, that was the very purpose of enacting the thresholds. Because respondent caused petitioners' inability to use their land from 1981 through 1987, that is the appropriate period of time from which to consider their takings claim.

II

I now turn to determining whether a ban on all economic development lasting almost six years is a taking. The District Court in this case held that the ordinances and resolutions in effect between August 24, 1981, and April 25, 1984, "did in fact deny the plaintiffs all economically viable use of their land. The Court does not dispute that petitioners were forced to leave their land economically idle during this period. But the Court refuses to apply *Lucas* on the ground that the deprivation was "temporary."

Neither the Takings Clause nor our case law supports such a distinction. For one thing, a distinction between "temporary" and "permanent" prohibitions is tenuous. Land-use regulations are not irrevocable. And the government can even abandon condemned land. Under the Court's decision today, the takings question turns entirely on the initial label given a regulation, a label that is often without much meaning. There is every incentive for government to simply label any prohibition on development "temporary," or to fix a set number of years. As in this case, this initial designation does not preclude the government from repeatedly extending the "temporary" prohibition into a long-term ban on all development. The Court now holds that such a designation by the government is conclusive even though in fact the moratorium greatly exceeds the time initially specified. Apparently, the Court would not view even a 10-year moratorium as a taking under *Lucas* because the moratorium is not "permanent."

Our opinion in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987), rejects any distinction between temporary and permanent takings when a landowner is deprived of all economically beneficial use of his land. *First English* stated that "temporary takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." More fundamentally, even if a practical distinction between temporary and permanent deprivations were plausible, to treat the two differently in terms of takings law would be at odds with the justification for the *Lucas* rule. The *Lucas* rule is derived from the fact that a "total deprivation of use is, from the landowner's point of view, the equivalent of a physical appropriation." The regulation in *Lucas* was the "practical equivalence" of a long-term physical appropriation, i.e., a condemnation, so the Fifth Amendment required compensation. The "practical equivalence," from the landowner's point of view, of a "temporary" ban on all economic use is a forced leasehold. For example, assume the following situation: Respondent is contemplating the creation of a National Park around Lake Tahoe to preserve its scenic beauty. Respondent decides to take a 6-year leasehold over petitioners'

property, during which any human activity on the land would be prohibited, in order to prevent any further destruction to the area while it was deciding whether to request that the area be designated a National Park.

Surely that leasehold would require compensation. In a series of World War II-era cases in which the Government had condemned leasehold interests in order to support the war effort, the Government conceded that it was required to pay compensation for the leasehold interest. See *United States v. General Motors Corp.*, 323 U.S. 373 (1945). From petitioners' standpoint, what happened in this case is no different than if the government had taken a 6-year lease of their property. The Court ignores this "practical equivalence" between respondent's deprivation and the deprivation resulting from a leasehold.

In addition to the "practical equivalence" from the landowner's perspective of such a regulation and a physical appropriation, we have held that a regulation denying all productive use of land does not implicate the traditional justification for differentiating between regulations and physical appropriations. In "the extraordinary circumstance when no productive or economically beneficial use of land is permitted," it is less likely that "the legislature is simply 'adjusting the benefits and burdens of economic life' in a manner that secures an 'average reciprocity of advantage' to everyone concerned," *Penn Central Transp. Co. v. New York City*, 438 U.S. (1978), and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415, and more likely that the property "is being pressed into some form of public service under the guise of mitigating serious public harm," *Lucas*, *supra*.

Lucas is implicated when the government deprives a landowner of "all economically beneficial or productive use of land." *Id.* at 1015. The District Court found, and the Court agrees, that the moratorium "temporarily" deprived petitioners of "all economically viable use of their land." Because the rationale for the *Lucas* rule applies just as strongly in this case, the "temporary" denial of all viable use of land for six years is a taking.

III

The Court worries that applying *Lucas* here compels finding that an array of traditional, short-term, land-use planning devices are takings. But since the beginning of our regulatory takings jurisprudence, we have recognized that property rights "are enjoyed under an implied limitation." *Mahon*, *supra*, at 413. Thus, in *Lucas*, after holding that the regulation prohibiting all economically beneficial use of the coastal land came within our categorical takings rule, we nonetheless inquired into whether such a result "inhered in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." 505 U.S. at 1029. Because the regulation at issue in *Lucas* purported to be permanent, or at least long term, we concluded that the only implied limitation of state property law that could achieve a similar long-term deprivation of all economic use would be something "achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the

State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." Ibid.

When a regulation merely delays a final land use decision, we have recognized that there are other background principles of state property law that prevent the delay from being deemed a taking. We thus noted in *First English* that our discussion of temporary takings did not apply "in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." 482 U.S. at 321. Thus, the short-term delays attendant to zoning and permit regimes are a longstanding feature of state property law and part of a landowner's reasonable investment-backed expectations.

But a moratorium prohibiting all economic use for a period of six years is not one of the longstanding, implied limitations of state property law.¹⁴³ Moratoria are "interim controls on the use of land that seek to maintain the status quo with respect to land development in an area by either 'freezing' existing land uses or by allowing the issuance of building permits for only certain land uses that would not be inconsistent with a contemplated zoning plan or zoning change." 1 E. Ziegler, *Rathkopf's The Law of Zoning and Planning* §13:3, p. 13-6 (4th ed. 2001). Typical moratoria thus prohibit only certain categories of development, such as fast-food restaurants, see *Schafer v. New Orleans*, 743 F.2d 1086 (CA5 1984), or adult businesses, see *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986), or all commercial development, see *Arnold Bernhard & Co. v. Planning & Zoning Comm'n*, 194 Conn. 152, 479 A.2d 801 (1984). Such moratoria do not implicate *Lucas* because they do not deprive landowners of all economically beneficial use of their land. As for moratoria that prohibit all development, these do not have the lineage of permit and zoning requirements and thus it is less certain that property is acquired under the "implied limitation" of a moratorium prohibiting all development. Moreover, unlike a permit system in which it is expected that a project will be approved so long as certain conditions are satisfied, a moratorium that prohibits all uses is by definition contemplating a new land-use plan that would prohibit all uses. Because the prohibition on development of nearly six years in this case cannot be said to resemble any "implied limitation" of state property law, it is a taking that requires compensation.

* * *

Lake Tahoe is a national treasure and I do not doubt that respondent's efforts at preventing further degradation of the lake were made in good faith in furtherance of the public interest. But, as is the case with most governmental action that furthers the public interest, the Constitution requires that the costs and burdens be borne by the public at large, not by a few targeted citizens. Justice Holmes' admonition of 80 years ago again rings true: "We are in danger

¹⁴³ Six years is not a "cut-off point," it is the length involved in this case. And the "explanation" for the conclusion that there is a taking in this case is the fact that a 6-year moratorium far exceeds any moratorium authorized under background principles of state property law.

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.” Mahon, 260 U.S. at 416.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

I join the CHIEF JUSTICE’S dissent. I write separately to address the majority’s conclusion that the temporary moratorium at issue here was not a taking because it was not a “taking of ‘the parcel as a whole.’”. While this questionable rule¹⁴⁴ has been applied to various alleged regulatory takings, it was, in my view, rejected in the context of temporal deprivations of property by *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987), which held that temporary and permanent takings “are not different in kind” when a landowner is deprived of all beneficial use of his land. I had thought that *First English* put to rest the notion that the “relevant denominator” is land’s infinite life. Consequently, a regulation effecting a total deprivation of the use of a so-called “temporal slice” of property is compensable under the Takings Clause unless background principles of state property law prevent it from being deemed a taking; “total deprivation of use is, from the landowner’s point of view, the equivalent of a physical appropriation.” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992).

A taking is exactly what occurred in this case. No one seriously doubts that the land use regulations at issue rendered petitioners’ land unsusceptible of any economically beneficial use. This was true at the inception of the moratorium, and it remains true today. These individuals and families were deprived of the opportunity to build single-family homes as permanent, retirement, or vacation residences on land upon which such construction was authorized when purchased. The Court assures them that “a temporary prohibition on economic use” cannot be a taking because “logically . . . the property will recover value as soon as the prohibition is lifted.” But the “logical” assurance that a “temporary restriction . . . merely causes a diminution in value,” is cold comfort to the property owners in this case or any other. After all, “in the long run we are all dead.” John Maynard Keynes, *Monetary Reform* 88 (1924).

I would hold that regulations prohibiting all productive uses of property are subject to Lucas’ per se rule, regardless of whether the property so burdened retains theoretical useful life and value if, and when, the “temporary” moratorium is lifted. To my mind, such potential future value bears on the amount of compensation due and has nothing to do with the question whether there was a taking in the first place. It is regrettable that the Court has charted a markedly different path today.

¹⁴⁴ The majority’s decision to embrace the “parcel as a whole” doctrine as settled is puzzling. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016, n. 7, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992) (recognizing that “uncertainty regarding the composition of the denominator in [the Court’s] ‘deprivation’ fraction has produced inconsistent pronouncements by the Court,” and that the relevant calculus is a “difficult question”).

Session 29. Expectations & Characteristics

CREPPEL v. UNITED STATES 41 F.3d 627 (Fed. Cir. 1994)

Before RICH, NEWMAN, and RADER, Circuit Judges.

RADER, Circuit Judge.

Landowners in Louisiana sued the United States Government for blocking a local land reclamation project. The United States Court of Federal Claims held that the statute of limitations bars their takings claims. *Creppel v. United States*, 30 Fed. Cl. 323 (1994). Because the statute of limitations bars the temporary but not the permanent taking claim, this court affirms in part and reverses in part.

BACKGROUND

The claimants own swamp and marshland in Jefferson Parish, Louisiana. This land floods during the wet season. To control these floods, the Army Corps of Engineers (Corps) approved the Harvey Canal-Barataria Levee Project (Project) in 1964. The Corps designed the Project to close two navigable bayous and to build new levees and a pumping station. The Corps' budget was \$1 million. In 1967 Jefferson Parish issued \$3.6 million in bonds to guarantee the remaining costs of the Project.

The Project had two phases. Phase I, completed on November 24, 1973, dredged the bayous and used the mud to begin the new levee system. Phase I exhausted the Corps' \$1 million budget. Before completion of Phase I, Congress passed the Clean Water Act of 1977 (CWA). Pub. L. No. 95-217, 91 Stat. 1567 (codified as amended in scattered sections of 33 U.S.C.). Section 404 of the CWA prohibits the discharge of dredge or fill material into navigable waterways without a permit. 33 U.S.C. §1344 (1986 & Supp. V 1993) (section 404 of the CWA).

Under Phase II of the Project, the Corps planned to complete the levee system, close the bayous, and drain the land behind the levees. Phase II began in March 1974. The Parish let a contract for the pumping station to drain the land in August 1974. Meanwhile, on July 10, 1974, the Parish stopped construction until the Corps could determine whether the Project complied with section 404.

On March 26, 1975, the Corps decided that the Project should continue as originally planned. The Environmental Protection Agency (EPA) objected and suggested alternatives to draining the wetlands. The EPA also notified the Corps of its intention to use section 404(c) to prohibit construction of the levees with dredged or fill material.

After negotiations with the EPA and Parish representatives, Brigadier General Drake Wilson issued an order modifying the Project on November 16, 1976 (the Wilson Order). General Wilson ordered construction of the pumping station to halt and ordered the replacement of dikes with flood gates. This order would have eliminated the land reclamation benefits of the original Project. The EPA concurred with the Wilson Order.

Local property owners, many of whom are claimants in this case, obtained a court order permanently enjoining the Parish from abandoning the original Project. *Creppel v. Parish of Jefferson*, No. 199-345 (24th Jud. Dist. Jefferson Parish, Jan. 12, 1979). They also had obtained a preliminary injunction barring the Parish from abandoning the land reclamation project on October 31, 1977. This injunction became permanent as well. *Creppel v. Parish of Jefferson*, 352 So. 2d 297 (La. Ct. App. 4th Cir. 1977), *aff'd*, 384 So. 2d 853 (La. Ct. App. 4th Cir.), writ denied, 392 So.2d 689 (La. 1980).

In 1977, while the state action was pending, the same landowners sued in federal district court to overturn the Wilson Order. The district court held, on summary judgment, that General Wilson did not abuse his discretion in adopting the modified Project. *Creppel v. United States Army Corps of Eng'rs*, 500 F. Supp. 1108, 1119 (E.D. La. 1980), *rev'd in part and aff'd in part*, 670 F.2d 564 (5th Cir. 1982). The United States Court of Appeals for the Fifth Circuit also found no abuse of discretion. The Fifth Circuit, however, reversed and remanded to determine whether local assurances were available for completion of the Project, and whether section 404(c) prevented it. *Creppel*, 670 F.2d at 575. On remand, the district court found that the Parish's refusal to assure the revised Project made its completion impossible. *Creppel v. United States Army Corps of Eng'rs*, No. 77-25, slip op. at 5 (E.D. La. Aug. 13, 1984). The district court therefore ordered the original Project to proceed. *Id.*

The EPA began proceedings on December 17, 1984, to determine whether to block the Project by denying a permit under section 404(c). On August 30, 1985, the EPA regional administrator issued a Recommended Determination that the EPA use a section 404(c) veto. The EPA issued a Final Determination on October 16, 1985, permanently blocking the Project.

In May 1986, the landowners sought to overturn the EPA's decision. The district court upheld the EPA's Final Determination and remanded the case to the Corps to determine whether the Parish would grant assurances for the modified Project. *Creppel v. United States Army Corps of Eng'rs*, No. 77-25, 1988 WL 70103 (E.D. La. June 29, 1988). The Parish did not grant the assurances. The district court, therefore, dismissed the landowners' lawsuit. *Creppel v. United States Army Corps of Eng'rs*, No. 77-25 (E.D. La. October 12, 1989).

The claimants then filed four consolidated takings claims in the Court of Federal Claims on July 5, October 10, and October 11, 1991. The Government moved for summary judgment on the basis of a time bar under the statute of limitations. The claimants sought to amend their complaints to allege that the limitations period began only when the district court upheld the EPA's Final Determination on June 30, 1988. The Court of Federal Claims held that the

claimants' cause of action accrued when the Wilson Order issued on November 16, 1976. The court granted summary judgment to the Government. *Creppel v. United States*, 30 Fed. Cl. 323 (1994). This appeal followed.

DISCUSSION

A trial court properly grants summary judgment only when no genuine issue of material fact exists and the law entitles the movant to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). This court reviews a grant of summary judgment by the Court of Federal Claims de novo. *Turner v United States*, 901 F.2d 1093, 1095 (Fed. Cir. 1990).

A six-year statute of limitations governs claims before the United States Court of Federal Claims:

Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the [claim] thereon is filed within six years after such claim first accrues. 28 U.S.C. §2501 (1988 & Supp. V 1993).

A claim accrues when all events have occurred that fix the alleged liability of the Government and entitle the plaintiff to institute an action. *Japanese War Notes Claimants Ass'n v. United States*, 178 Ct. Cl. 630, 373 F.2d 356, 358 (Ct. Cl.), cert. denied, 389 U.S. 971, 19 L. Ed. 2d 461, 88 S. Ct. 466 (1967). The question here is whether "all events" occurred to fix the alleged liability of the Government six years before the claimants' 1991 takings claims.

The claimants allege two distinct takings: (1) a temporary taking commencing when the Wilson Order issued in 1976 and ending in 1988 when the district court upheld the EPA's Final Determination; and (2) a permanent taking commencing when the EPA issued its Final Determination in 1985. The temporary taking claim is time-barred; the permanent taking claim is not.

I

When presented with a regulatory taking claim, this court analyzes three separate criteria: (1) the character of the governmental action; (2) the economic impact of the regulation on the claimant; and (3) the extent that the regulation interferes with distinct investment-backed expectations of the property owner. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978). These criteria define the events that comprise a regulatory taking claim. Thus, in this case, this court must examine these criteria to discern the events triggering the six-year statute of limitations.

The first criterion—the character of the governmental action—examines the challenged restraint under the lens of state nuisance law. If the regulation prevents what would or legally

could have been a nuisance, then no taking occurred. The state merely acted to protect the public under its inherent police powers. *Lucas v. South Carolina Coastal Council*, 120 L. Ed. 2d 798, 112 S. Ct. 2886, 2900 (1992). Here the courts must inquire into the degree of harm created by the claimant's prohibited activity, its social value and location, and the ease with which any harm stemming from it could be prevented. *Id.* If state nuisance law does not justify the restraint, the court must proceed to the remaining criteria.

The second criterion—the economic impact of the regulation on the claimant -- is designed to insure that not every restraint on private property results in a takings claim. This concern evolved into the threshold requirement that a claimant show that the Government denied him "economically viable use" of his land. *Agins v. Tiburon*, 447 U.S. 255, 260, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980); *Nollan v. California Coastal Comm'n.*, 483 U.S. 825, 834, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987).

This criterion requires this court to determine whether a partial denial of use constitutes a taking. In this context, this court has recognized a dichotomy between non-compensable "mere diminutions" and compensable "partial takings" in borderline cases. *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1570 (Fed. Cir. 1994). "Mere diminution" occurs when the property owner has received the benefits of a challenged regulation, such that an "average reciprocity of advantage" results from it. *Lucas*, 112 S. Ct. at 2894; *Florida Rock*, 18 F.3d at 1570. A "partial taking" occurs when a regulation singles out a few property owners to bear burdens, while benefits are spread widely across the community. *Florida Rock*, 18 F.3d at 1571. This dichotomy does not arise where a regulation removes all economically viable use of the property. Removal of all use indicates a fully compensable "categorical taking" of the property. *Lucas*, 112 S. Ct. at 2893; *Florida Rock*, 18 F.3d at 1568.

The third criterion—the extent to which the regulation interferes with the property owner's expectations —limits recovery to owners who can demonstrate that they bought their property in reliance on the nonexistence of the challenged regulation. One who buys with knowledge of a restraint assumes the risk of economic loss. *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 124 L. Ed. 2d 539, 113 S. Ct. 2264, 2291-92 (1993); *Golden Pacific Bancorp v. United States*, 15 F.3d 1066 (Fed. Cir. 1994). In such a case, the owner presumably paid a discounted price for the property. Compensating him for a "taking" would confer a windfall.

Finally, the Constitution recognizes a distinction between a temporary and a permanent taking. U.S. Const., amend. V; *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987). Simply declaring a regulation that takes property invalid does not grant a constitutionally sufficient remedy. *First English*, 482 U.S. at 319; *Yuba Natural Resources, Inc. v. United States*, 821 F.2d 638, 641-42 (Fed. Cir. 1987). Thus, property owners cannot sue for a temporary taking until the regulatory process that began it has ended. This is because they would not know the extent of their damages until the

Government completes the "temporary" taking. Only then may property owners seek compensation. First English, 482 U.S. at 321-22.

II

This case features allegations of both temporary and permanent takings. First, the temporary taking claim. On November 16, 1976, General Wilson ordered a halt to the land reclamation project. This order did not bar a nuisance, did significantly affect the economic value of the perennially flooded lands, and did abridge the owners' expectations of gaining valuable dry lands.

As the Court of Federal Claims noted, "it is evident that the act first effecting any taking of plaintiffs' properties was the modification of the original Project by the Wilson Order." Creppel, 30 Fed. Cl. at 329. The trial court correctly found that the alleged temporary taking began when the Wilson Order issued in 1976. The order did not bar a nuisance but eliminated the landowners' expectation of land reclamation, causing the property's value to plummet. These consequences fulfilled the three requirements of a taking enunciated in Penn Central, 438 U.S. at 124, and Lucas, 112 S. Ct. at 2886-94. With the issuance of the Wilson Order, then, "all the events" had occurred to fix the supposed liability of the Government. Japanese War Notes, 373 F.2d at 358. The landowners needed nothing more to state a takings claim.

The temporary taking allegedly ended on August 13, 1984, when the federal district court ordered the original Project to proceed. By restoring some measure of value to the claimants' property, this action concluded the "temporary" taking. See *Hendler v. United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991). The claimants' property value remained intact for at least four months, until the district court suspended its August Order on December 14, 1984. During that time, the claimants regained their expectation of development, and could presumably have sold the land if they so wished. Because the claimants' temporary taking claims accrued with the August 1984 Order, the statute of limitations bars their claims.

III

This court's recent opinion in *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994) (in banc), gives rise to a question of tolling the statute of limitations for the alleged temporary taking. In *Loveladies*, a claimant sought to challenge the validity of a Government action in district court and simultaneously to challenge its economic consequences as a taking in the Court of Federal Claims. This court found it foreseeable that the district court would not adjudicate the challenge before expiration of the statute of limitations on the takings claim. *Id.* at 1555. The court determined that a claimant may commence a challenge in the district court and in the Court of Federal Claims without facing the ticking jeopardy of the six year bar. The court stated: "It would not be sound policy to force plaintiffs to forego monetary claims in order to challenge the validity of Government action, or to preclude challenges to the validity of Government action in order to protect a constitutional claim for compensation." *Id.*

Thus, in *Loveladies*, this court clarified that a litigant may file a suit challenging the validity of governmental regulatory activity concurrently with a takings claim arising from the same set of facts. Furthermore, if a district court finds the regulatory activity valid, the Court of Federal Claims must hear the takings claim even if the regulatory challenge consumes more than six years. Accordingly, the Court of Federal Claims may stay a takings action pending completion of a related action in a district court. Cf. *Pennsylvania R.R. Co. v. United States*, 363 U.S. 202, 204-05, 4 L. Ed. 2d 1165, 80 S. Ct. 1131 (1960); *Aulston v. United States*, 823 F.2d 510, 514 (Fed. Cir. 1987). In this case, however, the claimants had not filed concurrent actions in the Court of Federal Claims and a district court.

The claimants, therefore, did not face the Hobson's choice either to challenge the validity of the Wilson Order or bring a takings claim. They could have brought both suits contemporaneously and had the takings challenge stayed pending resolution of the validity issue. Instead, the claimants elected to pursue a single remedy. This conscious choice militates against "equitably tolling" the statute of limitations on the basis of the *Loveladies* decision. Otherwise, claimants would be able to file in the Court of Federal Claims as an afterthought, once their challenge in the district court was resolved. Requiring that suits be filed contemporaneously, as in *Loveladies*, better insures the claimants' good faith and rewards the diligent prosecution of grievances. It also encourages claimants to muster their evidence early, and to preserve it. In addition, it prevents claimants from surprising the Government with potentially stale claims based on events that transpired many years before. Not coincidentally, these are the very reasons that statutes of limitation themselves exist. See *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314, 89 L. Ed. 1628, 65 S. Ct. 1137 (1945); *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49, 88 L. Ed. 788, 64 S. Ct. 582 (1944).

In addition, a federal district judge told the claimants as early as 1980 that the Court of Federal Claims was the proper forum in which to seek compensation. *Creppel*, 500 F. Supp. at 1120. This court will not invent a new reason to toll the statute of limitations and pretend that the claimants filed their takings claim contemporaneously with their 1976 challenge to the Wilson Order. The claimants' temporary taking claim is therefore time-barred.

IV

The claimants' permanent taking claim presents different questions. As this court recently held, a claim under the Fifth Amendment accrues when the taking action occurs. *Alliance of Descendants of Texas v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994), citing *Steel Improvement & Forge Co. v. United States*, 174 Ct. Cl. 24, 355 F.2d 627, 631 (Ct. Cl. 1966). The Court of Federal Claims determined that the Government could have taken nothing permanently because the property's value remained unchanged after the temporary taking precipitated by the Wilson Order: "The EPA Final Determination did not diminish the value of the land any more than it had been diminished by the Wilson Order." *Creppel*, 30 Fed. Cl. at 331.

The sequence of events discloses an error in the trial court's conclusion. On August 13, 1984, the federal district court ordered that the original Project proceed. *Creppel*, No. 77-25 (E.D. La. Aug. 13, 1984). This order rendered the Wilson Order nugatory. The EPA then commenced proceedings on December 17, 1984 to determine whether it would issue a veto under section 404(c). The district court stayed its order, pending the EPA's decision. On August 30, 1985, the EPA regional administrator issued a Recommended Determination that the EPA use a section 404(c) veto. The EPA issued a Final Determination on October 16, 1985, preventing completion of the Project.

The court order that the original Project proceed, which issued on August 13, 1984, restored some potential expectation of completion of the Project and thus some measure of the property's value. This value was maintained at least until December 1984, when the district court stayed its order. Between the invalidation of the Wilson Order in August 1984, and the stay in December 1984, the landowners owned 3,200 acres of land that appeared destined for development. By virtue of the district court's temporary restoration of the original Project, the landowners regained the "reasonable expectation" that their property value would increase. The EPA began hearings on whether to issue a section 404(c) order upon expiration of the district court's stay in December 1984. The EPA issued its order in October 1985.

Again, this court must determine when the events fixing any potential Government liability occurred. *Japanese War Notes*, 373 F.2d at 358. Until the EPA issued its Final Determination, the property owners retained some expectation of completion of the Project. The EPA's Final Determination "fixed the liability" of the Government. The claimants' permanent taking claim therefore accrued on October 16, 1985. On this date, the EPA finally fully vetoed the original Project and allegedly denied the claimants the ability to make economically viable use of their property. The EPA hearings on whether to issue a section 404(c) order did not fix the alleged liability of the Government because the outcome was unknown until the Final Determination issued. It remained unclear in December 1984 whether a section 404 (c) order would issue, and whether that order, if it did issue, would totally veto the Project. The alleged taking therefore accrued when the EPA issued its actual section 404(c) order, not when it started to consider whether to prepare such an order.

The claimants filed their permanent taking claim in the Court of Federal Claims within six years after it accrued on October 16, 1985. The claim thus was not time-barred by the statute of limitations.

CONCLUSION

The claimants' temporary taking claim is barred by the statute of limitations. Their permanent taking claim is not barred. The Court of Federal Claims shall evaluate the permanent taking claim on remand.

COSTS

Each party shall bear its own costs.

AFFIRMED-IN-PART, REVERSED-IN-PART, and REMANDED

AVENAL v. UNITED STATES
100 F.3d 933 (Fed. Cir. 1996)

PLAGER, Circuit Judge.

This is a Takings case. Albert Avenal, Jr. and 129 similarly situated plaintiffs ("Avenal" or "plaintiffs") leased oyster beds from the State of Louisiana. During the lease term, fresh-water diversion projects under the aegis of the United States altered the salinity level in the water over the oyster beds, thus rendering the beds unsuitable for oyster cultivation. Plaintiffs brought suit in the Court of Federal Claims alleging a taking by the United States ("Government") in violation of the Fifth Amendment of the Constitution. The Court of Federal Claims on summary judgment dismissed the claims, holding that Avenal never acquired a constitutionally protectable property interest. We affirm the judgment of the Court of Federal Claims, although on different grounds.

BACKGROUND

The properties involved in this case are in The Breton Sound Basin, a part of the coastal waters of Louisiana lying east of the Mississippi River and south of New Orleans. Because the area contained a broad mixing zone of freshwater outflow from the Mississippi River and smaller coastal streams and the saline waters of the Gulf of Mexico, the area historically provided excellent conditions for oyster growth.

But life for the oysters, and for those who made their living harvesting them, did not remain sweet. Oysters to thrive need a salinity level ranging from 5 parts per thousand to 15 parts per thousand. Over time, both man-made and natural changes to the area caused the salinity levels in the subdelta marsh lands below New Orleans to increase. The parties attribute the changes in salinity primarily to man-made causes, including the establishment of a levee system for flood control on the Mississippi, and oil and gas exploration that involved extensive canal networks. The natural changes stemmed from subsidence, shoreline erosion, and drought, all adding to the saltwater intrusion.

There is evidence that as early as 1900 the relevant state agencies and various parishes (similar to counties) were considering the idea that freshwater be diverted from the Mississippi River to adjacent marsh lands in order to improve oyster habitats and to reduce the mortality rate associated with increased salinity. In 1959, in a memorandum written by the United States Department of the Interior's Fish and Wildlife Service to the United States Army Corps of Engineers ("Corps"), the Interior Department set forth its conclusions resulting from an investigation into the advisability of establishing freshwater diversions via structures to be built for that purpose. The investigation itself was prompted, in part, by requests from local groups, including the oyster industry, concerning the need for such diversions.

The 1959 memorandum discussed a marked reduction in oyster yield that had occurred over time, and concluded that freshwater diversion would be beneficial in that it would re-establish natural patterns of salinity and increase oyster-bed fertility. The memorandum identified four separate areas in Plaquemines Parish as freshwater diversion sites, two of which are on the east side of the Mississippi. One of these two, Area 4, is in the vicinity of Scarsdale, in the upper landward end of the Breton Sound Basin. The area was described in the memorandum as itself being too fresh to support an oyster fishery, so that the effect of the Area 4 diversion would not be to change the salinity levels themselves, but to combat the effects of subsidence and push back salt-water intrusion.

The 1959 memorandum was later incorporated into House Document No. 308, which led to the passage, on October 27, 1965, of the Public Works-Rivers and Harbors Act, Pub. L. No. 89-298, 79 Stat. 1037 (1965) (the "Act"), which authorized certain freshwater diversion structures to be built in and around the Breton Sound Basin. During 1968 and 1969 the Corps met with, among others, the Louisiana Wildlife and Fisheries Commission and the Plaquemines Parish Commission Council to discuss proposed locations for these Congressionally-authorized diversion structures. During public hearings, the Corps proposed Caernarvon as the location of the freshwater diversion structure for Area No. 4.

Meanwhile, due to continuing salinity changes the zone favorable for oyster growth continued to move landward. This landward salinity movement spawned an oyster community in the marsh lands in the northwest portion of the Breton Sound Basin, in the area which had previously been too fresh to sustain such growth. While creating new oyster grounds, the change in salinity had the effect of rendering unusable large areas of previously productive oyster grounds. During the 1970's oyster farmers engaged in the spawning and harvesting of oysters noted the changed conditions in the northwest landward part of the Basin and entered into water-bottom lease agreements with the State of Louisiana for the areas then usable as oyster beds. Over the ensuing years the Corps and relevant state and local agencies continued to discuss at informal meetings the construction of a freshwater diversion structure at Caernarvon. It was known by all parties, including both the state and plaintiffs, that the Caernarvon project would create an area in which conditions again would become too fresh for oyster cultivation, and that this area would coincide with an area which had been formerly too fresh for oyster cultivation. On January 21, 1982, the State of Louisiana submitted a letter to the Corps, announcing its intent to participate in the Caernarvon freshwater diversion project. The Corps and the State issued a joint public notice regarding the construction surrounding the Caernarvon project.

On October 30, 1986, Congress authorized the funds for the construction of the Caernarvon project. The State of Louisiana entered into a formal agreement with the Corps stipulating that the State would maintain and operate the facilities following completion of construction, and that the State would be responsible for 25 percent of the total costs of construction. The agreement further provided an indemnification clause under which the State would indemnify the Federal Government for any losses occasioned by claims for "damages

arising from the construction, operation, maintenance, and rehabilitation of the project" The Caernarvon project was completed in due course, and it had the expected effect on the salinity levels in The Breton Sound Basin. Although the Caernarvon project was not itself completed until 1991, other freshwater diversion structures, upon which Caernarvon was modeled, had been completed earlier, some going back as early as 1956 (Bayou Lamoque) and 1964 (White Ditch Siphon).

On April 26, 1994, plaintiffs, who owned leases from the State of water-bottom lands used for oyster propagation, filed a complaint in the United States Court of Federal Claims, alleging a taking of their leasehold interests resulting from the Caernarvon project. Specifically, plaintiffs alleged that the Caernarvon project diluted the salinity level in the waters above their leased grounds and caused silt deposits in the leased area. These conditions were not favorable to oyster growth. As a result, the Government's Caernarvon project prevented them from continuing to cultivate oysters on their leased beds.

The Court of Federal Claims granted the Government's motion for summary judgment on the grounds that the oysterers held no compensable property interest. Since the State acquired no property interest in the salinity level of the waters above plaintiffs' leased grounds, plaintiffs could have acquired no such right from the State, and thus no property interest to be taken. Plaintiffs appeal that determination.

DISCUSSION

Summary judgment is appropriate when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. On appeal, the views of the trial court regarding the applicable law in light of the undisputed facts are given full consideration, but a grant of summary judgment is reviewed without special deference to the trial court's decision. In this case, though the parties disagree about certain factual issues, the facts material to the decision are not in genuine dispute. Summary judgment is fully appropriate in such a case; that it is a takings case does not affect the availability of summary judgment when appropriate to the circumstances.

The case was argued below, and the trial judge based her decision, on the issue of whether these plaintiffs owned a compensable property interest. Much of the argument there, as on appeal, focused on whether plaintiffs have a vested right, derived from the State, in an unintended benefit resulting from a federal government project, such that cessation of that benefit, due to the consequences of a separate federal project, warrants compensation under the Fifth Amendment.

The record establishes that plaintiffs own long-term leases from the State, which leases entitle plaintiffs to use the lands under the waters of the Breton Sound Basin for the cultivation and harvesting of oysters. No challenge is made to the right of the State to issue such leases, or to the right of the lessees to engage in the activity for which the leases are issued. The record does

not establish exactly when the several plaintiffs first acquired their leases. The trial court, in absence of evidence from the plaintiffs, made the reasonable inference that, for purposes of plaintiffs' complaint, the leases should be considered to have been entered into no earlier than 1976. This was arrived at by subtracting the term of the leases, 15 years, from the date on which the freshwater diversion from the Caernarvon project became operational, 1991.

The leases owned by the several plaintiffs granted them valuable property rights. Louisiana law has long recognized that the property rights created by such leases, authorized by state statute (see La. Rev. Stat. Ann. §56:423 (West 1995)), have the attributes of other forms of real property, and are entitled to protection from injury by third parties. See e.g., *Inabnett v. Exxon Corp.*, 642 So. 2d 1243 (La. 1994) (Oil company found liable to oyster lessee for any damages sustained by oyster lessee due to company's dredging of canal.); *Butler v. Baber*, 529 So. 2d 374 (La. 1988) (Oyster lessees could recover against mineral lessees for damage to oyster beds and oyster production caused by mineral lessees' dredging operation.). The United States Constitution protects such state-created property interests from uncompensated takings by government, whether that government be state, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), or federal, *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991).

The question, then, is not whether the plaintiffs had a constitutionally protected property interest, but whether that property interest was taken by the Government. The leasehold estates owned by the plaintiffs entitle them to use the beds of the Basin for the cultivation of oysters. The result of the series of government decisions that culminated in the Caernarvon project was not to occupy the plaintiffs' property or to have that property used for government purposes, but was to limit the uses of the property available to plaintiffs. There can be no doubt from the record that the limit on plaintiffs' use imposed by the Government's activities had the effect of substantially reducing the value of plaintiffs' property, well beyond the level of "mere diminution." *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1570 (Fed. Cir. 1994).

When government limits the use a property owner may make of her property, without itself occupying or otherwise using the property for government purposes, the classic analytical tool for assessing whether a taking has occurred is the three-part test enunciated by the Supreme Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978): the court considers the character of the governmental action, the economic impact on the claimant and, particularly, the extent to which the governmental action has interfered with distinct investment-backed expectations. *Id.* at 124. Though it is a truism that "no set formula exists to determine whether compensation is constitutionally due for a government restriction of property," *Hendler v. United States*, 952 F.2d 1364, 1373 (Fed. Cir. 1991), see *Penn Central*, 438 U.S. at 124, the *Penn Central* formulation provides guidance in analyzing what the trial court here viewed as a question of first impression.

The case before us presents a textbook example of a situation in which the plaintiffs, in the face of established public concerns and while governmental efforts to address those concerns were well known, moved to take advantage of the existing conditions for their own economic benefit. There is nothing wrong with their having done that; the State of Louisiana provided the mechanism for it, and their own initiative gave them whatever economic advantages the situation afforded. It is hard for them to claim surprise, however, that the pre-existing salinity conditions, created at least in part by earlier government activity, were not left alone, but were again tampered with to their (this time) disadvantage.

Though as entrepreneurs they are entitled to capitalize on the opportunities afforded by government action, they cannot here insist on a guarantee of non-interference by government when they well knew or should have known that, in response to widely-shared public concerns, including concerns of the oystering industry itself, government actions were being planned and executed that would directly affect their new economic investments. These concerns and plans date back to the early part of the century, and beginning in the 1950's and 1960's were actively being pursued by state and federal agencies. They were certainly a part of the environment in which the raising and harvesting of oysters in the Louisiana marshes were conducted. Assuming, as we must, that these plaintiffs did not invest in their leases until the 1970's, these plaintiffs, in the words of Penn Central, cannot have had reasonable investment-backed expectations that their oyster leases would give them rights protected from the planned freshwater diversion projects of the state and federal governments.

The arguments put forward by plaintiffs do not persuade us otherwise. We grant that they have valuable property rights created by the State and protected by the Constitution. These rights include the right to harvest oysters and the right to damages when the acts of another harm the oyster beds, including harm caused by deleterious changes in the waters in which the beds lie, for example by unlawful pollution. We grant that the decrease in salinity in the water covering the plaintiffs' leased grounds has restrained a valuable use of the lease rights. And plaintiffs are correct that the existence of certain hold-harmless clauses in some of the leases for the benefit of the federal government and against the state does not change the case. Having said all that, however, what we do not grant these plaintiffs is the right to be free from the planned and announced efforts of the Government to act in ways that would affect their uses of their after-acquired property interests. In light of the history of events in this case, plaintiffs as a matter of law must be assumed to have known that their rights to use the bottom-lands for oystering were subject to the inevitable changes that the anticipated government program would bring about.

We reach, then, the same result as the trial court. In this case there was no taking by the United States of a protected property interest. The judgment of the trial court is

AFFIRMED.

EASTERN ENTERPRISES v. APFEL
524 U.S. 498 (1998)

[Part II]

[Summary: The “Coal Act” that was passed by Congress in 1992 provided benefits for retired miners. The plaintiff who had left the industry in twenty seven years before was assigned pension obligations for over 1000 miners who had worked for the company before 1966. The plaintiff sued claiming a violation of both substantive due process and the “taking” clause.]

O' CONNOR, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined. THOMAS, J., filed a concurring opinion. KENNEDY, J., filed an opinion concurring in the judgment and dissenting in part. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined.

JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join.

This case does not present the "classic taking" in which the government directly appropriates private property for its own use. See *United States v. Security Industrial Bank*, 459 U.S. 70, 78, 74 L. Ed. 2d 235, 103 S. Ct. 407 (1982). Although takings problems are more commonly presented when "the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good," *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978) (citation omitted), economic regulation such as the Coal Act may nonetheless effect a taking, see *Security Industrial Bank*, *supra*, at 78. See also *Calder v. Bull*, 3 U.S. 386, 3 Dall. 386, 388, 1 L. Ed. 648 (1798) (Chase, J.) ("It is against all reason and justice" to presume that the legislature has been entrusted with the power to enact "a law that takes property from A. and gives it to B"). By operation of the Act, Eastern is "permanently deprived of those assets necessary to satisfy its statutory obligation, not to the Government, but to [the Combined Benefit Fund]," *Connolly*, *supra*, at 222, and "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. 393, 416, 67 L. Ed. 322, 43 S. Ct. 158 (1922).

Of course, a party challenging governmental action as an unconstitutional taking bears a substantial burden. See *United States v. Sperry Corp.*, 493 U.S. 52, 60, 107 L. Ed. 2d 290, 110 S. Ct. 387 (1989). Government regulation often "curtails some potential for the use or economic exploitation of private property," *Andrus v. Allard*, 444 U.S. 51, 65, 62 L. Ed. 2d 210, 100 S. Ct. 318 (1979), and "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense," *Armstrong*, *supra*, at 48. In light of that

understanding, the process for evaluating a regulation's constitutionality involves an examination of the "justice and fairness" of the governmental action. See *Andrus, supra*, at 65. That inquiry, by its nature, does not lend itself to any set formula, see *ibid.*, and the determination whether "'justice and fairness' require that economic injuries caused by public action [must] be compensated by the government, rather than remain disproportionately concentrated on a few persons," is essentially ad hoc and fact intensive, *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979) (internal quotation marks omitted).

Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties. Congress also may impose retroactive liability to some degree, particularly where it is "confined to short and limited periods required by the practicalities of producing national legislation." *Gray*, 467 U.S. at 731 (internal quotation marks omitted). Our decisions, however, have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience.

We believe that the Coal Act's allocation scheme, as applied to Eastern, presents such a case. We reach that conclusion by applying the three factors that traditionally have informed our regulatory takings analysis.

As to the first factor relevant in assessing whether a regulatory taking has occurred, economic impact, there is no doubt that the Coal Act has forced a considerable financial burden upon Eastern. The parties estimate that Eastern's cumulative payments under the Act will be on the order of \$50 to \$100 million.

That liability is not, of course, a permanent physical occupation of Eastern's property of the kind that we have viewed as a *per se* taking. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982).

Here, however, while Eastern contributed to the 1947 and 1950 W&R Funds, it ceased its coal mining operations in 1965 and neither participated in negotiations nor agreed to make contributions.

The company's obligations under the Act depend solely on its roster of employees some 30 to 50 years before the statute's enactment, without any regard to responsibilities that Eastern accepted under any benefit plan the company itself adopted.

For similar reasons, the Coal Act substantially interferes with Eastern's reasonable investment-backed expectations. The Act's beneficiary allocation scheme reaches back 30 to 50 years to impose liability against Eastern based on the company's activities between 1946 and 1965. Thus, even though the Act mandates only the payment of future health benefits, it nonetheless "attaches new legal consequences to [an employment relationship] completed before

its enactment." *Landgraf v. USI Film Products*, 511 U.S. 244, 270, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994).

Retroactivity is generally disfavored in the law, *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988), in accordance with "fundamental notions of justice" that have been recognized throughout history, *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855, 108 L. Ed. 2d 842, 110 S. Ct. 1570 (1990) (SCALIA, J., concurring). In his Commentaries on the Constitution, Justice Story reasoned, "retro-spective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact." 2 J. Story, *Commentaries on the Constitution* §1398 (5th ed. 1891).

Our Constitution expresses concern with retroactive laws through several of its provisions, including the Ex Post Facto and Takings Clauses. *Landgraf*, 511 U.S. at 266. In *Calder v. Bull*, 3 U.S. 386, 3 Dall. 386, 1 L. Ed. 648 (1798), this Court held that the Ex Post Facto Clause is directed at the retroactivity of penal legislation, while suggesting that the Takings Clause provides a similar safeguard against retrospective legislation concerning property rights. See *id.*, at 394 (Chase, J.) ("The restraint against making any ex post facto laws was not considered, by the framers of the constitution, as extending to prohibit the depriving a citizen even of a vested right to property; or the provision, 'that private property should not be taken for public use, without just compensation,' was unnecessary").

The Coal Act operates retroactively, divesting Eastern of property long after the company believed its liabilities to have been settled. And the extent of Eastern's retroactive liability is substantial and particularly far reaching.

Finally, the nature of the governmental action in this case is quite unusual. That Congress sought a legislative remedy for what it perceived to be a grave problem in the funding of retired coal miners' health benefits is understandable; complex problems of that sort typically call for a legislative solution. When, however, that solution singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause. Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised. Accordingly, in the specific circumstances of this case, we conclude that the Coal Act's application to Eastern effects an unconstitutional taking.

Eastern also claims that the manner in which the Coal Act imposes liability upon it violates substantive due process. To succeed, Eastern would be required to establish that its liability under the Act is "arbitrary and irrational." *Turner Elkhorn*, *supra*, at 15. Our analysis of legislation under the Takings and Due Process Clauses is correlated to some extent, and there is a question whether the Coal Act violates due process in light of the Act's severely retroactive impact. At the same time, this Court has expressed concerns about using the Due Process Clause

to invalidate economic legislation. Because we have determined that the Coal Act's allocation scheme violates the Takings Clause as applied to Eastern, we need not address Eastern's due process claim.

In enacting the Coal Act, Congress was responding to a serious problem with the funding of health benefits for retired coal miners. While we do not question Congress' power to address that problem, the solution it crafted improperly places a severe, disproportionate, and extremely retroactive burden on Eastern. Accordingly, we conclude that the Coal Act's allocation of liability to Eastern violates the Takings Clause, and that 26 U.S.C. §9706(a)(3) should be enjoined as applied to Eastern. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

GOOD v. UNITED STATES
189 F.3d 1355 (Fed. Cir. 1999)

Before NEWMAN, Circuit Judge, SMITH, Senior Circuit Judge, and GAJARSA, Circuit Judge.

SMITH, Senior Circuit Judge.

This is a regulatory takings case. Lloyd A. Good, Jr. sued the federal government on the basis that it effectively took his property without just compensation when the U.S. Army Corps of Engineers denied him permission to dredge and fill on land he owns in the Florida Keys. The U.S. Court of Federal Claims granted summary judgment to the United States. Lloyd A. Good, Jr. v. United States, 39 Fed. Cl. 81 (1997). We affirm.

Facts

Lloyd A. Good, Jr. (“Good”) and his mother purchased a forty-acre tract of undeveloped land on Lower Sugarloaf Key, Florida, in 1973,¹⁴⁵ as part of a much larger real estate purchase. The tract, known as Sugarloaf Shores, consists of thirty-two acres of wetlands (a combination of salt marsh and freshwater marsh) and eight acres of uplands. The sales contract for the land stated that:

The Buyers recognize that certain of the lands covered by this contract may be below the mean high tide line and that as of today there are certain problems in connection with the obtaining of State and Federal permission for dredging and filling operations.

Good’s efforts to develop the property began in 1980, when he hired Keycology, Inc., a land planning and development firm, to obtain the federal, state, and county permits necessary to develop Sugarloaf Shores into a residential subdivision. In their contract, Good and Keycology acknowledged that “obtaining said permits is at best difficult and by no means assured.”

Good submitted his first permit application to the U.S. Army Corps of Engineers (“Corps”) in March 1981. The Corps permit was required for dredging and filling navigable waters of the United States, including wetlands adjacent to navigable waters, under the Rivers and Harbors Act of 1899¹⁴⁶ and under §404 of the Clean Water Act.¹⁴⁷ Good proposed filling 7.4 acres of salt marsh and excavating another 5.4 acres of salt marsh in order to create a 54-lot subdivision and a 48-slip marina. The Corps granted the requested permit in May 1983. Good modified the permit in response to county environmental concerns and the modified permit was

¹⁴⁵ Good became the sole owner of the property on his mother’s death in 1975.

¹⁴⁶ 33 U.S.C. §403 (1994).

¹⁴⁷ Pub. L. No. 92-500 §2, 86 Stat. 884 (Oct. 18, 1972), amending the Federal Water Pollution Control Act (codified as amended at 33 U.S.C. §1344 (1994)).

issued January 6, 1984. Under both permits, the authorized work had to be completed within five years. See 33 CFR §325.6 (1998).

Good and Keycology were also pursuing the required state and county permits. In February 1983, the state Department of Environmental Regulation issued a permit for the requested dredging and filling. The state permit was conditioned, however, on Good obtaining county approval for the project.

On May 10, 1983, Good applied for county approval of the dredge-and-fill proposal that had been approved by the federal and state permits. The county determined that the plan was a “major development” subject to a more stringent environmental review than under standard procedures. After Good appealed the “major development” determination, the County Commission ordered the county to process the permit application under standard review procedures. The county granted Good’s permit on July 13, 1984.

At this point, Good had received federal, state, and county approval to develop the property. Florida law, however, presented one more hurdle, in the form of the Environmental Land and Water Management Act, FLA. STAT. ANN. §§380.012 to 380.12 (West 1997). The Act created a statutory regime for regulating development in Areas of Critical State Concern, including the entire Florida Keys.¹⁴⁸ Under the Act, the Florida Department of Community Affairs (“DCA”) reviews local land development orders in Areas of Critical State Concern and may appeal those orders to the Florida Land and Water Adjudicatory Commission (“FLAWAC”).¹⁴⁹ See FLA. STAT. ANN. §380.07 (West 1997). On September 10, 1984, the DCA appealed the county’s approval of Good’s dredge-and-fill project. FLAWAC held that the county had erred in subjecting Good’s plan only to the standard review, and on May 29, 1986 ordered the county to review the project as a “major development.”

Making matters worse for Good, the county in the meantime had adopted a new land use plan and new development regulations. The new regulations prohibited dredging to provide access to docks, prohibited filling of salt marsh for building sites, and limited filling of salt marsh to 10% of the salt marsh on a parcel. MONROE COUNTY, FLA. CODE, art. II, §9.5-345 (1986). Since Good’s plan involved dredging to provide boat access between the proposed marina and Upper Sugarloaf Sound, and required filling roughly 25% of the parcel’s salt marsh to provide building sites, Good’s project would not have been allowed under the new regulations.

Good filed suit in state court, alleging that the state had taken his property without just compensation and that FLAWAC’s order was an unreasonable exercise of police power. That

¹⁴⁸ The Keys were designated an Area of Critical State Concern in 1977. Although the Florida Supreme Court later held the Act’s procedure for designating Areas of Critical State Concern to be unconstitutional, see *Askew v. Cross Key Waterways*, 372 So. 2d 913, 918 (Fla. 1978), the Florida Legislature formally so designated the Keys in the Florida Keys Protection Act of 1979, FLA. STAT. ANN. §380.0552 (West 1997).

¹⁴⁹ FLAWAC is composed of the Governor and Cabinet of the State of Florida. FLA. STAT. ANN. §§14.202, 380.07 (West 1997).

suit was settled on October 22, 1987. The consent decree provided that Good's application would be evaluated under the repealed major development review standard but that any future development of Sugarloaf Shores would be subject to later-enacted land use regulations.

Good's efforts to get state and county approval for his project had used up most of the five-year time limit on the federal permits issued in 1983 and 1984. Good therefore requested that the Corps extend the time limits of the permits. The Corps denied Good's request to reissue the permits without changes, but granted a new permit allowing substantially the same development on October 17, 1988.

The county gave preliminary approval to Good's plan on November 9, 1989. Final county approval, however, was subject to fifteen conditions, the most significant of which was approval of the project by the South Florida Water Management District (SFWMD).

Good filed an application with SFWMD. A few months later, SFWMD notified Good that its staff recommended denying the application, based on "the unmitigated loss of wetlands, the loss of habitat for the endangered species within them [i.e., the state-listed mud turtle and Lower Keys marsh rabbit] and the lack of reasonable assurance that future unmitigated wetlands destruction will not occur due to the lack of the above-requested dedication." In view of this negative review, Good requested that his application be removed from SFWMD's agenda. He never reactivated the application or otherwise obtained SFWMD approval for his project.

Apparently despairing of ever obtaining approval for his 54-lot plan, Good submitted a new, scaled-down plan to the Corps in July 1990. In this 1990 permit application, Good proposed building only sixteen homes, together with a canal and tennis court. Although the new plan greatly reduced the overall number of houses, it located all of them in the wetlands area. The overall wetlands loss, therefore, was only reduced from 10.53 acres to 10.17 acres.

Between the time the Corps issued Good's 1988 permit and the time he applied for the 1990 permit, the Lower Keys marsh rabbit was listed as an endangered species under the Endangered Species Act ("ESA"). See 16 U.S.C. §1533 (1994); 55 Fed. Reg. 25,588 (June 21, 1990). The Corps was therefore required to consult with the Fish and Wildlife Service ("FWS") to insure that issuing the requested permit would not place the continued existence of the species in jeopardy. See 16 U.S.C. §1536 (a)(2) (1994).

Under this so-called "section 7 consultation," FWS prepared a biological opinion as to whether the proposed permit would put the rabbit in jeopardy. In its biological opinion, issued February 19, 1991, FWS concluded that the project proposed in Good's 1990 permit application would not jeopardize the continued existence of the marsh rabbit. Nevertheless, it recommended denial of the permit based on the development's overall environmental impact.¹⁵⁰

¹⁵⁰ FWS made its recommendation pursuant to the Fish and Wildlife Coordination Act of 1934, 16 U.S.C.

The FWS biological opinion also instructed the Corps to notify Good not to proceed under his 1988 permit. The 1988 permit had been issued before the marsh rabbit was listed as an endangered species and proposed a different project than the 1990 permit application. Therefore, the FWS “no jeopardy” finding did not apply to the earlier permit, and development pursuant to the 1988 permit could violate the ESA.

On May 14, 1991, the Corps notified FWS that Good intended to proceed with the project allowed by the 1988 permit. The Corps also noted that it did not believe the project would jeopardize the marsh rabbit, but noted that the silver rice rat had been listed as an endangered species subsequent to the FWS biological opinion on the 1990 permit application. See 56 Fed. Reg. 19,809 (April 30, 1991).

In response, FWS initiated consultation under the ESA and notified the Corps that it would prepare a new biological opinion evaluating the effect of Good’s 1988 plan on both endangered species. On December 18, 1991, FWS released its new biological opinion, concluding that both the 1988 and 1990 plans jeopardized the continued existence of both the Lower Keys marsh rabbit and the silver rice rat.¹⁵¹ FWS recommended that the Corps deny the 1990 application and modify the 1988 permit to include FWS’s “reasonable and prudent alternatives,” which included locating all homesites in upland areas and limiting water access to a single communal dock.

The Corps denied Good’s 1990 permit application on March 17, 1994. At the same time, the Corps notified Good that his 1988 permit had expired. The Corps based its denial on the threat that either project posed to the endangered rat and rabbit.

Proceedings in the Court of Federal Claims

On July 11, 1994, Good filed suit, alleging that the Corps’ denial of his permit worked an uncompensated taking in violation of the Fifth Amendment. On cross-motions for summary judgment, the Court of Federal Claims granted summary judgment in favor of the government. The court held that the Corps’ denial of Good’s permit did not constitute a “per se” taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), because the ESA did not require that the property be left in its natural state and because the government had shown that the property retained value, either for development or for sale of transferrable development rights (TDRs), after the permit denial. The court found that Good had not presented sufficient evidence to show a reasonable dispute over the value of the property and rejected Good’s legal challenge to the use of TDRs in the value calculation.

§§662-666 (1994). The Corps was not required to follow this recommendation.

¹⁵¹ FWS had earlier concluded that the 1990 plan did not place the marsh rabbit in jeopardy, but changed its mind in view of information showing further decline in the marsh rabbit population.

The court also held that there had been no taking under the ad hoc analysis of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978). The court held that Good lacked reasonable, investment-backed expectations since federal and state regulations imposed significant restrictions on his ability to develop his property both at the time he purchased it and at the time he began to develop it. Finding the lack of reasonable expectations determinative, the court held that no taking had occurred.

Jurisdiction and Standard of Review

This court has jurisdiction over an appeal from a final judgment of the Court of Federal Claims. See 28 U.S.C. §1295(a)(3) (1994). We review a grant of summary judgment completely and independently, construing the facts in the light most favorable to the non-moving party. Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See *State of Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997).

Analysis

The Fifth Amendment to the United States Constitution provides that private property shall not “be taken for public use, without just compensation.” U.S. CONST. amend. V. The government can “take” private property by either physical invasion or regulatory imposition. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982); *Lucas*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886. Appellant in this case alleges a regulatory taking.

It has long been recognized that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (1922). The Supreme Court has set out “several factors that have particular significance” in determining whether a regulation effects a taking. *Penn Central*, 438 U.S. at 124. These factors are (1) the character of the government action, (2) the extent to which the regulation interferes with distinct, investment-backed expectations, and (3) the economic impact of the regulation. See *id.* See also *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994); *Florida Rock Inds., Inc. v. United States*, 18 F.3d 1560, 1567 (Fed. Cir. 1994); *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994). Because we find the expectations factor dispositive, we will not further discuss the character of the government action or the economic impact of the regulation.

Reasonable, Investment-backed Expectations

For any regulatory takings claim to succeed, the claimant must show that the government’s regulatory restraint interfered with his investment-backed expectations in a manner that requires the government to compensate him. See *Loveladies Harbor*, 28 F.3d at 1179. The requirement of investment-backed expectations “limits recovery to owners who can demonstrate

that they bought their property in reliance on the non-existence of the challenged regulation.” Creppel, 41 F.3d at 632. These expectations must be reasonable. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-1006, 81 L. Ed. 2d 815, 104 S. Ct. 2862 (1984).

Reasonable, investment-backed expectations are an element of every regulatory takings case. See *Loveladies Harbor*, 28 F.3d at 1179. See also *id.* at 1177 (“In legal terms, the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss. In economic terms, it could be said that the market had already discounted for the risk, so that a purchaser could not show a loss in his investment attributable to it.”); *Creppel*, 41 F.3d at 632 (“One who buys with knowledge of a restraint assumes the risk of economic loss.”).

Good argues that the Supreme Court has eliminated the requirement for reasonable, investment-backed expectations, at least in cases where the challenged regulation eliminates virtually all of the economic value of the landowner’s property. In support, Appellant cites *Lucas*, 505 U.S. at 1015, and argues that *Loveladies Harbor* should be reversed as contrary to *Lucas*.

However, we agree with the *Loveladies Harbor* court that the Supreme Court in *Lucas* did not mean to eliminate the requirement for reasonable, investment-backed expectations to establish a taking. It is true that the Court in *Lucas* set out what it called a “categorical” taking “where regulation denies all economically beneficial or productive use of land.” 505 U.S. at 1015. The *Lucas* Court, however, clarified that by “categorical” it meant those “categories of regulatory action [that are] compensable without case-specific inquiry into the public interest advanced in support of the restraint.” *Id.* (emphasis added). A *Lucas*-type taking, therefore, is categorical only in the sense that the courts do not balance the importance of the public interest advanced by the regulation against the regulation’s imposition on private property rights. See *Loveladies Harbor*, 28 F.3d at 1179.

The *Lucas* Court did not hold that the denial of all economically beneficial or productive use of land eliminates the requirement that the landowner have reasonable, investment-backed expectations of developing his land. In *Lucas*, there was no question of whether the plaintiff had satisfied that criterion. See 505 U.S. at 1006-1007 (“In 1986, petitioner David H. Lucas paid \$975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes. In 1988, however, the South Carolina Legislature enacted the Beachfront Management Act, S.C. Code Ann. §48-39-250 et seq. (Supp. 1990), which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels.”).

In addition, it is common sense that “one who buys with knowledge of a restraint assumes the risk of economic loss. In such a case, the owner presumably paid a discounted price for the property. Compensating him for a ‘taking’ would confer a windfall.” *Creppel*, 41 F.3d at 632 (citations omitted).

Appellant alternatively argues that he had reasonable, investment-backed expectations of building a residential subdivision on his property. Appellant reasons that the permit requirements of the Rivers and Harbors Act and the Clean Water Act are irrelevant to his reasonable expectations at the time he purchased the subject property, because he obtained the federal dredge-and-fill permits required by those acts three times, and was only denied a permit, based on the provisions of the Endangered Species Act (“ESA”), when two endangered species were found on his property. Therefore, since the ESA did not exist when he bought his land, he could not have expected to be denied a permit based on its provisions.

Appellant’s position is not entirely unreasonable, but we must ultimately reject it. In view of the regulatory climate that existed when Appellant acquired the subject property, Appellant could not have had a reasonable expectation that he would obtain approval to fill ten acres of wetlands in order to develop the land.

In 1973, when Appellant purchased the subject land, federal law required that a permit be obtained from the Army Corps of Engineers in order to dredge or fill in wetlands adjacent to a navigable waterway. Even in 1973, the Corps had been considering environmental criteria in its permitting decisions for a number of years. See *Deltona Corp. v. United States*, 228 Ct. Cl. 476, 657 F.2d 1184, 1187 (Ct. Cl. 1981) (“On December 18, 1968, in response to a growing national concern for environmental values and related federal legislation, the Corps [announced that it] would consider the following additional factors in reviewing permit applications: fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest.”). See also 657 F.2d at 1190 (“Since the late 1960’s the regulatory jurisdiction of the Army Corps of Engineers has substantially expanded pursuant to §404 of the [Clean Water Act] and—under the spur of steadily evolving legislation—the Corps has greatly added to the substantive criteria governing the issuance of dredge and fill permits”). By 1973, the Corps had denied dredge-and-fill permits solely on environmental grounds. See, e.g., *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970).

In addition to the federal regulations, development of the subject land required approval by both the state of Florida and Monroe County. See the discussion of Good’s permit application process, *supra*.

At the time he bought the subject parcel, Appellant acknowledged both the necessity and the difficulty of obtaining regulatory approval. The sales contract specifically stated that “the Buyers recognize that ... as of today there are certain problems in connection with the obtaining of State and Federal permission for dredging and filling operations.” Appellant thus had both constructive and actual knowledge that either state or federal regulations could ultimately prevent him from building on the property. Despite his knowledge of the difficult regulatory path ahead, Appellant took no steps to obtain the required regulatory approval for seven years.

During this period, public concern about the environment resulted in numerous laws and regulations affecting land development. For example:

In December 1973, the Endangered Species Act was enacted. 16 U.S.C. §1531 et seq. (1994). The ESA prohibited federal actions that would be “likely to jeopardize the continued existence of any endangered species,” 16 U.S.C. §1536(a)(2), and made it unlawful to “take” (i.e., kill, harass, etc.) any endangered animal. See 16 U.S.C. §§1532(19), 1538(a)(1)(B).

In 1975, the Corps of Engineers issued regulations broadening its interpretation of its §404 authority to regulate dredging and filling in wetlands. See *United States v. Riverside Bayview Homes*, 474 U.S. 121, 123-124, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985). In 1977, the Corps further broadened its definition of wetlands subject to §404’s permit requirements. See *id.*

Also in 1977, Florida enacted its own Endangered and Threatened Species Act, FLA. STAT. ANN. §372.072 (West 1997), further emphasizing the public concern for Florida’s environment. In 1979, the Florida Keys Protection Act was enacted, designating the Keys an Area of Critical State Concern. FLA. STAT. ANN. §380.0552 (West 1997).

Thus, rising environmental awareness translated into ever-tightening land use regulations. Surely Appellant was not oblivious to this trend.

The picture emerges, then, of Appellant in 1973 acknowledging the difficulty of obtaining approval for his project, then waiting seven years, watching as the applicable regulations got more stringent, before taking any steps to obtain the required approval. When in 1980 he finally retained a land development firm to seek the required permits, he acknowledged that “obtaining said permits is at best difficult and by no means assured.”

While Appellant’s prolonged inaction does not bar his takings claim, it reduces his ability to fairly claim surprise when his permit application was denied. Appellant was aware at the time of purchase of the need for regulatory approval to develop his land. He must also be presumed to have been aware of the greater general concern for environmental matters during the period of 1973 to 1980. In light of the growing consciousness of and sensitivity toward environmental issues, Appellant must also have been aware that standards could change to his detriment, and that regulatory approval could become harder to get.

We therefore conclude that Appellant lacked a reasonable, investment-backed expectation that he would obtain the regulatory approval needed to develop the property at issue here. We have previously held that the government is entitled to summary judgment on a regulatory takings claim where the plaintiffs lacked reasonable, investment-backed expectations, even where the challenged government action “substantially reduced the value of plaintiffs’ property.” *Avenal v. United States*, 100 F.3d 933, 937 (Fed. Cir. 1996). Here, too, Appellant’s lack of reasonable, investment-backed expectations defeats his takings claim as a matter of law.

Conclusion

Appellant lacked the reasonable, investment-backed expectations that are necessary to establish that a government action effects a regulatory taking. Therefore, we affirm the grant of summary judgment to the United States.

AFFIRMED.

PALAZZOLO v. RHODE ISLAND
533 U.S. 606 (2001)

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O’CONNOR, SCALIA, and THOMAS, JJ., joined, and in which STEVENS, J., joined as to Part II-A. O’CONNOR, J., and SCALIA, J., filed concurring opinions. STEVENS, J., filed an opinion concurring in part and dissenting in part. GINSBURG, J., filed a dissenting opinion, in which SOUTER and BREYER, JJ., joined. BREYER, J., filed a dissenting opinion.

JUSTICE KENNEDY delivered the opinion of the Court.

Petitioner Anthony Palazzolo owns a waterfront parcel of land in the town of Westerly, Rhode Island. Almost all of the property is designated as coastal wetlands under Rhode Island law. After petitioner’s development proposals were rejected by respondent Rhode Island Coastal Resources Management Council (Council), he sued in state court, asserting the Council’s application of its wetlands regulations took the property without compensation in violation of the Takings Clause of the Fifth Amendment, binding upon the State through the Due Process Clause of the Fourteenth Amendment. Petitioner sought review in this Court, contending the Supreme Court of Rhode Island erred in rejecting his takings claim. We granted certiorari. 531 U.S. 923 (2000).

I

The town of Westerly is on an edge of the Rhode Island coastline. The town’s western border is the Pawcatuck River, which at that point is the boundary between Rhode Island and Connecticut. Westerly today has about 20,000 year-round residents, and thousands of summer visitors come to enjoy its beaches and coastal advantages.

One of the more popular attractions is Misquamicut State Beach, a lengthy expanse of coastline facing Block Island Sound and beyond to the Atlantic Ocean. The primary point of access to the beach is Atlantic Avenue, a well-traveled 3-mile stretch of road running along the coastline within the town’s limits. At its western end, Atlantic Avenue is something of a commercial strip, with restaurants, hotels, arcades, and other typical seashore businesses. The pattern of development becomes more residential as the road winds eastward onto a narrow spine of land bordered to the south by the beach and the ocean, and to the north by Winnapaug Pond, an intertidal inlet often used by residents for boating, fishing, and shellfishing.

In 1959 petitioner, a lifelong Westerly resident, decided to invest in three undeveloped, adjoining parcels along this eastern stretch of Atlantic Avenue. To the north, the property faces, and borders upon, Winnapaug Pond; the south of the property faces Atlantic Avenue and the beachfront homes abutting it on the other side, and beyond that the dunes and the beach. To purchase and hold the property, petitioner and associates formed Shore Gardens, Inc. (SGI). After SGI purchased the property petitioner bought out his associates and became the sole

shareholder. In the first decade of SGI's ownership of the property the corporation submitted a plat to the town subdividing the property into 80 lots; and it engaged in various transactions that left it with 74 lots, which together encompassed about 20 acres. During the same period SGI also made initial attempts to develop the property and submitted intermittent applications to state agencies to fill substantial portions of the parcel. Most of the property was then, as it is now, salt marsh subject to tidal flooding. The wet ground and permeable soil would require considerable fill—as much as six feet in some places—before significant structures could be built. SGI's proposal, submitted in 1962 to the Rhode Island Division of Harbors and Rivers (DHR), sought to dredge from Winnapaug Pond and fill the entire property. The application was denied for lack of essential information. A second, similar proposal followed a year later. A third application, submitted in 1966 while the second application was pending, proposed more limited filling of the land for use as a private beach club. These latter two applications were referred to the Rhode Island Department of Natural Resources, which indicated initial assent. The agency later withdrew approval, however, citing adverse environmental impacts. SGI did not contest the ruling.

No further attempts to develop the property were made for over a decade. Two intervening events, however, become important to the issues presented. First, in 1971, Rhode Island enacted legislation creating the Council, an agency charged with the duty of protecting the State's coastal properties. Regulations promulgated by the Council designated salt marshes like those on SGI's property as protected "coastal wetlands," Rhode Island Coastal Resources Management Program (CRMP) §210.3 (as amended, June 28, 1983) on which development is limited to a great extent. Second, in 1978 SGI's corporate charter was revoked for failure to pay corporate income taxes; and title to the property passed, by operation of state law, to petitioner as the corporation's sole shareholder.

In 1983 petitioner, now the owner, renewed the efforts to develop the property. An application to the Council, resembling the 1962 submission, requested permission to construct a wooden bulkhead along the shore of Winnapaug Pond and to fill the entire marsh land area. The Council rejected the application, noting it was "vague and inadequate for a project of this size and nature." The agency also found that "the proposed activities will have significant impacts upon the waters and wetlands of Winnapaug Pond," and concluded that "the proposed alteration . . . will conflict with the Coastal Resources Management Plan presently in effect." Petitioner did not appeal the agency's determination.

Petitioner went back to the drawing board, this time hiring counsel and preparing a more specific and limited proposal for use of the property. The new application, submitted to the Council in 1985, echoed the 1966 request to build a private beach club. The details do not tend to inspire the reader with an idyllic coastal image, for the proposal was to fill 11 acres of the property with gravel to accommodate "50 cars with boat trailers, a dumpster, port-a-johns, picnic tables, barbecue pits of concrete, and other trash receptacles."

The application fared no better with the Council than previous ones. Under the agency's regulations, a landowner wishing to fill salt marsh on Winnapaug Pond needed a "special exception" from the Council. In a short opinion the Council said the beach club proposal conflicted with the regulatory standard for a special exception. To secure a special exception the proposed activity must serve "a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests." This time petitioner appealed the decision to the Rhode Island courts, challenging the Council's conclusion as contrary to principles of state administrative law. The Council's decision was affirmed.

Petitioner filed an inverse condemnation action in Rhode Island Superior Court, asserting that the State's wetlands regulations, as applied by the Council to his parcel, had taken the property without compensation in violation of the Fifth and Fourteenth Amendments. The suit alleged the Council's action deprived him of "all economically beneficial use" of his property, *ibid.* resulting in a total taking requiring compensation under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992). He sought damages in the amount of \$3,150,000, a figure derived from an appraiser's estimate as to the value of a 74-lot residential subdivision. The State countered with a host of defenses. After a bench trial, a justice of the Superior Court ruled against petitioner, accepting some of the State's theories.

The Rhode Island Supreme Court affirmed. 746 A.2d 707 (2000). Like the Superior Court, the State Supreme Court recited multiple grounds for rejecting petitioner's suit. The court held, first, that petitioner's takings claim was not ripe,; second, that petitioner had no right to challenge regulations predating 1978, when he succeeded to legal ownership of the property from SGI,; and third, that the claim of deprivation of all economically beneficial use was contradicted by undisputed evidence that he had \$200,000 in development value remaining on an upland parcel of the property. In addition to holding petitioner could not assert a takings claim based on the denial of all economic use the court concluded he could not recover under the more general test of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978). On this claim, too, the date of acquisition of the parcel was found determinative, and the court held he could have had "no reasonable investment-backed expectations that were affected by this regulation" because it predated his ownership.

We disagree with the Supreme Court of Rhode Island as to the first two of these conclusions; and, we hold, the court was correct to conclude that the owner is not deprived of all economic use of his property because the value of upland portions is substantial. We remand for further consideration of the claim under the principles set forth in *Penn Central*.

II

The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897), prohibits the government from taking private property for public use without just compensation. The clearest sort of taking occurs when the government encroaches upon or

occupies private land for its own proposed use. Our cases establish that even a minimal “permanent physical occupation of real property” requires compensation under the Clause. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982). In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 67 L. Ed. 322, 43 S. Ct. 158 (1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. In Justice Holmes’ well-known, if less than self-defining, formulation, “while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.”

Since *Mahon*, we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking. First, we have observed, with certain qualifications that a regulation which “denies all economically beneficial or productive use of land” will require compensation under the Takings Clause. Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation’s economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. These inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960).

Petitioner seeks compensation under these principles. At the outset, however, we face the two threshold considerations invoked by the state court to bar the claim: ripeness, and acquisition which postdates the regulation.

A

In *Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985), the Court explained the requirement that a takings claim must be ripe. The central question in resolving the ripeness issue, under *Williamson County* and other relevant decisions, is whether petitioner obtained a final decision from the Council determining the permitted use for the land. As we have noted, SGI’s early applications to fill had been granted at one point, though that assent was later revoked. Petitioner then submitted two proposals: the 1983 proposal to fill the entire parcel, and the 1985 proposal to fill 11 of the property’s 18 wetland acres for construction of the beach club. The court reasoned that, notwithstanding the Council’s denials of the applications, doubt remained as to the extent of development the Council would allow on petitioner’s parcel. We cannot agree.

The court based its holding in part upon petitioner’s failure to explore “any other use for the property that would involve filling substantially less wetlands.” 746 A.2d at 714. It relied upon this Court’s observations that the final decision requirement is not satisfied when a

developer submits, and a land use authority denies, a grandiose development proposal, leaving open the possibility that lesser uses of the property might be permitted.. The suggestion is that while the Council rejected petitioner's effort to fill all of the wetlands, and then rejected his proposal to fill 11 of the wetland acres, perhaps an application to fill (for instance) 5 acres would have been approved. Thus, the reasoning goes, we cannot know for sure the extent of permitted development on petitioner's wetlands.

This is belied by the unequivocal nature of the wetland regulations at issue and by the Council's application of the regulations to the subject property. With respect to the wetlands on petitioner's property, the Council's decisions make plain that the agency interpreted its regulations to bar petitioner from engaging in any filling or development activity on the wetlands, a fact reinforced by the Attorney General's forthright responses to our questioning during oral argument in this case. The rulings of the Council interpreting the regulations at issue, and the briefs, arguments, and candid statements by counsel for both sides, leave no doubt on this point: On the wetlands there can be no fill for any ordinary land use. There can be no fill for its own sake; no fill for a beach club, either rustic or upscale; no fill for a subdivision; no fill for any likely or foreseeable use. And with no fill there can be no structures and no development on the wetlands. Further permit applications were not necessary to establish this point.

As noted above, however, not all of petitioner's parcel constitutes protected wetlands. The trial court accepted uncontested testimony that an upland site located at the eastern end of the property would have an estimated value of \$200,000 if developed. So there is no genuine ambiguity in the record as to the extent of permitted development on petitioner's property, either on the wetlands or the uplands.

B

We turn to the second asserted basis for declining to address petitioner's takings claim on the merits. When the Council promulgated its wetlands regulations, the disputed parcel was owned not by petitioner but by the corporation of which he was sole shareholder. When title was transferred to petitioner by operation of law, the wetlands regulations were in force. The state court held the post regulation acquisition of title was fatal to the claim for deprivation of all economic use, 746 A.2d at 716, and to the Penn Central claim, *id.* at 717. While the first holding was couched in terms of background principles of state property law, see *Lucas*, 505 U.S. at 1015, and the second in terms of petitioner's reasonable investment-backed expectations, see *Penn Central*, 438 U.S. at 124, the two holdings together amount to a single, sweeping, rule: A purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking.

The theory underlying the argument that post-enactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. See, e.g., *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 163, 141 L. Ed. 2d 174, 118 S. Ct. 1925 (1998). So, the argument goes, by prospective legislation the State can

shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.

The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. See *Pennsylvania Coal Co.*, 260 U.S. at 413 (“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”). The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State’s regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. Were we to accept the State’s rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Nor does the justification of notice take into account the effect on owners at the time of enactment, who are prejudiced as well. Should an owner attempt to challenge a new regulation, but not survive the process of ripening his or her claim (which, as this case demonstrates, will often take years), under the proposed rule the right to compensation may not be asserted by an heir or successor, and so may not be asserted at all. The State’s rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself. See *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164, 66 L. Ed. 2d 358, 101 S. Ct. 446 (1980) (“[A] State, by ipse dixit, may not transform private property into public property without compensation”); cf. *Ellickson, Property in Land*, 102 *Yale L. J.* 1315, 1368-1369 (1993) (right to transfer interest in land is a defining characteristic of the fee simple estate). The proposed rule is, furthermore, capricious in effect. The young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions. The Takings Clause is not so quixotic. A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken.

A challenge to the application of a land-use regulation does not mature until ripeness requirements have been satisfied, under principles we have discussed; until this point an inverse condemnation claim alleging a regulatory taking cannot be maintained. It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership

where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.

In *Lucas* the Court observed that a landowner's ability to recover for a government deprivation of all economically beneficial use of property is not absolute but instead is confined by limitations on the use of land which "inhere in the title itself." This is so, the Court reasoned, because the landowner is constrained by those "restrictions that background principles of the State's law of property and nuisance already place upon land ownership." It is asserted here that *Lucas* stands for the proposition that any new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment.

We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here. It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title. This relative standard would be incompatible with our description of the concept in *Lucas*, which is explained in terms of those common, shared understandings of permissible limitations derived from a State's legal tradition. A regulation or common-law rule cannot be a background principle for some owners but not for others. The determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed. A law does not become a background principle for subsequent owners by enactment itself.

For reasons we discuss next, the state court will not find it necessary to explore these matters on remand in connection with the claim that all economic use was deprived; it must address, however, the merits of petitioner's claim under *Penn Central*. That claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction.

III

As the case is ripe, and as the date of transfer of title does not bar petitioner's takings claim, we have before us the alternative ground relied upon by the Rhode Island Supreme Court in ruling upon the merits of the takings claims. It held that all economically beneficial use was not deprived because the uplands portion of the property can still be improved. On this point, we agree with the court's decision. Petitioner accepts the Council's contention and the state trial court's finding that his parcel retains \$200,000 in development value under the State's wetlands regulations. He asserts, nonetheless, that he has suffered a total taking and contends the Council cannot sidestep the holding in *Lucas* "by the simple expedient of leaving a landowner a few crumbs of value."

In his brief submitted to us petitioner attempts to revive this part of his claim by reframing it. He argues, for the first time, that the upland parcel is distinct from the wetlands

portions, so he should be permitted to assert a deprivation limited to the latter. This contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, see, e.g., *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987); but we have at times expressed discomfort with the logic of this rule, see *Lucas*, supra, at 1016-1017, n. 7, a sentiment echoed by some commentators, see, e.g., Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1, 16-17 (1987); Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535 (1994). Whatever the merits of these criticisms, we will not explore the point here. Petitioner did not press the argument in the state courts, and the issue was not presented in the petition for certiorari. The case comes to us on the premise that petitioner's entire parcel serves as the basis for his takings claim, and, so framed, the total deprivation argument fails.

For the reasons we have discussed, the State Supreme Court erred in finding petitioner's claims were unripe and in ruling that acquisition of title after the effective date of the regulations barred the takings claims. The court did not err in finding that petitioner failed to establish a deprivation of all economic value, for it is undisputed that the parcel retains significant worth for construction of a residence. The claims under the Penn Central analysis were not examined, and for this purpose the case should be remanded.

The judgment of the Rhode Island Supreme Court is affirmed in part and reversed in part, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, concurring.

I join the opinion of the Court but with my understanding of how the issues discussed in the opinion must be considered on remand.

The Court's opinion addresses the circumstance, present in this case, where a takings claimant has acquired title to the regulated property after the enactment of the regulation at issue. As the Court holds, the Rhode Island Supreme Court erred in effectively adopting the sweeping rule that the pre-acquisition enactment of the use restriction ipso facto defeats any takings claim based on that use restriction. Accordingly, the Court holds that petitioner's claim under Penn Central Transp. Co. v. New York City, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978), "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction."

The more difficult question is what role the temporal relationship between regulatory enactment and title acquisition plays in a proper Penn Central analysis. Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial

to the Penn Central analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance. Our polestar instead remains the principles set forth in Penn Central itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine. Further, the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.

We have “identified several factors that have particular significance” in these “essentially ad hoc, factual inquiries.” Penn Central, 438 U.S. at 124. Two such factors are “the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.” Another is “the character of the governmental action.” The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis. *Id.* at 127 (“[A] use restriction on real property may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial public purpose, [citations omitted], or perhaps if it has an unduly harsh impact upon the owner’s use of the property”); see also *Yee v. Escondido*, 503 U.S. 519, 523, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992) (Regulatory takings cases “necessarily entail complex factual assessments of the purposes and economic effects of government actions”). Penn Central does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required.

The Rhode Island Supreme Court concluded that, because the wetlands regulations predated petitioner’s acquisition of the property at issue, petitioner lacked reasonable investment-backed expectations and hence lacked a viable takings claim. 746 A.2d 707, 717 (2000). The court erred in elevating what it believed to be “[petitioner’s] lack of reasonable investment-backed expectations” to “dispositive” status. *Ibid.* Investment-backed expectations, though important, are not talismanic under Penn Central. Evaluation of the degree of interference with investment-backed expectations instead is one factor that points toward the answer to the question whether the application of a particular regulation to particular property “goes too far.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (1922).

Further, the state of regulatory affairs at the time of acquisition is not the only factor that may determine the extent of investment-backed expectations. For example, the nature and extent of permitted development under the regulatory regime vis-a-vis the development sought by the claimant may also shape legitimate expectations without vesting any kind of development right in the property owner. We also have never held that a takings claim is defeated simply on account of the lack of a personal financial investment by a post-enactment acquirer of property, such as a donee, heir, or devisee. *Cf. Hodel v. Irving*, 481 U.S. 704, 714-718, 95 L. Ed. 2d 668, 107 S. Ct. 2076 (1987). Courts instead must attend to those circumstances which are probative of what fairness requires in a given case.

If investment-backed expectations are given exclusive significance in the Penn Central analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights upon passage of title. On the other hand, if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost.¹⁵² As I understand it, our decision today does not remove the regulatory backdrop against which an owner takes title to property from the purview of the Penn Central inquiry. It simply restores balance to that inquiry. Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred. As before, the salience of these facts cannot be reduced to any “set formula.” Penn Central, 438 U.S. at 124 (internal quotation marks omitted). The temptation to adopt what amount to per se rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context. The court below therefore must consider on remand the array of relevant factors under Penn Central before deciding whether any compensation is due.

JUSTICE SCALIA, concurring.

I write separately to make clear that my understanding of how the issues discussed in the Court’s opinion must be considered on remand is not JUSTICE O’CONNOR’S.

The principle that underlies her separate concurrence is that it may in some (unspecified) circumstances be “unfair,” and produce unacceptable “windfalls,” to allow a subsequent purchaser to nullify an unconstitutional partial taking (though, inexplicably, not an unconstitutional total taking) by the government.. The polar horrible, presumably, is the situation in which a sharp real estate developer, realizing (or indeed, simply gambling on) the unconstitutional excessiveness of a development restriction that a naive landowner assumes to be valid, purchases property at what it would be worth subject to the restriction, and then develops it to its full value (or resells it at its full value) after getting the unconstitutional restriction invalidated.

¹⁵² JUSTICE SCALIA’S inapt “government-as-thief” simile is symptomatic of the larger failing of his opinion, which is that he appears to conflate two questions. The first question is whether the enactment or application of a regulation constitutes a valid exercise of the police power. The second question is whether the State must compensate a property owner for a diminution in value effected by the State’s exercise of its police power. We have held that “the ‘public use’ requirement [of the Takings Clause] is . . . coterminous with the scope of a sovereign’s police powers.” *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984). The relative timing of regulatory enactment and title acquisition, of course, does not affect the analysis of whether a State has acted within the scope of these powers in the first place. That issue appears to be the one on which JUSTICE SCALIA focuses, but it is not the matter at hand. The relevant question instead is the second question described above. It is to this inquiry that “investment-backed expectations” and the state of regulatory affairs upon acquisition of title are relevant under Penn Central. JUSTICE SCALIA’S approach therefore would seem to require a revision of the Penn Central analysis that this Court has not undertaken.

This can, I suppose, be called a windfall—though it is not much different from the windfalls that occur every day at stock exchanges or antique auctions, where the knowledgeable (or the venturesome) profit at the expense of the ignorant (or the risk averse). There is something to be said (though in my view not much) for pursuing abstract “fairness” by requiring part or all of that windfall to be returned to the naive original owner, who presumably is the “rightful” owner of it. But there is nothing to be said for giving it instead to the government—which not only did not lose something it owned, but is both the cause of the miscarriage of “fairness” and the only one of the three parties involved in the miscarriage (government, naive original owner, and sharp real estate developer) which acted unlawfully—indeed unconstitutionally. JUSTICE O’CONNOR would eliminate the windfall by giving the malefactor the benefit of its malefaction. It is rather like eliminating the windfall that accrued to a purchaser who bought property at a bargain rate from a thief clothed with the indicia of title, by making him turn over the “unjust” profit to the thief.¹⁵³

In my view, the fact that a restriction existed at the time the purchaser took title (other than a restriction forming part of the “background principles of the State’s law of property and nuisance,” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992)) should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking. The “investment-backed expectations” that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional. Which is to say that a Penn Central taking, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978), no less than a total taking, is not absolved by the transfer of title.

JUSTICE GINSBURG, with whom JUSTICE SOUTER and JUSTICE BREYER join, dissenting.

A regulatory takings claim is not ripe for adjudication, this Court has held, until the agency administering the regulations at issue, proceeding in good faith, “has arrived at a final, definitive position regarding how it will apply [those regulations] to the particular land in question.” *Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985). Absent such a final decision, a court cannot “know the nature and extent of permitted development” under the regulations, and therefore cannot say “how far the regulations go,” as regulatory takings law requires. Therefore, even when a landowner seeks and is denied permission to develop property, if the denial does not demonstrate the effective impact of the regulations on the land, the denial does not represent the “final decision” requisite to generate a ripe dispute. *Williamson County*, 473 U.S. at 190.

¹⁵³ Contrary to JUSTICE O’CONNOR’S assertion, at my contention of governmental wrongdoing does not assume that the government exceeded its police powers by ignoring the “public use” requirement of the Takings Clause, see *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984). It is wrong for the government to take property, even for public use, without tendering just compensation.

As the Rhode Island Supreme Court saw the case, Palazzolo's claim was not ripe for several reasons, among them, that Palazzolo had not sought permission for "development only of the upland portion of the parcel." 746 A.2d at 714. The Rhode Island court emphasized the "undisputed evidence in the record that it would be possible to build at least one single-family home on the existing upland area, with no need for additional fill."

Today, the Court rejects the Rhode Island court's determination that the case is unripe, finding no "uncertainty as to the [uplands'] permitted use." The Court's conclusion is, in my view, both inaccurate and inequitable. It is inaccurate because the record is ambiguous. And it is inequitable because, given the claim asserted by Palazzolo in the Rhode Island courts, the State had no cause to pursue further inquiry into potential upland development. But Palazzolo presses other claims here, and at his behest, the Court not only entertains them, but also turns the State's legitimate defense against the claim Palazzolo originally stated into a weapon against the State. I would reject Palazzolo's bait-and-switch ploy and affirm the judgment of the Rhode Island Supreme Court.

In sum, as I see this case, we still do not know "the nature and extent of permitted development" under the regulation in question. I would therefore affirm the Rhode Island Supreme Court's judgment.

JUSTICE BREYER, dissenting.

I agree with JUSTICE GINSBURG that Palazzolo's takings claim is not ripe for adjudication, and I join her opinion in full. Ordinarily I would go no further. But because the Court holds the takings claim to be ripe and goes on to address some important issues of substantive takings law, I add that, given this Court's precedents, I would agree with JUSTICE O'CONNOR that the simple fact that a piece of property has changed hands (for example, by inheritance) does not always and automatically bar a takings claim. Here, for example, without in any way suggesting that Palazzolo has any valid takings claim, I believe his post-regulatory acquisition of the property (through automatic operation of law) by itself should not prove dispositive.

As JUSTICE O'CONNOR explains, under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978), much depends upon whether, or how, the timing and circumstances of a change of ownership affect whatever reasonable investment-backed expectations might otherwise exist. Ordinarily, such expectations will diminish in force and significance—rapidly and dramatically—as property continues to change hands over time. I believe that such factors can adequately be taken into account within the Penn Central framework.

Several amici have warned that to allow complete regulatory takings claims, see *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), to survive changes in land ownership could allow property owners to manufacture such claims by

strategically transferring property until only a non-usable portion remains. But I do not see how a constitutional provision concerned with “fairness and justice,” *Penn Central*, supra, at 123-124 (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960)), could reward any such strategic behavior.

JUSTICE STEVENS, concurring in part and dissenting in part.

In an admirable effort to frame its inquiries in broadly significant terms, the majority offers commentary on the issue of whether an owner of property can challenge regulations adopted prior to her acquisition of that property without ever discussing the particular facts or legal claims at issue in this case. While I agree with some of what the Court has to say on this issue, an examination of the issue in the context of the facts of this case convinces me that the Court has over-simplified a complex calculus and conflated two separate questions. I

Though States and local governments have broad power to adopt regulations limiting land usage, those powers are constrained by the Constitution and by other provisions of state law. In adopting land-use restrictions, local authorities must follow legally valid and constitutionally sufficient procedures and must adhere to whatever substantive requirements are imposed by the Constitution and supervening law. If a regulating body fails to adhere to its procedural or substantive obligations in developing land-use restrictions, anyone adversely impacted by the restrictions may challenge their validity in an injunctive action. If the application of such restriction to a property owner would cause her a “direct and substantial injury,” e.g., *Chicago v. Atchison, T. & S. F. R. Co.*, 357 U.S. 77, 83, 2 L. Ed. 2d 1174, 78 S. Ct. 1063 (1958), I have no doubt that she has standing to challenge the restriction’s validity whether she acquired title to the property before or after the regulation was adopted. For, as the Court correctly observes, even future generations “have a right to challenge unreasonable limitations on the use and value of land.”

It by no means follows, however, that, as the Court assumes, a succeeding owner may obtain compensation for a taking of property from her predecessor in interest. A taking is a discrete event, a governmental acquisition of private property for which the state is required to provide just compensation. Like other transfers of property, it occurs at a particular time, that time being the moment when the relevant property interest is alienated from its owner.¹⁵⁴

Precise specification of the moment a taking occurred and of the nature of the property interest taken is necessary in order to determine an appropriately compensatory remedy. For

¹⁵⁴ A regulation that goes so “far” that it violates the Takings Clause may give rise to an award of compensation or it may simply be invalidated as it would be if it violated any other constitutional principle (with the consequence that the State must choose between adopting a new regulatory scheme that provides compensation or forgoing regulation). While some recent Court opinions have focused on the former remedy, Justice Holmes appears to have had a regime focusing on the latter in mind in the opinion that began the modern preoccupation with “regulatory takings.” See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414, 67 L. Ed. 322, 43 S. Ct. 158 (1922) (because the statute in question takes private property without just compensation “the act cannot be sustained”).

example, the amount of the award is measured by the value of the property at the time of taking, not the value at some later date. Similarly, interest on the award runs from that date. Most importantly for our purposes today, it is the person who owned the property at the time of the taking that is entitled to the recovery. See, e.g., *Danforth v. United States*, 308 U.S. 271, 284, 84 L. Ed. 240, 60 S. Ct. 231 (1939) (“For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment”). The rationale behind that rule is true whether the transfer of ownership is the result of an arm’s-length negotiation, an inheritance, or the dissolution of a bankrupt debtor. Cf. *United States v. Dow*, 357 U.S. 17, 20-21, 2 L. Ed. 2d 1109, 78 S. Ct. 1039 (1958).¹⁵⁵

II

Much of the difficulty of this case stems from genuine confusion as to when the taking Palazzolo alleges actually occurred. According to Palazzolo’s theory of the case, the owners of his Westerly, Rhode Island, property possessed the right to fill the wetland portion of the property at some point in the not-too-distant past. In 1971, the State of Rhode Island passed a statute creating the Rhode Island Coastal Resources Management Council (Council) and delegating the Council the authority to promulgate regulations restricting the usage of coastal land. The Council promptly adopted regulations that, *inter alia*, effectively foreclosed petitioner from filling his wetlands. As the regulations nonetheless provided for a process through which petitioner might seek permission to fill the wetlands, he filed two applications for such permission during the 1980s, both of which were denied.

The most natural reading of petitioner’s complaint is that the regulations in and of themselves precluded him from filling the wetlands, and that their adoption therefore constituted the alleged taking. This reading is consistent with the Court’s analysis in Part II-A of its opinion (which I join) in which the Court explains that petitioner’s takings claims are ripe for decision because respondents’ wetlands regulations unequivocally provide that there can be “no fill for any likely or foreseeable use.” If it is the regulations themselves of which petitioner complains, and if they did, in fact, diminish the value of his property, they did so when they were adopted.

¹⁵⁵ The Court argues, that a regulatory taking is different from a direct state appropriation of property and that the rules this Court has developed for identifying the time of the latter do not apply to the former. This is something of an odd conclusion, in that the entire rationale for allowing compensation for regulations in the first place is the somewhat dubious proposition that some regulations go so “far” as to become the functional equivalent of a direct taking.

Ultimately, the Court’s regulations-are-different principle rests on the confusion of two dates: the time an injury occurs and the time a claim for compensation for that injury becomes cognizable in a judicial proceeding. That we require plaintiffs making the claim that a regulation is the equivalent of a taking to go through certain pre-litigation procedures to clarify the scope of the allegedly infringing regulation does not mean that the injury did not occur before those procedures were completed. To the contrary, whenever the relevant local bodies construe their regulations, their construction is assumed to reflect “what the [regulation] meant before as well as after the decision giving rise to that construction.” *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-313, 128 L. Ed. 2d 274, 114 S. Ct. 1510 (1994).

To the extent that the adoption of the regulations constitute the challenged taking, petitioner is simply the wrong party to be bringing this action. If the regulations imposed a compensable injury on anyone, it was on the owner of the property at the moment the regulations were adopted. Given the trial court's finding that petitioner did not own the property at that time, in my judgment it is pellucidly clear that he has no standing to claim that the promulgation of the regulations constituted a taking of any part of the property that he subsequently acquired.

III

The title Palazzolo took by operation of law in 1978 was limited by the regulations then in place to the extent that such regulations represented a valid exercise of the police power. For the reasons expressed above, I think the regulations barred petitioner from filling the wetlands on his property. At the very least, however, they established a rule that such lands could not be filled unless the Council exercised its authority to make exceptions to that rule under certain circumstances. Under the reading of the regulations most favorable to Palazzolo, he acquired no more than the right to a discretionary determination by the Council as to whether to permit him to fill the wetlands. As his two hearings before that body attest, he was given the opportunity to make a presentation and receive such a determination. Thus, the Council properly respected whatever limited rights he may have retained with regard to filling the wetlands.

If the existence of valid land-use regulations does not limit the title that the first post-enactment purchaser of the property inherits, then there is no reason why such regulations should limit the rights of the second, the third, or the thirtieth purchaser. Perhaps my concern is unwarranted, but today's decision does raise the spectre of a tremendous—and tremendously capricious—one-time transfer of wealth from society at large to those individuals who happen to hold title to large tracts of land at the moment this legal question is permanently resolved.

IV

In the final analysis, the property interest at stake in this litigation is the right to fill the wetlands on the tract that petitioner owns. Whether either he or his predecessors in title ever owned such an interest, and if so, when it was acquired by the State, are questions of state law. If it is clear—as I think it is and as I think the Court's disposition of the ripeness issue assumes—that any such taking occurred before he became the owner of the property, he has no standing to seek compensation for that taking. On the other hand, if the only viable takings claim has a different predicate that arose later, that claim is not ripe and the discussion in Part II-B of the Court's opinion is superfluous dictum. In either event, the judgment of the Rhode Island Supreme Court should be affirmed in its entirety.

I respectfully dissent.

Session 30. Background Principles of Property and Nuisance

“Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with... Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.” *Lucas v. South Carolina Coastal Council*.

HENDLER v. UNITED STATES **952 F.2d 1364 (Fed. Cir. 1991)**

Before ARCHER, PLAGER and CLEVINGER, Circuit Judges.

Plager, Circuit Judge.

I. INTRODUCTION

This is a takings case. It involves an almost decade-long dispute between the Government and the property owners over the distinction between a regulatory taking and a taking by permanent physical occupation, and what the scope of proper discovery should be in such a case. The case began with the efforts of the United States, acting through the U.S. Environmental Protection Agency (Government or EPA), to combat ground water pollution from a major hazardous waste site, the Stringfellow Acid Pits in California. Utilizing its authority under CERCLA,¹⁵⁶ commonly known as Superfund, the Government, in conjunction with the State of California, undertook a broad-ranging attack on the problem.

As part of this attack, the Government decided to locate ground water wells and associated equipment in the general area of the acid pits to monitor the movement of contaminated ground water. The area of concern included not only the site of the acid pits, but nearby properties as well. Plaintiffs own one of those nearby properties. This case is about the Government’s enlistment of plaintiffs’ property, without plaintiffs’ consent, in the battle against pollution, and plaintiffs’ efforts to be recompensed for that use.

¹⁵⁶ The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§9601-57 (1982).

In 1983 the Government first undertook activities on plaintiffs' land. In 1984 plaintiffs filed suit in the Claims Court for just compensation for the alleged taking of plaintiffs' property. The suit dragged on for years, with two different trial judges. Extensive discovery was undertaken. Before the first trial judge, the Government moved for summary judgment that there had been no regulatory taking, and that the United States was not responsible for the activities on the property undertaken by the State of California. The court granted both motions. The plaintiffs moved for summary judgment that there had been a physical occupation amounting to a taking. The court denied plaintiffs' motion, and ordered trial. (*Hendler v. United States*, 11 Cl. Ct. 91 (1986) (*Hendler I*).

III. BACKGROUND

A

Plaintiffs own property in Riverside County, California near the hazardous waste disposal site known as the Stringfellow Acid Pits (*Stringfellow*). EPA became aware that a plume of ground water contaminated with toxic substances from *Stringfellow* was threatening to enter a nearby source of drinking and agricultural water. EPA requested access to plaintiffs' property to install wells for monitoring and extracting these migrating hazardous substances. Plaintiffs refused.

In September 1983, EPA issued an administrative order granting itself and the State of California access to plaintiffs' property for, *inter alia*, "locating, constructing, operating, maintaining, and repairing monitor/extraction wells." *Henry Hendler*, Order (EPA Sept. 20, 1983); see *infra* note 10. Shortly after, EPA went upon plaintiffs' property and began the installation of a series of wells; five were installed by contractors for the EPA, and (by the time of the first hearing) at least another thirteen by the State of California.

Plaintiffs filed their initial complaint on September 5, 1984. Plaintiffs alleged that the EPA's actions constituted a taking of their property; they sought \$4.5 million as compensation. The Government filed its answer on November 1, 1984. After an initial court conference at which the parties agreed that no material facts were in dispute, the court approved a briefing schedule that set May 29, 1985 as the final deadline for the filing of responses to discovery requests. A few weeks later, the parties filed Joint Fact Stipulations which set out the events leading up to the law suit; the document detailed the five wells placed on the property by the EPA and the thirteen installed by the State of California pursuant to its role under a cooperative agreement with the EPA. *Hendler I* at 98.

In *Hendler I*, the trial judge, in his memorandum order of October 24, 1986, determined that:

- (1) the mere issuance of the EPA Order of September 1983 did not constitute a regulatory taking of any of plaintiffs' property (the court did not address the

question of whether the Order as subsequently applied might be deemed such a taking);

(2) the record afforded insufficient evidence upon which to base a decision whether there had been a taking by physical occupation--the court wanted to know more about the Government's long-range intentions; and

(3) the activities of the State of California were not attributable to the Government for purposes of takings law.

The Government's motion for summary judgment was granted on points one and three. Point two was left for trial--the plaintiffs' motion for summary judgment on the issue of taking by physical occupation was denied.

B

A man's home may be his castle, but that does not keep the Government from taking it. As an incident to its sovereignty, the Government has the authority to take private property for a public purpose. In England, when the King did so, payment for what was taken was, at least before Magna Carta, a sometime thing, and largely at the discretion of the sovereign. See 1 P. Nichols, *The Law of Eminent Domain* §2 (1917). In the United States, the Constitution does not leave that issue to the sovereign's good will. The ringing phrases of the Fifth Amendment conclude with the simple statement: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

At the time of the writing of the Constitution and for many years thereafter a government taking meant exactly that--the Government would physically occupy the land. If the Government needed a place for a military base, or for a building to house a government office or activity, that was a public purpose for which a government taking was authorized upon payment of just compensation. Much of the law of eminent domain--both statutory and case--developed for the purpose of providing the procedural structure for government takings; the main issue in the cases was what compensation was just. See J. Sackman, Nichols' *The Law of Eminent Domain* §8 (1991); see generally L. Orgel, *Valuation under the Law of Eminent Domain* (2d ed. 1953).

As government activities expanded, situations arose in which government action resulted in an invasion of an owner's private property, but the government had not undertaken the procedural steps called for by statute to acquire the affected property interests. For example, the government's road-building activity on A's land, the taking of which was authorized and paid for by the government, might cause permanent flooding on the nearby land of B. The suit by B, to require the government to pay just compensation for the taking of B's property as well, acquired the name of inverse condemnation.

Since the suit was based upon the constitutional provision protecting property rights, and the provision was considered to be self-executing with respect to compensation, it escaped the

problems of sovereign immunity. See *Jacobs v. United States*, 290 U.S. 13, 78 L. Ed. 142, 54 S. Ct. 26 (1933); 3 J. Sackman, *supra*, at §§8.01[2] & 8.01[4] [a]. Whether by planned acquisition through the exercise of eminent domain, or a payment after the fact through inverse condemnation, there was routinely present in these cases the fact of physical entry upon and occupation of private property by the government.

Occasionally an issue arose as to whether the government's activity was so short lived as to be more like the tort of trespass than a taking of property. The distinction between the government vehicle parked one day on O's land while the driver eats lunch, on the one hand, and the entry on O's land by the government for the purpose of establishing a long term storage lot for vehicles and equipment, on the other, is clear enough. The fact that sovereign immunity might insulate the government from liability in the tort but not in the taking makes for interesting line-drawing in the close cases, and provides employment for lawyers. See 1 P. Nichols, *supra*., at §113.

Traditional takings doctrine, based as it is on the indicia of physical occupation of land, does not fit easily into the issues that arose with the emergence of the regulatory state. In an early case Justice Holmes declared this basic proposition: "the general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (1922).

A few years later the Supreme Court was confronted with what had emerged as the government's most pervasive mechanism for regulating land use: zoning. While upholding zoning as a constitutionally permissible activity in general, the Court reserved in a passing nod to Justice Holmes the thought that there could be specific instances in which a zoning regulation would be so intrusive as to violate the constitutional norm. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 71 L. Ed. 303, 47 S. Ct. 114 (1926). Two years later, in *Nectow v. City of Cambridge*, 277 U.S. 183, 72 L. Ed. 842, 48 S. Ct. 447 (1928), that passing thought became law, and a specific zoning regulation was held constitutionally invalid as applied to plaintiff's property.

For the next fifty years the Supreme Court left it largely to the state courts to sort out the validity of zoning ordinances and other regulatory enactments affecting land use. Those that were found too intrusive— had gone 'too far' —were struck down by the courts as violative of the Constitution.

For purposes of this opinion we need not explore in detail the various articulations of what constitutes a regulatory taking that have emerged from the cases. Much ink has flowed in attempts to critique and explain. The Supreme Court itself likes to point out that no set formula exists to determine whether compensation is constitutionally due for a government restriction of property; instead the court must engage in "essentially ad hoc, factual inquiries." See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 at 124 (1978). But at bottom what

emerges is at least the basic notion that the government, under the guise of regulation, cannot take from a property owner the core economic value of the property, leaving the owner with a mere shell of shambled expectations.

For our purposes here, the important point is that in 1989 when the trial judge dismissed the case, there were two clear lines of Supreme Court authority under which a taking for which just compensation must be paid could be held to have occurred: the traditional physical occupation theory, and the newly-developed regulatory taking theory. And by that time, a series of critical rulings had been made: the 1983 EPA Order alone was not a regulatory taking, although the question of whether that Order plus the subsequent events alleged could constitute a regulatory taking was not foreclosed; there was not yet a taking by physical occupation--the trial judge wanted to know more about the Government's long-range intentions; and the activities for which the Federal Government bore responsibility were only those it undertook directly--the activities of the State of California, although pursuant to the Order, were nevertheless not attributable to the Government. We examine each of these rulings and the impact the rulings had on the dismissal sanction.

IV. DISCUSSION

A. The Question of a Regulatory Taking

The first issue before the trial court in *Hendler I* was whether there was evidence sufficient to establish a regulatory taking by the Government. The judge was of the view that there was no regulatory taking as a result of the EPA Order itself. That Order mandated that EPA officials and other authorized personnel, including state officials, were to have access to plaintiffs' property for the purposes of installing wells and related equipment such as pipes, tanks, and other storage facilities, and to carry on various activities such as storing and transporting ground water, conducting tests, extraction operations and so on. (The terms of the Order are set out in the footnote below.¹⁵⁷) Plaintiffs were ordered not to interfere in any manner

¹⁵⁷ The order required, inter alia, that EPA officials and other authorized personnel, including state officials, be given:

A. Access to [plaintiffs' property] for the following purposes: (1) locating[,] constructing, operating, maintaining, and repairing, monitor/extraction wells; (2) taking measurements and samples from those wells; (3) performing groundwater extraction operations, if necessary, including off-site disposal of such extracted groundwater.

B. Access to [plaintiffs' property] to accomplish all the activities described in paragraph A of this Order, and any necessary activities incident thereto, which shall include but shall not be limited to storing and transporting groundwater, and constructing facilities for such purposes, and the installation, operation, maintenance and repair of electric lines, pipes and storage tanks.

C. Access to [plaintiffs' property] to conduct any and all other activities necessary to investigate, monitor, survey, test and perform information gathering to identify the existence and extent of the

with the EPA/state activities, under pain of significant civil penalties, including punitive damages. Hendler I at 93.

The trial judge construed this Order as “not purporting to dispossess plaintiffs or limit their use of the property While [the Order’s] terms were expansive, they were not necessarily inimical to simultaneous use of the property by plaintiffs, as long as they did not interfere with defendant’s admittedly beneficent activities.” Hendler I at 95.

This misconceives the meaning and purpose of the constitutional protections underlying the Fifth Amendment. The Government does not have the right to declare itself a co-tenant-in-possession with a property owner. Among a citizen’s—including a property owner’s—most cherished rights is the right to be let alone. *Olmstead v. United States*, 277 U.S. 438, 478, 72 L. Ed. 944, 48 S. Ct. 564 (1928) (Brandeis, J., dissenting); see generally Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession—the right to exclude strangers, or for that matter friends, but especially the Government.

The notion of exclusive ownership as a property right is fundamental to our theory of social organization. In addition to its central role in protecting the individual’s right to be let alone, the importance of exclusive ownership-- the ability to exclude freeriders --is now understood as essential to economic development, and to the avoidance of the wasting of resources found under common property systems. See Hardin, *The Tragedy of the Commons*, 162 *Science* 1243 (1968); Barzel, *Optimal Timing of Inventions*, 50 *Rev. Econ. & Stat.* 348 (1968); Lunn, *The Roles of Property Rights and Market Power in Appropriating Innovative Output*, 14 *J. Legal Stud.* 423 (1985).

The intruder who enters clothed in the robes of authority in broad daylight commits no less an invasion of these rights than if he sneaks in in the night wearing a burglar’s mask. In some ways, entry by the authorities is more to be feared, since the citizen’s right to defend against the intrusion may seem less clear. Courts should leave no doubt as to whose side the law stands upon.

In the case before us, the Order issued by the EPA purported to authorize Government agents, both federal and state, to come on plaintiffs land and to establish a Government presence there. That it was for a beneficent purpose, from the viewpoint of the general public at least, is not at issue; plaintiffs did not contest, nor do we think they could, that the Order qualifies under the “public purpose” language of the Fifth Amendment.

release of hazardous substances or the threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of the danger to the public health or welfare or to the environment. Hendler I at 93.

The question addressed by the Claims Court in *Hendler I* was whether that Order, standing alone, met the tests for a regulatory taking. The court concluded no. On the facts then before the court, and in light of the absence by plaintiffs of proof of facts addressed specifically to the tests for a regulatory taking based on the Order alone, we do not disagree with that ruling.

We note, however, that that ruling says nothing about whether subsequent events, in light of the character of the Government's action and plaintiffs' distinct investment-backed expectations, might have had sufficient economic impact on the plaintiffs to constitute a regulatory taking. Given the fact-specific findings required for determining under current regulatory takings law when such a taking occurs, we understand the trial judge to have refrained from deciding this issue on summary judgment. It remains an issue in the case.

B. Takings under the Traditional Physical Occupation Theory

1. The second issue before the trial court was whether the Government's actions, in placing wells on plaintiffs' property and engaging in other activities on the site, was a taking—an inverse condemnation—under traditional physical occupation theory. With regard to the wells, the trial judge felt more evidence was needed to establish “whether the devices are truly permanently affixed to plaintiffs' property.” *Hendler I* at 97. But on the facts before the judge, that conclusion again misperceives the thrust of the protections afforded by the Fifth Amendment.

A physical occupation of private property by the government which is adjudged to be of a permanent nature is a taking, and that is true without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982) (placement by authority of the government of cable television (CATV) cable and connection boxes on the roof of an apartment building was a taking under the traditional test). As Justice Marshall said in *Loretto*: “when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, ‘the character of the government action’ not only is an important factor in resolving whether the action works a taking but also is determinative.” *Id.* at 426.

In this context, ‘permanent’ does not mean forever, or anything like it. A taking can be for a limited term—what is ‘taken’ is, in the language of real property law, an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute. (While called an estate for years, the term can be for less than a year. See generally Cribbet, *Principles of the Law of Property* 54 (3d ed. 1989).)

In *United States v. General Motors Corp.*, 323 U.S. 373, 89 L. Ed. 311, 65 S. Ct. 357 (1945), the government's appropriation of the unexpired term of a warehouse lease was a taking; the fact that it was finite went to the determination of compensation rather than to the question of whether a taking had occurred.

There is nothing ‘temporary’ about the wells the Government installed on plaintiffs’ property, in the sense in which we used it in referring to the parked truck of the lunchtime visitor. Years have passed since the Government installed the first wells. The wells are some 100 feet deep, lined with plastic and stainless steel, and surrounded by gravel and cement. Each well was capped with a cement casing lined with reinforcing steel bars, and enclosed by a railing of steel pipe set in cement. These surveillance wells are at least as ‘permanent’ in this sense as the CATV equipment in *Loretto*, which comprised only a few cables attached by screws and nails and a box attached by bolts. 458 U.S. at 422. Nothing in the Government’s activities suggests that the wells were a momentary excursion shortly to be withdrawn, and thus little more than a trespass. Nor does the Order or the Government’s subsequent actions disclose any indication of a timetable for withdrawal.

If the term ‘temporary’ has any real world reference in takings jurisprudence, it logically refers to those governmental activities which involve an occupancy that is transient and relatively inconsequential, and thus properly can be viewed as no more than a common law trespass *quare clausum fregit*. Our truckdriver parking on someone’s vacant land to eat lunch is an example.

We do not by that example mean to suggest that that defines the boundaries of the case. We need not decide here what physical occupancy, of what kind, for what duration, constitutes a *Loretto* taking. It is enough to say that, on the facts before the Claims Court on the motion for summary judgment, we conclude that the occupancy by the Government was comfortably within the degree necessary to make out a taking. When the governmental intrusion is as substantial a physical occupancy of private property as this is, *Loretto* establishes that there is a taking.

2. By like token, the concept of permanent physical occupation does not require that in every instance the occupation be exclusive, or continuous and uninterrupted. The evidence before the court was that Government vehicles and equipment entered upon plaintiffs’ land from time to time, without permission, for purposes of installing and servicing the various wells. They remained on the land for whatever duration was necessary to conduct their activities, and then left, only to return again when the Government desired.

In *Kaiser Aetna v. United States*, 444 U.S. 164, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979), the property owners had formed a marina by dredging a shallow lagoon and a connecting outlet into contiguous navigable waters. An exclusive subdivision community was then built around the marina. The lagoon had been private property before the development, and the property owners continued to deny access to the public after the development.

Subsequently, the government claimed that the property owners were required to open the lagoon to members of the public who might choose to visit by boat, since it was now subject to the “navigational servitude.” The Court held that if the Government wished to impose public use—even intermittent public use—of the lagoon upon the property owners, it was required to pay just compensation.

The evidence before the court in *Hendler I* reflected a situation in which the Government behaved as if it had acquired an easement not unlike that claimed in *Kaiser Aetna*. Pursuant to the easement, the Government at its convenience drove equipment upon plaintiffs' land for the purpose of installing and periodically servicing and obtaining information from the various wells it had located there. *Kaiser Aetna* would seem to leave little doubt that such activity, even though temporally intermittent, is not 'temporary.' It is a taking of the plaintiffs' right to exclude, for the duration of the period in which the wells are on the property and subject to the Government's need to service them.¹⁵⁸

We emphasize that the issue is not whether the Government had the right to impose itself and its activities on these plaintiffs. Whatever right the plaintiffs had to be let alone was overcome by the Government's need in the interest of public health and safety to monitor the ground water contamination. Indeed, plaintiffs expressly concede that point.

The issue before the court in *Hendler I* was whether, on the facts before it, the Government took any property by permanent physical occupation, thus obligating it to pay plaintiffs just compensation. The trial judge thought not, absent more facts; we think nothing more needed to be shown. The trial judge denied plaintiffs' motion for summary judgment on this point; he should have granted it.

CONCLUSION

The case is remanded to the Claims Court for further proceedings consistent with this opinion.

¹⁵⁸ Accord, *United States v. Causby*, 328 U.S. 256, 90 L. Ed. 1206, 66 S. Ct. 1062 (1946) (the noise from government planes passing a mere 83 feet above the plaintiff's property constituted a taking, even though such overflights occurred for only 4% of the takeoffs and for 7% of the landings).

HENDLER v. UNITED STATES
175 F.3d 1374 (Fed. Cir. 1999)

Before PLAGER, Circuit Judge, ARCHER, Senior Circuit Judge, and CLEVINGER, Circuit Judge.

PLAGER, Circuit Judge.

In this takings case, we approach the final chapter in a decade-long dispute between the landowners and the Government. The dispute was initiated when the Government entered upon the land of the plaintiffs, without their consent and over their objection, for the purpose of sinking wells for monitoring of ground water migration from adjacent properties. Over time the Government continued to establish additional wells and to service them, all without payment to the landowners for the use of their property. The landowners sued, claiming inverse condemnation.

After several false starts at the trial level this court determined that plaintiffs had a good cause of action. We held that the Government, however well motivated and however important its cause, must adhere to fundamental Constitutional principles: if private property is taken for public use, just compensation must be paid. See *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991). The cause was remanded to the trial court for further proceedings.

Subsequently, the Court of Federal Claims undertook to determine, on the facts of the case, what was the just compensation mandated by the Constitution. After trials on liability theories and damages issues, the Court of Federal Claims determined that plaintiffs ultimately were due no compensation. See *Hendler v. United States*, 36 Fed. Cl. 574 (1996); *Hendler v. United States*, 38 Fed. Cl. 611 (1997). Plaintiffs appeal that judgment, and the findings that underlay it.

BACKGROUND

The State of California and the United States, acting through the U.S. Environmental Protection Agency (“Government”), undertook cleanup efforts pursuant to federal authority under CERCLA, commonly known as Superfund. As part of its efforts, the Government decided to locate wells and associated equipment on plaintiffs’ property to monitor the movement of the contaminated groundwater from Stringfellow. When the Government approached plaintiffs with this proposal, plaintiffs resisted. Shortly thereafter, in 1983, the Government issued an order (herein “access order”) mandating that government officials, including both state and federal officials and their agents, were to have access to plaintiffs’ land for purposes of installing wells and related equipment, and conducting tests and other related activities. The access order further ordered that plaintiffs were not to interfere in any manner.

Well-drilling then began on plaintiffs’ property. Over the course of the following three years, twenty wells were installed on the property. During this period and well beyond,

Government officials and agents periodically entered the property to monitor the groundwater, using the installed wells. Based on information derived from the wells, a plume of contaminated water from Stringfellow was located flowing directly under portions of plaintiffs' land, and on down to lower-lying communities.

The Government undertook extensive cleanup and remediation activities at Stringfellow. Groundwater samples since taken from the wells on plaintiffs' property have shown these efforts to have been successful. The groundwater contamination under plaintiffs' property has been greatly reduced, to the extent that, it is reported, the groundwater as of May 1995 has been restored almost to its pre-polluted condition, nearly meeting drinking water standards.

In 1994 the Government formally terminated the 1983 access order. As noted, the litigation triggered by the order had started some ten years earlier when plaintiffs filed suit against the Government in the Claims Court (now the Court of Federal Claims). This was shortly after the Government began installing the wells on their property. In their suit, plaintiffs claimed that their property suffered a regulatory and physical taking by way of the access order and the associated activities taken thereunder on their land; they sought just compensation for the alleged takings.

The trial court dismissed plaintiffs' suit on procedural grounds, and entered a final judgment. We reversed the dismissal and concluded that the trial court should have entered summary judgment for plaintiffs on their physical taking claim, opining that "the Government behaved as if it had acquired an easement" 952 F.2d at 1378. We also noted with respect to the physical taking that plaintiffs would have "the opportunity to establish their severance damages, the damages accruing to their retained land as a result of the taking." With respect to plaintiffs' regulatory taking claim, we indicated concurrence in the trial court's view that the access order did not, alone, effect a regulatory taking. However, we noted that "subsequent events . . . might have had sufficient economic impact on the plaintiffs to constitute a regulatory taking."

On remand, the trial court bifurcated the trial between the liability issues and damages. The trial court determined that the physical taking was in the form of well-site and access-corridor easements. 36 Fed. Cl. at 584. Specifically, the court found that each well-site easement "comprises a 50 by 50 foot square area for activities related to the well(s) contained therein," and that each access-corridor easement comprises a "16 foot wide access corridor [from a well-site] to a public right of way." With regard to the regulatory taking issue, the court determined that there had been no regulatory taking because, among other reasons, in its view the nuisance doctrine defeated the claim and there was insufficient adverse economic impact on plaintiffs.

In the damages trial, the court heard evidence on the valuation of the well-site and access-corridor easements, as well as evidence as to whether and to what extent plaintiffs' remaining property was harmed or benefited from the Government's activity on their land. The court found that neither the easements nor the access order damaged the remaining part of plaintiffs'

property, and hence determined that the remaining part suffered no compensable severance damage. The court further determined that plaintiffs' remaining property received substantial "special benefits" and that those benefits outweighed the value of the easements taken. As a consequence, the court concluded that plaintiffs are due no compensation for the value of the easements, and plaintiffs were awarded no compensation for the access order and the Government's activities thereunder.

Plaintiffs appeal, asserting that the trial court erred in denying them compensation for the partial physical taking of their land, both for the value of the part taken and severance damages to the remainder. Plaintiffs also assert that the trial court erred in determining that there has not been a regulatory taking of their land. We consider these issues in turn.

DISCUSSION: COMPENSATION FOR THE PART TAKEN

With regard to the partial physical taking of plaintiffs' land in the form of the well-site and access-corridor easements, plaintiffs argue that the trial court erred in rejecting their expert's valuation of the easements as of 1983 at \$67,364 (which with interest to 1996 totaled \$185,000). Plaintiffs' valuation was based on the scope of use permitted under the access order, rather than on the Government's actual use. They additionally assert that the trial court erroneously determined that their retained land (the part not taken) received special benefits as a result of the taking.

The trial court's conclusion that plaintiffs are not entitled to compensation for the value of the part of their property taken hinged on this latter determination, that the retained property received special benefits. In particular, the court determined that the special benefits conferred on the property as a result of the taking more than offset the value of the easements—even under plaintiffs' valuation—and hence no compensation therefore is due. Accordingly, we first consider plaintiffs' arguments that the trial court erred in its special benefits determination.

In the case before us, the trial court, based on the testimony of the Government's experts, found three types of special benefits arising from the taking of the easements: (1) the investigation, (2) the characterization, and (3) the remediation of the contaminated groundwater. The trial court found that, with regard to the "investigation" benefit, it would have been necessary for the plaintiffs to investigate, by way of testing and sampling, the contamination underneath the subject property prior to its commercial development. The trial court noted that both parties' experts explained that property suspected of containing contamination is investigated in two phases when a property owner is preparing a plan of development. Phase One is an assessment of the likelihood of contamination based on available public records and historical data. Phase Two is scientific analysis involving actual testing and sampling.

The court considered that the installation of the wells and attendant testing by the Government provided the necessary information and is the equivalent of a completed Phase Two

investigation. The court found that a private undertaking of the investigation would have cost at least \$100,000 (with interest, \$195,000).

With regard to the “characterization” benefit, the trial court found that the Government, by way of its activities on plaintiffs’ land, characterized the nature and extent of the contamination, thereby eliminating uncertainty as to the land and as a result restoring its otherwise depressed value due to uncertainty. Similarly, the court found that the Government’s remediation of the contamination in conjunction with the activities on plaintiffs’ land conferred a “remediation” benefit to plaintiffs.

The Government’s expert valued the characterization benefit at \$280,000 and the remediation benefit at \$244,000. The trial court appears to have credited the Government’s characterization and remediation valuations, but it did not expressly find them to be correct. Rather, the court stated that even if it “limits the special benefits to the \$100,000 cost avoided for a required Phase Two study, the special benefits would outweigh any damage from the physical taking. Therefore, no compensation is due to plaintiffs for the physical taking.” In particular, the court noted that even if plaintiffs’ valuation of the easements is adopted (with interest, \$185,000), the investigation benefit (with interest, \$195,000) outweighs the value of the easements.

Plaintiffs do not challenge the valuation of this benefit. To the contrary, the trial court noted that plaintiffs concurred that privately-undertaken equivalent tests and analyses, as part of a proposed commercial development, would have cost at least \$100,000, totaling with interest \$195,000. We have no basis for concluding that this finding is clearly erroneous.

Furthermore, given the record in this case, we conclude that the trial court did not err in offsetting this special benefit against the value of the easements taken. However harsh by modern day standards the federal offset rule may seem, which allows the Government to escape any payment for private property actually taken for public use, we accept it as the governing rule for purposes of this case. If the rule is to be changed, and to make it more consistent with the rule followed in the states, it is for Congress to make that change.

Because the unchallenged trial court’s valuation of that benefit completely offsets even plaintiffs’ valuation of the easements taken, we need not address the correctness of the other special benefits found by the trial court. Simply put, because the court did not err in determining that the value, however measured, of the easements taken is outweighed by the special benefits conferred to the remainder, we affirm the denial of compensation for the value of those easements.

III

SEVERANCE DAMAGES

Next we consider plaintiffs' contention that the trial court erred in finding that their retained property suffered no severance damage. In cases of a partial physical taking as that here, just compensation under the takings clause of the Constitution includes "not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing . . . injury due to the use to which the part appropriated is to be devoted." However, plaintiffs bear the burden of proving severance damages.

Plaintiffs presented through their expert the proposition in essence that the access order and the Government's activities thereunder made their retained property unmarketable, or at least greatly depreciated. This damage, they contend, was caused by the access order and attendant activities significantly interfering with development of their property and creating the false impression that the property was a source of contamination. Plaintiffs' expert valued the alleged severance damage at over one million dollars (with interest, \$3.1 million).

The trial court rejected this aspect of plaintiffs' theory. The court found unconvincing their assertion that the access order and associated activities created the false impression that their property was contaminated, thereby decreasing its value. Instead, the court "found that the 'evidence shows that the value of plaintiffs' property was reduced by the contamination [from Stringfellow], rather than by the actions pursuant to the access order.'" The court went on to state that "it defies logic that the monitoring wells, rather than the actual existence of groundwater contamination, would devalue plaintiffs' property." 38 Fed. Cl. at 622. Thus, the trial court's rejection of plaintiffs' "false impression" theory turned on causation, a question of fact.

While we might have reached contrary findings had we sat as the trier of fact, that does not entitle us to reverse the trial court's findings. We are limited to the clearly erroneous standard of review, and plaintiffs' have failed to convince us that the findings fail that standard. In view of these findings, we must affirm the judgment with respect to severance damages.

IV

REGULATORY TAKING

Lastly, we consider plaintiffs' assertion that the trial court erred in determining that there has been no regulatory taking of their property. In *Hendler I*, the trial court held that the access order, standing alone, did not work a regulatory taking. We remanded for "the fact-specific findings required for determining" whether a regulatory taking has occurred. That is what the trial court set out to do, but plaintiffs claim that it erred.

A pivotal criterion governing whether a regulatory taking has occurred is the impact the regulatory imposition has had on the economic use, and hence value, of the property. See *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1564-65 (Fed. Cir. 1994); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994). If a regulation categorically prohibits all economically beneficial use of land there is, without more, a compensable taking. See *Florida*

Rock, 18 F.3d at 1564-65. On the other hand, though it is not necessary to have a total wipeout before the Constitution compels compensation, if the regulatory action is not shown to have had a negative economic impact on the property, there is no regulatory taking. See generally 18 F.3d at 1569-71; Loveladies, 28 F.3d at 1180. The question of the economic impact of a particular regulatory action is of course fact-specific to the case. See Florida Rock, 18 F.3d at 1570.

Plaintiffs' economic impact theory for their regulatory taking claim is quite similar to their severance damage theory. They contend that the access order and attendant activities falsely stigmatized their property as a source of contamination, and significantly interfered with its development. As a result, they contend, the property was unmarketable for a period of up to twelve years, yielding a loss in the range of \$16-18 million.

The trial court's rejection of this claimed economic impact parallels its analysis and findings with respect to plaintiffs' severance damage claim. The court found that their property was stigmatized by the actual contamination from Stringfellow, rather than the Government's actions pursuant to the access order. See *Hendler IV*, 36 Fed. Cl. at 588. Furthermore, the court found that the access order and Government actions thereunder did not interfere with the development or marketing of the property.

We have already concluded (with respect to the question of severance damages) that these factual findings by the trial court are not clearly erroneous, and thus cannot be disturbed. In light of these findings, we cannot say that the court erred in determining that plaintiffs have not suffered a regulatory taking. In sum, as found by the trial court, plaintiffs failed to prove that their "use" was sufficiently interfered with to constitute a regulatory taking. See *Florida Rock*, 18 F.3d at 1568-71.

The trial court alternatively based its rejection of plaintiffs' regulatory taking claim on the theory that "the nuisance exception described in *Loveladies*, *Lucas*, and other cases" is applicable and defeats the claim. *Hendler IV*, 36 Fed. Cl. at 585-86. However, having concluded that the trial court did not err in determining that there was insufficient economic impact to give rise to a regulatory taking, it is unnecessary for us to consider this further theory; under the circumstances, we choose not to. Thus, while in appropriate cases the nuisance doctrine is an available defense (see *Florida Rock*, 18 F.3d at 1565 n.10; *Loveladies*, 28 F.3d at 1182-83), we do not decide whether it has any applicability to this case.

CONCLUSION

The judgment of the Court of Federal Claims is **AFFIRMED**.

ESPLANADE PROPERTIES v. CITY OF SEATTLE
307 F.3d 978(2002)

B. FLETCHER, Circuit Judge:

Plaintiff Esplanade Properties, LLC challenges the legality of the City of Seattle's ("the City's") denial of its application to develop shoreline property on Elliot Bay in Seattle, Washington. Esplanade contends that the City's action resulted in a complete deprivation of economic use of its property, constituting an inverse condemnation in violation of federal and state constitutional law, and violating both federal and state substantive due process. Specifically, plaintiff appeals three decisions of the district court which, in toto, resulted in the dismissal of its claims against the defendant, to wit, granting summary judgment to the defendant on plaintiff's takings claim, granting summary judgment to the defendant on plaintiff's federal substantive due process claim, and dismissing plaintiff's state substantive due process claim. We have jurisdiction under 28 U.S.C. §1291 and we affirm.

I. BACKGROUND

In 1992, Esplanade began a long, and ultimately unsuccessful, process of attempting to secure permission to construct single-family residential housing on and over tidelands located below Magnolia bluff, near both a large city park and a large marina. The property is classified as first class tideland, and is submerged completely for roughly half of the day, during which time it resembles a large sand bar.

Esplanade purchased the property for \$40,000 in 1991, and quickly retained a development team to design and secure permits for nine waterfront homes, each to be constructed on platforms supported by pilings. In June of 1992, Esplanade applied for building permits, as well as various use permits, variance permits, and special use permits. None of these applications were ever approved.¹⁵⁹

After reviewing Esplanade's permit applications, the City's Department of Construction and Land Use ("DCLU") identified three significant code compliance issues related to the proposed project: (1) the size of the proposed piers and docks, (2) the design of the causeway access to the houses, and (3) lack of parking on dry land. The City notified Esplanade of its

¹⁵⁹ Under Washington's Shoreline Management Act ("SMA"), RCW 90.58.010, enacted in 1971, localities are required to develop a set of regulations with respect to their shorelines. Before 1992, under the Seattle Shoreline Master Program ("SSMP"), developed pursuant to the dictates of the SMA, above-water residential construction was seemingly allowed where the lots had less than 30 feet of dry land. Though the Seattle City Council later amended that provision in the SSMP, instead allowing for such use only where a lot has at least 15 feet of dry land, Esplanade filed its building permit applications before this change took effect, thus vesting its application to the former provision. *West Main Assoc. v. City of Bellevue*, 106 Wn.2d 47, 720 P.2d 782, 786 (Wash. 1986) ("A vested right merely establishes the ordinances to which a building permit and subsequent development must comply.").

concerns in a Correction Notice. Esplanade responded to the City's concerns, and sought three formal code interpretations from the DCLU, each relating to the issues raised by the City. Central to the ongoing dispute, the City was asked, inter alia, to interpret the code with respect to parking.¹⁶⁰ According to the City's interpretation, parking built over water in a single-family zone was prohibited, despite the general requirement that single-family homes be constructed with onsite parking. Esplanade appealed this interpretation, which was eventually affirmed by the Washington Court of Appeals on the ground that residential housing was not a waterdependent or water-related use.

At the end of the appeals process, in November of 1997, Esplanade was informed by the City that it had 60 days to submit formal alterations to its proposed plan, in light of the DCLU's code interpretations, without which the application would be cancelled. Esplanade, instead of altering its parking proposal, simply applied for a variance. Because Esplanade failed to modify its plans with respect to each of the three design concerns raised by the City, on April 13, 1998, the City cancelled Esplanade's application and later refused to reconsider its unappealable decision.

On June 5, 2000, Esplanade served a letter on the City threatening to make an inverse condemnation claim as a result of the cancellation of its application. Without a response from the City, Esplanade made good on its threat and filed the current action against the City on August 22, 2000.

In its complaint, Esplanade alleges, "inverse condemnation []in violation of the federal and state constitutional provisions prohibiting the taking of private property without just compensation." Plaintiff seeks "monetary damages" under 42 U.S.C. §1983.

The district court granted the defendant's motion for summary judgment on Esplanade's claim, to wit, the City's alleged taking of its property without just compensation, in violation of the Fifth Amendment. The court held that because Esplanade failed to establish that the City's action was the "proximate cause" of its alleged damages, and alternatively, because the "background principles" of Washington state law would have precluded the development, under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), the City was not liable to Esplanade.

Esplanade appealed, challenging each of the district court's three decisions.

III. DISCUSSION

¹⁶⁰ SSMP prohibits parking above water unless it is accessory to a waterdependent or water-related use. SMC 23.60.092.

The Takings Clause of the Fifth Amendment prohibits the government from taking "private property ... for public use, without just compensation." U.S. Const. amend. V. This clause prohibits "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." *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978) (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960)). In addition to instances of physical invasion or confiscation, the Supreme Court has long held that "if regulation goes too far it will be recognized as a taking." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (1922).

"Courts have had little success in devising any set formula for determining when government regulation of private property amounts to a regulatory taking," *Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 771-72 (9th Cir. 2000), affirmed by *Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg'l Planning Agency*, 152 L. Ed. 2d 517, 122 S. Ct. 1465 (2002). However, it is clear that under the "categorical" takings doctrine articulated in *Lucas*, "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas*, 505 U.S. at 1019; see also *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 150 L. Ed. 2d 592, 121 S. Ct. 2448 (2001). Where a regulation "denies all economically beneficial or productive use of land," the multi-factor analysis established in *Penn Central* is not applied, and a compensable taking has occurred unless "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027. In other words, for a government entity to avoid liability, any "law or decree" depriving the property owner of all economically beneficial use of her property "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."

Here, the district court found no taking of plaintiff's property for two reasons. First, the court found that the City's interpretation of the SSMP and its ultimate cancellation of Esplanade's development applications were not the proximate cause of Esplanade's alleged damages. Second, the court found that the background principles of Washington law, specifically the public trust doctrine, burdened plaintiff's property and precluded Esplanade from prevailing in a takings action against the City.

We agree with the district court that under both federal and state law a plaintiff must make a showing of causation between the government action and the alleged deprivation. See *Tahoe-Sierra* (9th Cir. 2000), 216 F.3d at 783 & n. 33 (discussing requirement that "plaintiff [in takings claim] must establish both causation-in-fact and proximate causation," and noting that while "true that there is little discussion of a 'causation' requirement in any of the case law involving regulatory takings," despite a passing reference to proximate cause in *Penn Central*, 438 U.S. at 124, "this is due to nothing more than the fact that, in most regulatory takings cases, there is no doubt whatsoever about whether the government's action was the cause of the alleged

taking."); *Ventures N.W. Ltd. P'ship v. State*, 81 Wn. App. 353, 914 P.2d 1180, 1187 (Wash. Ct. App. 1996) ("An owner claiming loss of the economically viable use of property must show that the challenged government regulation proximately caused the loss of all such use.") (citing *Guimont v. Clarke*, 854 P.2d 1 (Wash. 1993), cert. denied, 510 U.S. 1176, 127 L. Ed. 2d 563, 114 S. Ct. 1216 (1994); *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (Wash. 1987), cert. denied, 486 U.S. 1022, 100 L. Ed. 2d 227, 108 S. Ct. 1996 (1988)). However, because we find that the background principles of Washington state law would have precluded development of the proposed project, and therefore that plaintiff's claimed property right never existed, we do not address the question of causation.

1. Background Principle: Washington's Public Trust Doctrine

As discussed above, a deprivation by the government of all beneficial uses of one's property results in a taking unless, inter alia, the "background principles" of state law already serve to deprive the property owner of such uses. *Lucas*, 505 U.S. at 1029. In *Lucas*, subsequent to plaintiff's purchase of two residential lots of shoreline property, the state of South Carolina passed a statute having the "direct effect of barring petitioner from erecting any permanent structures on his two parcels," rendering them "valueless." 505 U.S. at 1007. In response, the plaintiff sued, alleging that the government effected a complete deprivation of his property. The Court held that "any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership," and remanded for a determination of whether such "background principles" would have prevented the proposed use of plaintiff's property. *Id.*, 505 U.S. at 1029.

In this case, the "restrictions that background principles" of Washington law place upon such ownership are found in the public trust doctrine. As the Washington Supreme Court recently explained, the "state's ownership of tidelands and shorelands is comprised of two distinct aspects— the *jus privatum* and the *jus publicum*." *State v. Longshore*, 141 Wn.2d 414, 5 P. 3d 1256, 1262 (Wash. 2000). Relevant here, the "*jus publicum*, or public trust doctrine, is the right 'of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters.'" *Id.* (quoting *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 989, 994 (Wash. 1987) (internal quotation marks and citation omitted)). The "doctrine reserves a public property interest, the *jus publicum*, in tidelands and the waters flowing over them, despite the sale of these lands into private ownership." *Weden v. San Juan County*, 135 Wn.2d 678, 958 P.2d 273, 283 (Wash. 1998), (citing *Ralph W. Johnson et al., The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521, 524 (1992)). "The state can no more convey or give away this *jus publicum* interest than it can 'abdicate its police powers in the administration of government and the preservation of the peace.'" *Caminiti*, 732 P.2d at 994 (quoting *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453, 36 L. Ed. 1018, 13 S. Ct. 110 (1892)). Instead, the state may only divest itself of interests in the

state's waters in a manner that does not substantially impair the public interest. 732 P.2d at 993-95.

It is beyond cavil that "a public trust doctrine has always existed in Washington." Orion Corp., 747 P.2d at 1072 (citing Caminiti, 732 P.2d at 994). The doctrine is "partially encapsulated in the language of [Washington's] constitution which reserves state ownership in 'the beds and shores of all navigable waters in the state.' " Rettkowski v. Dep't of Ecology, 122 Wn.2d 219, 858 P.2d 232, 239 (Wash. 1993) (quoting Wash. Const. art. 17, §1). The doctrine is also reflected in Washington's Shoreline Management Act ("SMA"), adopted in 1971. RCW §§90.58.010-930. Following a long history "favoring the sale of tidelands and shorelands," resulting in the privatization of approximately 60 percent of the tidelands and 30 percent of the shorelands originally owned by the state, Caminiti, 732 P.2d at 996, the Washington legislature found that the SMA was necessary because "unrestricted construction on the privately owned or public owned shorelines ... is not in the best public interest." RCW 90.58.020.

The public trust doctrine, reflected in part in the SMA, unquestionably burdens Esplanade's property.

We agree with the district court that the Washington Supreme Court's decision in Orion controls the outcome of this case, and that Washington's public trust doctrine ran with the title to the tideland properties and alone precluded the shoreline residential development proposed by Esplanade.

In Orion, the plaintiff corporation, prior to the enactment of the SMA, purchased tideland property in Padilla Bay, the "most diverse, least disturbed, and most biologically productive of all major estuaries on Puget Sound." Id., 747 P.2d at 1065. Orion Corp. proposed dredging and filling of the Bay to create a significant residential community. Id. In addressing plaintiff's challenge to subsequent local and state environmental regulations, which it alleged combined to completely deprive it of all economically viable use of its property, the court decided that the tidelands of the Bay were burdened by the public trust doctrine prior to the enactment of the SMA. 747 P.2d at 1072. At the time of Orion's purchase, "Orion could make no use of the tidelands which would substantially impair the [public] trust." 747 P.2d at 1073. Specifically, "Orion never had the right to dredge and fill its tidelands, either for a residential community or farmlands since a property right must exist before it can be taken, neither the SMA nor the SCSMMP effected a taking ..." Id. (internal quotation marks and citation omitted).

We find that the development proposed by Esplanade would suffer the same fate under the public trust doctrine as the project proposed by Orion Corp.

Esplanade's argument that Orion lacks authority, following the Court's decision in Lucas, is without merit. Lucas, while articulating an expansive concept of what constitutes a regulatory taking, effectively recognized the public trust doctrine:

Any [regulation that prohibits all economically beneficial use of land] ... must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts - by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise The principal "otherwise" that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of "real and personal property, in cases of actual necessity, to prevent the spreading of a fire" or to forestall other grave threats to the lives and property of others. 505 U.S. at 1029 & n. 16 (internal citations omitted).

Lucas does nothing to disturb Orion's application of Washington's public trust doctrine.

Esplanade's contention that the proposed development was consistent with the SMA at the time his project vested in 1992 is similarly without merit. As the City concedes, at the time of the purchase, the SMA, theoretically, permitted single-family dwellings to be constructed on the property. As the district court noted, however, "there are numerous limitations that the SMA places on developments of shorelines, even if those developments, like Esplanade's, are not categorically prohibited." (citing, e.g., RCW 90.58.020(2) (requiring that shoreline developments "preserve the natural character of the shoreline"), and RCW 90.58.020(4) (requiring that "projects protect the resources and ecology of the shoreline")). In this case, because Esplanade's tideland property is navigable for the purpose of public recreation (used for fishing and general recreation, including by Tribes), and located just 700 feet from Discovery Park, the development would have interfered with those uses, and thus would have been inconsistent with the public trust doctrine. Therefore, Esplanade's development plans never constituted a legally permissible use.

As the district court correctly noted, "Esplanade ... took the risk," when it purchased this large tract of tidelands in 1991 for only \$40,000, "that, despite extensive federal, state, and local regulations restricting shoreline development, it could nonetheless overcome those numerous hurdles to complete its project and realize a substantial return on its limited initial investment. Now, having failed ..., it seeks indemnity from the City." The takings doctrine does not supply plaintiff with such a right to indemnification.

IV. CONCLUSION

Esplanade's proposal to construct concrete pilings, driveways and houses in the navigable tidelands of Elliot Bay, an area regularly used by the public for various recreational and other activities, was inconsistent with the public trust that the State of Washington is obligated to protect.

For the reasons given, we affirm.

AFFIRMED.

McQUEEN v. SOUTH CAROLINA COASTAL COUNCIL
354 S.C. 142; 580 S.E.2D 116 (2003)

US Supreme Court certiorari denied

JUSTICE MOORE: This regulatory takings case is before us on remand from the United States Supreme Court to reconsider our previous decision in light of *Palazzolo v. Rhode Island*, 533 U.S. 606, 150 L. Ed. 2d 592, 121 S. Ct. 2448 (2001).

FACTS AND PROCEDURE

In the early 1960's, respondent McQueen purchased two non-contiguous lots located on manmade saltwater canals in the Cherry Grove section of North Myrtle Beach. He paid \$2,500 in 1961 for a lot on 53rd Avenue and \$1,700 in 1963 for a lot on 48th Avenue. Since then, both lots have remained unimproved. The lots surrounding McQueen's are improved and have bulkheads or retaining walls.

In 1991, McQueen filed applications with petitioner Office of Ocean and Coastal Resource Management (OCRM) to build bulkheads on his lots. After an administrative delay, he reapplied in 1993 requesting permits to backfill his lots and build bulkheads. In January 1994, a hearing was held at which the following facts were put into evidence.

At the time of the hearing, the majority of both lots had reverted to tidelands or critical area saltwater wetlands. This reversion was caused by "continuous" erosion, although little change had occurred since the permits were originally sought in 1991. The 53rd Avenue lot is inundated regularly by tidal flow all the way up to the street. The 48th Avenue lot has less tidal flow but contains more critical area wetland vegetation. On both lots, only some irregular portions of high ground remain.

The proposed backfill would permanently destroy the critical area environment on these lots. Without the backfill and bulkheads, the property does not have enough high ground to be developed. Eventually tidal water will reach the roads bordering these lots which will require bulkheads to protect the public roads.

In October 1994, a final decision was issued denying both permits based on OCRM's evaluation of McQueen's lots as predominantly critical area wetlands.¹⁶¹ McQueen then commenced this action seeking compensation for a regulatory taking. The master-in-equity found the denial of the permits deprived McQueen of all economically beneficial use of the lots and awarded him \$50,000 per lot as just compensation.

¹⁶¹ S.C. Code Ann. §48-39-130(C) (Supp. 2002) provides that "no person shall fill, remove, dredge, drain or erect any structure on or in any way alter any critical area without first obtaining a permit from the department." Under §48-39-10(J), "critical area" includes tidelands. "Tidelands" means "all areas which are at or below mean high tide and coastal wetlands, mudflats, and similar areas that are contiguous or adjacent to coastal waters and are an integral part of the estuarine systems involved." §48-39-10.

OCRM appealed. By a divided court, the Court of Appeals affirmed the finding of a taking because McQueen was deprived of all economically beneficial use of his property. The majority held: "The definitive issue is what rights McQueen possessed when he purchased the lots and . . . the right to add a bulkhead and fill were McQueen's at the time of purchase." *McQueen v. South Carolina Coastal Council*, 329 S.C. 588, 595, 496 S.E.2d 643, 647 (Ct. App. 1998). The Court of Appeals found the evidence insufficient, however, to support the amount of compensation awarded by the master and the case was remanded. OCRM then sought a writ of certiorari in this Court which was granted.

On review of the Court of Appeals' decision, we reversed. We found it was uncontested that McQueen was deprived of all economically beneficial use of his property but found he had no reasonable investment-backed expectations because of pre-existing wetlands regulations, therefore no taking had occurred. *McQueen v. South Carolina Coastal Council*, 340 S.C. 65, 530 S.E.2d 628 (2000). The United States Supreme Court then granted McQueen's petition for a writ of certiorari, summarily vacated our opinion, and remanded for further consideration in light of the recent *Palazzolo* decision.

Palazzolo involved a partial taking of property including wetlands. The Rhode Island Supreme Court found the landowner had not been deprived of all economically beneficial use of his property and, even if he had, the right to fill wetlands was not part of his ownership estate because regulations prohibiting such activity were enacted before he acquired title. *Palazzolo v. State*, 746 A.2d 707 (2000). On writ of certiorari, the United States Supreme Court reversed holding that pre-existing regulation was not dispositive in itself, either in the context of determining ownership rights under background principles of state law or in determining the investment-backed expectation factor in a partial taking. *Palazzolo*, 533 U.S. at 626 & 629-30.

ISSUE

Do background principles of South Carolina property law absolve the State from compensating McQueen?

DISCUSSION

First, we accept as uncontested that McQueen's lots retain no value and therefore a total taking has occurred.¹⁶² When there has been a total deprivation of all economically beneficial

¹⁶² Our analysis differs depending on whether a taking is characterized as partial or total. When there has been a partial taking by government regulation, the court determines if compensation is due by applying a complex of factors referred to as the *Penn Central* factors: the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. *Palazzolo*, 533 U.S. at 617. Where regulation compels the property owner to suffer a physical occupation or deprives the owner of all economically beneficial use of his property, however, with "certain qualifications," compensation is due. *Palazzolo*, 533 U.S. at 617; see also *Sea Cabins on Ocean IV Homeowners Assoc., Inc. v. City of North Myrtle Beach*, 345 S.C. 418, 548 S.E.2d 595 (2001). In these two instances, the owner must be

use, the threshold issue in determining whether compensation is due is whether the landholder's rights of ownership are "confined by limitations on the use of land which 'inhere in the title itself.'" Palazzolo, 533 U.S. at 629 (quoting Lucas, 505 U.S. at 1029); see also Rick's Amusement, Inc. v. State, 351 S.C. 352, 570 S.E.2d 155 (2001) cert. denied 535 U.S. 1053, 122 S. Ct. 1909, 152 L. Ed. 2d 819 (2002) (threshold inquiry in regulatory taking is whether the property interest affected is inherent in the plaintiff's ownership rights). Background principles of State property and nuisance law inform this inquiry. Palazzolo, 533 U.S. at 629. Where the proscribed use is not part of the owner's title to begin with, no compensatory taking has occurred. Lucas, 505 U.S. at 1027.

Public Trust Doctrine

As a coastal state, South Carolina has a long line of cases regarding the public trust doctrine in the context of land bordering navigable waters. Historically, the State holds presumptive title to land below the high water mark. As stated by this Court in 1884, not only does the State hold title to this land in *jus privatum*, it holds it in *jus publicum*, in trust for the benefit of all the citizens of this State. *State v. Pacific Guano Co.*, 22 S.C. 50, 84 (1884); see also *State v. Hardee*, 259 S.C. 535, 193 S.E.2d 497 (1972); *Rice Hope Plantation v. South Carolina Pub. Serv. Auth.*, 216 S.C. 500, 59 S.E.2d 132 (1950), overruled on other grounds, *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985).

The State has the exclusive right to control land below the high water mark for the public benefit, *Port Royal Mining Co. v. Hagood*, 30 S.C. 519, 9 S.E. 686 (1889), and cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access. *Sierra Club v. Kiawah Resort Assocs.*, 318 S.C. 119, 456 S.E.2d 397 (1995); see also *Heyward v. Farmers' Min. Co.*, 42 S.C. 138, 19 S.E. 963 (1884) (public trust land cannot be placed entirely beyond direction and control of the State); *Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co.*, 148 S.C. 428, 146 S.E. 434 (1928) (protected public purposes of trust include navigation and fishery). The State's presumptive title applies to tidelands. *State v. Yelsen Land Co.*, 265 S.C. 78, 216 S.E.2d 876 (1975).

compensated "without case-specific inquiry into the public interest advanced in support of the restraint," a factor in the Penn Central complex. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992).

Lucas left much confusion, however, about whether another Penn Central factor, "investment-backed expectations," survived in the context of a total deprivation case. Compare *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999) (this factor applies even in total deprivation case) and *Palm Beach Isles Assocs.*, 231 F.3d 1354 (Fed. Cir. 2000) (Lucas eliminated this factor in total deprivation case), petition for rehearing en banc denied 231 F.3d 1365 (Gajarsa, J. dissenting); see also *Westside Quik Shop, Inc. v. Stewart*, 341 S.C. 297, 534 S.E.2d 270 (2000) (following *Good*). Palazzolo has not clearly resolved this issue. In light of our disposition on the threshold issue of background principles of state law discussed below, we need not decide whether this factor applies to a total taking.

Significantly, under South Carolina law, wetlands created by the encroachment of navigable tidal water belong to the State. *Coburg Dairy, Inc. v. Lesser*, 318 S.C. 510, 458 S.E.2d 547 (1995). Proof that land was highland at the time of grant and tidelands were subsequently created by the rising of tidal water cannot defeat the State's presumptive title to tidelands. *State v. Fain*, 273 S.C. 748, 259 S.E.2d 606 (1979).

As described above, each of McQueen's lots borders a man-made tidal canal.¹⁶³ At the time the permits were denied,¹⁶⁴ the lots had reverted to tidelands with only irregular portions of highland remaining. This reversion to tidelands effected a restriction on McQueen's property rights inherent in the ownership of property bordering tidal water.

The tidelands included on McQueen's lots are public trust property subject to control of the State. McQueen's ownership rights do not include the right to backfill or place bulkheads on public trust land and the State need not compensate him for the denial of permits to do what he cannot otherwise do. Accord *Esplanade Props., Inc. v. City of Seattle*, 307 F.3d 978 (9th Cir. 2002) (finding no taking where state public trust doctrine precludes dredging and filling tidelands). Any taking McQueen suffered is not a taking effected by State regulation but by the forces of nature and McQueen's own lack of vigilance in protecting his property.

We find no compensation is due. After reconsideration in light of *Palazzolo*, we reach the same conclusion we originally reached in this case and reverse the Court of Appeals.

REVERSED.

¹⁶³ While many of the cases cited above refer to land bordering "navigable tidal" water, under South Carolina law tidal water is presumed navigable unless shown incapable of navigation in fact, a showing not made here. *State v. Pacific Guano Co.*, *supra*. The fact that a waterway is artificial is irrelevant since it is considered the functional equivalent of a natural waterway. *Hughes v. Nelson*, 303 S.C. 102, 399 S.E.2d 24 (1990).

¹⁶⁴ The value of the interest in land is to be determined at the time of condemnation. *City of Folly Beach v. Atlantic House Props., Ltd.*, 318 S.C. 450, 458 S.E.2d 426 (1995). Condemnation occurred when the permits were denied by a final decision. See *Palazzolo*, 533 U.S. at 618. Regulatory delay does not give rise to a compensatory taking. *Sea Cabins*, *supra*.

Session 31. Judicial Takings

MUHLKER v. NEW YORK AND HARLEM RAILROAD COMPANY 197 U.S. 544 (1905)

MR. JUSTICE McKENNA, after stating the case, announced the judgment of the court and delivered the following opinion:

The Appellate Division [held that under the case] of *Lewis v. New York & Harlem R.R. Co.* that the railroad company the [did not have the] the right to [violate easements of light and air when constructing a] viaduct ... above ground, in [the street] to front of the plaintiff's premises. The case of *Lewis* applies fully to the one at bar.

In the case at bar there is a complete change of ruling by the N.Y. Court of Appeals. The *Lewis* case is declared, in so far as it expressed rights of abutting property owners, to have been improvidently decided. But it does not follow that private property can be taken either by the erection of the structure or its use. This was plainly seen and expressed in the *Lewis* case as to the use of the structure. The rights of abutting property owners must be considered, and against their infringement plaintiff urges the contract clause of the Constitution of the United States and the Fourteenth Amendment.

It will be observed from the statement of facts that before the construction of the viaduct complained of the railroad ran partly on the surface of the street and partly in a cut or trench, the latter being flanked by masonry walls three feet high. The viaduct is a solid roadbed thirty-one feet above the surface, having iron girders on the sides and in the middle, and supported by iron columns, of which there are six in front of the plaintiff's land. The new construction impairs or destroys the plaintiff's easements of light and air. And such easements ... belonged to plaintiff in common with other abutters upon the public streets of New York

The *Lewis* case, we have seen, was overruled by the Court of Appeals in the case at bar, We think that the *Lewis* case ... [is] in point and decisive. When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.

Judgment is reversed and cause remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE HOLMES, dissenting.

I regret that I am unable to agree with the judgment of the court, and as it seems to me to involve important principles I think it advisable to express my disagreement and to give my reasons for it.

The plaintiff owns no soil within the limits of the avenue. The New York and Harlem Railroad Company at the time of the change was and long had been the owner, and the other defendant was the lessee of a railroad with four tracks along the middle of Park avenue, in front of the plaintiff's land, at the south end being at the surface of the avenue, and at the north in a trench about four feet and a half deep, the railroad being bounded on both sides by a masonry wall three feet high, which prevented crossing or access to the tracks. This is the finding of the court of first instance and I take it to be binding upon us.

The plaintiff's rights, whether expressed in terms of property or of contract, are all a construction of the courts, deduced by way of consequence from dedication to and trusts for the purposes of a public street. They never were granted to him or his predecessors in express words, or, probably, by any conscious implication. If at the outset the New York courts had decided that apart from statute or express grant the abutters on a street had only the rights of the public and no private easement of any kind, it would have been in no way amazing.

If the decisions, which I say conceivably might have been made, had been made as to the common law, they would have infringed no rights under the Constitution of the United States. So much, I presume, would be admitted by every one. But if that be admitted, I ask myself what has happened to cut down the power of the same courts as against that same Constitution at the present day. So far as I know the only thing which has happened is that they have decided the elevated railroad cases, to which I have referred. It is on that ground alone that we are asked to review the decision of the Court of Appeals upon what otherwise would be purely a matter of local law.

The doctrine now is explained, however, not to mean that a change in the decision impairs the obligation of contracts, and certainly never has been supposed to mean that all property owners in a State have a vested right that no general proposition of law shall be reversed, changed or modified by the courts if the consequence to them will be more or less pecuniary loss. I know of no constitutional principle to prevent the complete reversal of the elevated railroad cases to-morrow.

But again, if the plaintiff had an easement over the whole street he got it as a tacit incident of an appropriation of the street to the uses of the public. The most obvious aspect of the change is that the whole street now is open to travel, and that an impassable barrier along its width has been removed, in other words, that the convenience of travellers on the highway has been considered and enhanced. It was possible for the New York Courts to hold, as they seem to have held, that the easement which they had declared to exist is subject to the fullest exercise of the primary right out of which it sprang, and that any change in the street for the benefit of public travel is a matter of public right, as against what I have called the parasitic right which the plaintiff claims.

The foregoing distinctions seem to me not wanting in good sense. Certainly I should have been inclined to adopt one or both of them, or in some way to avoid the earlier decisions.

But I am not discussing the question whether they are sound. If my disagreement was confined to that I should be silent. I am considering what there is in the Constitution of the United States forbidding the Court of Appeals to hold them sound. I think there is nothing; and there being nothing, and the New York decision obviously not having been given its form for the purpose of evading this court, I think we should respect and affirm it, if we do not dismiss the case.

What the plaintiff claims is really property, a right in rem. It is called contract merely to bring it within the contract clause of the Constitution. It seems to me a considerable extension of the power to determine for ourselves what the contract is, which we have assumed when it is alleged that the obligation of a contract has been impaired, to say that we will make the same independent determination when it is alleged that property is taken without due compensation. But it seems to me that it does not help the argument. The rule adopted as to contract is simply a rule to prevent an evasion of the constitutional limit to the power of the States, and, it seems to me, should not be extended to a case like this. Bearing in mind that, as I have said, the plaintiff's rights, however expressed, are wholly a construction of the courts, I cannot believe that whenever the Fourteenth Amendment or Article I, section 10, is set up we are free to go behind the local decisions on a matter of land law, and, on the ground that we decide what the contract is, declare rights to exist which we should think ought to be implied from a dedication or location if we were the local courts

If we are bound by local decisions as to local rights in real estate, then we equally are bound by the distinctions and the limitations of those rights declared by the local courts. If an exception were established in the case of a decision which obviously was intended to evade constitutional limits, I suppose I may assume that such an evasion would not be imputed to a judgment which four Justices of this court think right.

As I necessarily have dealt with the merits of the case for the purpose of presenting my point, I will add one other consideration. Suppose that the plaintiff has an easement and that it has been impaired, bearing in mind that his damage is in respect of light and air, not access, and is inflicted for the benefit of public travel, I should hesitate to say that in inflicting it the legislature went beyond the constitutional exercise of the police power. To a certain and to an appreciable extent the legislature may alter the law of nuisance, although property is affected. To a certain and to an appreciable extent the use of particular property may be limited without compensation. Not every such limitation, restriction or diminution of value amounts to a taking in a constitutional sense. I have a good deal of doubt whether it has been made to appear that any right of the plaintiff has been taken or destroyed for which compensation is necessary under the Constitution of the United States

HUGHES v. WASHINGTON
389 U.S. 290 (1967)

MR. JUSTICE BLACK delivered the opinion of the Court.

The question for decision is whether federal or state law controls the ownership of land, called accretion, gradually deposited by the ocean on adjoining upland property conveyed by the United States prior to statehood. The circumstances that give rise to the question are these. Prior to 1889 all land in what is now the State of Washington was owned by the United States, except land that had been conveyed to private parties. At that time owners of property bordering the ocean, such as the predecessor in title of Mrs. Stella Hughes, the petitioner here, had under the common law a right to include within their lands any accretion gradually built up by the ocean.¹⁶⁵ Washington became a State in 1889, and Article 17 of the State's new constitution, as interpreted by its Supreme Court, denied the owners of ocean-front property in the State any further rights in accretion that might in the future be formed between their property and the ocean. This is a suit brought by Mrs. Hughes, the successor in title to the original federal grantee, against the State of Washington as owner of the tidelands to determine whether the right to future accretions which existed under federal law in 1889 was abolished by that provision of the Washington Constitution. The trial court upheld Mrs. Hughes' contention that the right to accretions remained subject to federal law, and that she was the owner of the accreted lands. The State Supreme Court reversed, holding that state law controlled and that the State owned these lands. 67 Wash. 2d 799, 410 P. 2d 20 (1966). We granted certiorari. 385 U.S. 1000 (1967). We hold that this question is governed by federal, not state, law and that under federal law Mrs. Hughes, who traces her title to a federal grant prior to statehood, is the owner of these accretions.

While the issue appears never to have been squarely presented to this Court before, we think the path to decision is indicated by our holding in *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1935). In that case we dealt with the rights of a California property owner who held under a federal patent, and in that instance, unlike the present case, the patent was issued after statehood. We held that

"the question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law." 296 U.S., at 22.

No subsequent case in this Court has cast doubt on the principle announced in *Borax*. See also *United States v. Oregon*, 295 U.S. 1, 27-28 (1935). The State argues, and the court

¹⁶⁵ *Jones v. Johnston*, 18 How. 150 (1856); *County of St. Clair v. Lovington*, 23 Wall. 46 (1874).

below held, however, that the Borax case should not be applied here because that case involved no question as to accretions. While this is true, the case did involve the question as to what rights were conveyed by the federal grant and decided that the extent of ownership under the federal grant is governed by federal law. This is as true whether doubt as to any boundary is based on a broad question as to the general definition of the shoreline or on a particularized problem relating to the ownership of accretion. See *United States v. Washington*, 294 F.2d 830, 832 (C. A. 9th Cir. 1961), cert. denied, 369 U.S. 817 (1962). We therefore find no significant difference between Borax and the present case.

Recognizing the difficulty of distinguishing Borax, respondent urges us to reconsider it. Borax itself, as well as *United States v. Oregon*, supra, and many other cases, makes clear that a dispute over title to lands owned by the Federal Government is governed by federal law, although of course the Federal Government may, if it desires, choose to select a state rule as the federal rule. Borax holds that there has been no such choice in this area, and we have no difficulty in concluding that Borax was correctly decided. The rule deals with waters that lap both the lands of the State and the boundaries of the international sea. This relationship, at this particular point of the marginal sea, is too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any law but the "supreme Law of the Land."

This brings us to the question of what the federal rule is. The State has not attempted to argue that federal law gives it title to these accretions, and it seems clear to us that it could not. A long and unbroken line of decisions of this Court establishes that the grantee of land bounded by a body of navigable water acquires a right to any natural and gradual accretion formed along the shore. In *Jones v. Johnston*, 18 How. 150 (1856), a dispute between two parties owning land along Lake Michigan over the ownership of soil that had gradually been deposited along the shore, this Court held that "land gained from the sea either by alluvion or dereliction, if the same be by little and little, by small and imperceptible degrees, belongs to the owner of the land adjoining." 18 How., at 156. The Court has repeatedly reaffirmed this rule, *County of St. Clair v. Lovington*, 23 Wall. 46 (1874); *Jefferis v. East Omaha Land Co.*, 134 U.S. 178 (1890), and the soundness of the principle is scarcely open to question. Any other rule would leave riparian owners continually in danger of losing the access to water which is often the most valuable feature of their property, and continually vulnerable to harassing litigation challenging the location of the original water lines. While it is true that these riparian rights are to some extent insecure in any event, since they are subject to considerable control by the neighboring owner of the tideland, this is insufficient reason to leave these valuable rights at the mercy of natural phenomena which may in no way affect the interests of the tideland owner. See *Stevens v. Arnold*, 262 U.S. 266, 269-270 (1923). We therefore hold that petitioner is entitled to the accretion that has been gradually formed along her property by the ocean.

The judgment below is reversed, and the case is remanded to the Supreme Court of Washington for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE STEWART, concurring.

I fully agree that the extent of the 1866 federal grant to which Mrs. Hughes traces her ownership was originally measurable by federal common law, and that under the applicable federal rule her predecessor in title acquired the right to all accretions gradually built up by the sea. For me, however, that does not end the matter. For the Supreme Court of Washington decided in 1966, in the case now before us, that Washington terminated the right to oceanfront accretions when it became a State in 1889. The State concedes that the federal grant in question conferred such a right prior to 1889. But the State purports to have reserved all post-1889 accretions for the public domain. Mrs. Hughes is entitled to the beach she claims in this case only if the State failed in its effort to abolish all private rights to seashore accretions.

Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual States to develop and administer. And surely Washington or any other State is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners. Nor are riparian owners who derive their title from the United States somehow immune from the changing impact of these general state rules. *Joy v. St. Louis*, 201 U.S. 332, 342. For if they were, then the property law of a State like Washington, carved entirely out of federal territory, would be forever frozen into the mold it occupied on the date of the State's admission to the Union. It follows that Mrs. Hughes cannot claim immunity from changes in the property law of Washington simply because her title derives from a federal grant. Like any other property owner, however, Mrs. Hughes may insist, quite apart from the federal origin of her title, that the State not take her land without just compensation. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 236-241.

Accordingly, if Article 17 of the Washington Constitution had unambiguously provided, in 1889, that all accretions along the Washington coast from that day forward would belong to the State rather than to private riparian owners, this case would present two questions not discussed by the Court, both of which I think exceedingly difficult. First: Does such a prospective change in state property law constitute a compensable taking? Second: If so, does the constitutional right to compensation run with the land, so as to give not only the 1889 owner, but also his successors -- including Mrs. Hughes -- a valid claim against the State?

The fact, however, is that Article 17 contained no such unambiguous provision. In that Article, the State simply asserted its ownership of "the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes." In the present case the Supreme Court of Washington held that, by this 1889 language, "littoral rights of upland owners were terminated." 67 Wash. 2d 799, 816, 410 P. 2d 20, 29. Such a conclusion by the State's highest court on a question of state law would ordinarily

bind this Court, but here the state and federal questions are inextricably intertwined. For if it cannot reasonably be said that the littoral rights of upland owners were terminated in 1889, then the effect of the decision now before us is to take from these owners, without compensation, land deposited by the Pacific Ocean from 1889 to 1966.

We cannot resolve the federal question whether there has been such a taking without first making a determination of our own as to who owned the seashore accretions between 1889 and 1966. To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court. See *Demorest v. City Bank Co.*, 321 U.S. 36, 42-43. Cf. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95. The Washington court insisted that its decision was "not startling." 67 Wash. 2d 799, 814, 410 P. 2d 20, 28. What is at issue here is the accuracy of that characterization.

The state court rested its result upon *Eisenbach v. Hatfield*, 2 Wash. 236, 26 P. 539, but that decision involved only the relative rights of the State and the upland owner in the tidelands themselves. The *Eisenbach* court declined to resolve the accretions question presented here. This question was resolved in 1946, in *Ghione v. State*, 26 Wash. 2d 635, 175 P. 2d 955. There the State asserted, as it does here, that Article 17 operated to deprive private riparian owners of post-1889 accretions. The Washington Supreme Court rejected that assertion in *Ghione* and held that, after 1889 as before, title to gradual accretions under Washington law vested in the owner of the adjoining land. In the present case, 20 years after its *Ghione* decision, the Washington Supreme Court reached a different conclusion. The state court in this case sought to distinguish *Ghione*: The water there involved was part of a river. But the *Ghione* court had emphatically stated that the same "rule of accretion . . . applies to both tidewaters and fresh waters." 26 Wash. 2d 635, 645, 175 P. 2d 955, 961. I can only conclude, as did the dissenting judge below, that the state court's most recent construction of Article 17 effected an unforeseeable change in Washington property law as expounded by the State Supreme Court.

There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive

transformation of private into public property -- without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.

STEVENS v. CITY OF CANNON BEACH
510 U.S. 1207 (1994)

OPINION: The petition for a writ of certiorari is denied.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR joins, dissenting.

This is a suit by owners of a parcel of beachfront property against the City of Cannon Beach and the State of Oregon. Petitioners purchased the property in 1957. In 1989, they sought a building permit for construction of a seawall on the dry-sand portion of the property. When the permit was denied, they brought this inverse condemnation action against the city in the Circuit Court of Clatsop County, alleging a taking in violation of the Fifth and Fourteenth Amendments. That court dismissed the complaint for failure to state a claim pursuant to Ore. Rule Civ. Proc. 21A(8), on the ground that under *State ex rel. Thornton v. Hay*, 254 Ore. 584, 462 P.2d 671 (1969), petitioners never possessed the right to obstruct public access to the dry-sand portion of the property. The Court of Appeals, 114 Ore. App. 457, 835 P.2d 940 (1992), and then the Supreme Court of Oregon, 317 Ore. 131, 854 P.2d 449 (1993), both relying on *Thornton*, affirmed. The landowners have petitioned this Court for writ of certiorari to the Supreme Court of Oregon. They allege an unconstitutional taking of property without just compensation, and a denial of due process of law.

In order to clarify the nature of the constitutional questions that the case presents, a brief sketch of Oregon case law involving beachfront property is necessary.

I

In 1969, the State of Oregon brought suit to enjoin owners of certain beachfront tourist facilities from constructing improvements on the “dry-sand” portion of their properties. The trial court granted an injunction. *State ex rel. Thornton v. Hay*, 254 Ore. 584, 462 P.2d 671 (1969). In defending that judgment on appeal to the Supreme Court of Oregon, the State briefed and argued its case on the theory that by implied dedication or prescriptive easement the public had acquired the right to use the dry-sand area for recreational purposes, precluding development. The Supreme Court of Oregon found “a better legal basis” for affirming the decision and decided the case on an entirely different theory:

“The most cogent basis for the decision in this case is the English doctrine of custom. Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region. Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly.” *Id.*, at 595, 462 P.2d, at 676.

The court set forth what it said were the seven elements of the doctrine of custom¹⁶⁶ and concluded that “the custom of the people of Oregon to use the dry-sand area of the beaches for public recreational purposes meets every one of Blackstone’s requisites.” *Id.*, at 597, 462 P.2d, at 677. The court affirmed the injunction, saying that “it takes from no man anything which he has had a legitimate reason to regard as exclusively his.” *Id.*, at 599, 462 P.2d, at 678. Thus, Thornton declared as the customary law of Oregon the proposition that the public enjoys a right of recreational use of all dry-sand beach, which denies property owners development rights.

Or so it seemed until 1989. That year, the Supreme Court of Oregon revisited the issue of dry-sand beach in the case of *McDonald v. Halvorson*, 308 Ore. 340, 780 P.2d 714 (1989). There, the beachfront property owners who were plaintiffs sought a judicial declaration that their property included a portion of dry-sand area adjacent to a cove of the Pacific Ocean. With such a declaration in place, they hoped to gain access (under Thornton, as members of the public) to the remaining dry-sand area of the cove lying on property to which the defendants held record title. The State intervened to assert the public’s right (under the doctrine of custom) to use the dry-sand area of the cove, and to enjoin defendants from interfering with that right. The Supreme Court of Oregon held that the public had no right to recreational use of the dry-sand portions of the cove beach. 308 Ore., at 360, 780 P.2d, at 724. *McDonald* noted what it called inconsistencies in *Thornton*, 308 Ore., at 358-359, 780 P.2d, at 723, and resolved them by stating that “nothing in [*Thornton*] fairly can be read to have established beyond dispute a public claim by virtue of ‘custom’ to the right to recreational use of the entire Oregon coast.” *Id.*, at 359, 780 P.2d, at 724. “There may also be [dry-sand] areas,” the court said, “to which the doctrine of custom is not applicable.” *Ibid.* The court noted that “there [was] no testimony in this record showing customary use of the narrow beach on the bank of the cove. . . . The doctrine of custom announced in [*Thornton*] simply does not apply to this controversy. The public has no right to recreational use of the [dry-sand beach area of the cove] because there is no factual predicate for application of the doctrine.” *Id.*, at 360, 780 P.2d, at 724.

With *McDonald* now the leading case interpreting the law of custom, petitioners here brought their takings challenge in the Oregon state trial court. As recited above, that court dismissed for failure to state a claim upon which relief could be granted, saying that “[*Thornton*] teaches us that ocean front owners cannot enclose or develop the dry sand beach area so as to exclude the public therefrom. . . . Because of the public’s ancient and continued use of the dry sand area on the Oregon coast . . . its future use thereof cannot be curtailed or limited.” *App. to Pet. for Cert. C-24*. The trial court did not cite *McDonald*, and its peremptory dismissal

¹⁶⁶ The Supreme Court of Oregon described the English doctrine of custom as applying to land used in a certain manner (1) so long that the mind runneth not to the contrary; (2) without interruption; (3) peaceably; (4) where the public use has been appropriate to the land and the usages of the community; (5) where the boundary is certain; (6) where the custom is obligatory (not left up to individual landowners as to whether they will recognize the public’s right to access); and (7) where the custom is not repugnant to or inconsistent with other customs or laws.

prevented petitioners from doing what McDonald clearly contemplated their doing: providing the factual predicate for their challenge through testimony of customary use showing that their property is one of those areas “to which the doctrine of custom [was] not applicable.” McDonald, *supra*, at 359, 780 P.2d, at 724. Moreover, when petitioners attempted to introduce such factual material on appeal they were rebuffed on grounds that appeal was confined to the purely legal question of whether the complaint stated a claim under Oregon law. App. to Pet. for Cert. I-197 – I-198 (Tr., Mar. 3, 1993); see also *id.*, at I-185 – I-190.

In its decision here, the Supreme Court of Oregon quoted portions of Thornton’s sweeping language appearing to declare the law of custom for all the Oregon shore. But it then read Thornton (which also originated in a dispute over property in Cannon Beach) to have said that the “historic public use of the dry sand area of Cannon Beach met [Blackstone’s] requirements.” 317 Ore., at 140, 854 P.2d, at 454 (emphasis added).¹⁶⁷ The court then framed the issue as the continuing validity of Thornton in light of *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, (1992). The court quoted our opinion in *Lucas*: “Any limitation so severe [as to prohibit all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.” 317 Ore., at 142, 854 P.2d, at 456 (quoting *Lucas*, 505 U.S., at ___, (slip op., at 23-24) (emphasis added by the Oregon court). The court held that the doctrine of custom was just such a background principle of Oregon property law, and that petitioners never had the property interests that they claim were taken by respondents’ decisions and regulations. 317 Ore., at 143, 854 P.2d, at 456. It then affirmed the dismissal.

II

As a general matter, the Constitution leaves the law of real property to the States. But just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, see *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 455-458 (1958), neither may it do so by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a State court chooses to denominate “background law” – regardless of whether it is really such – could eliminate property rights. “[A] State cannot

¹⁶⁷ This reading of Thornton is in my view unsupportable. Thornton did not limit itself to “the dry sand area of Cannon Beach.” On the contrary, Thornton includes the following statements: “Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly.” 254 Ore., at 595, 462 P.2d, at 676. “This case deals solely with the dry-sand area along the Pacific shore” *Ibid.* “The custom of the people of Oregon to use the dry-sand area of the beaches for public recreational purposes meets every one of Blackstone’s requisites.” *Id.*, at 597, 462 P.2d, at 677. “The custom of the inhabitants of Oregon and of visitors in the state to use the dry sand as a public recreation area is so notorious that notice of the custom . . . must be presumed.” *Id.*, at 598, 462 P.2d, at 678. The passage in which Thornton actually applies Blackstone’s seven-factor test contains not a single mention of the city of Cannon Beach. *Id.*, at 595-597, 462 P.2d, at 677.

be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.” *Hughes v. Washington*, 389 U.S. 290, 296-297 (1967) (Stewart, J., concurring). No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation. *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). See also *Lucas*, 505 ___ U.S., at ___, (slip op., at 26). Since opening private property to public use constitutes a taking, see *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 831 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979), if it cannot fairly be said that an Oregon doctrine of custom deprived Cannon Beach property owners of their rights to exclude others from the dry sand, then the decision now before us has effected an uncompensated taking.

To say that this case raises a serious Fifth Amendment takings issue is an understatement. The issue is serious in the sense that it involves a holding of questionable constitutionality; and it is serious in the sense that the land-grab (if there is one) may run the entire length of the Oregon coast.¹⁶⁸ It is by no means clear that the facts—either as to the entire Oregon coast, or as to the small segment at issue here—meet the requirements for the English doctrine of custom. The requirements set forth by Blackstone included, *inter alia*, that the public right of access be exercised without interruption, and that the custom be obligatory, *i.e.*, in the present context that it not be left to the option of each landowner whether he will recognize the public’s right to go on the dry-sand area for recreational purposes. In *Thornton*, however, the Supreme Court of Oregon determined the historical existence of these fact-intensive criteria (as well as five others) in a discussion that took less than one full page of the *Pacific Reporter*. That is all the more remarkable a feat since the Supreme Court of Oregon was investigating these criteria in the first instance; the trial court had not rested its decision on the basis of custom and the state did not argue that theory to the Supreme Court.¹⁶⁹

¹⁶⁸ From *Thornton* to *McDonald* to the decision below, the Supreme Court of Oregon’s vacillations on the scope of the doctrine of custom make it difficult to say how much of the coast is covered. They also reinforce a sense that the court is creating the doctrine rather than describing it.

¹⁶⁹ In *Thornton*, the Supreme Court of Oregon appears to have misread Blackstone in applying the law of custom to the entire Oregon coast. “Customs . . . affect only the inhabitants of particular districts.” 1 W. Blackstone, *Commentaries* 74. *McDonald* seems to suggest that a custom may extend to all property “similarly situated” in terms of its physical characteristics, *i.e.*, all dry-sand beach abutting the ocean. 308 Ore., at 359, 780 P.2d, at 724. That does not appear to comport with Blackstone’s requirement that the custom affect “inhabitants of particular districts.” See *Post v. Pearsall*, 22 Wend. 425, 440 (N. Y. Ct. Err. 1839); see also *Fitch v. Rawling*, 2 Bl. H. 393, 398-399, 126 Eng. Rep. 614, 616-617 (C. P. 1795) (“Customs must in their nature be confined to individuals of a particular description [and not to all inhabitants of England], and what is common to all mankind, can never be claimed as a custom”); *Sherborn v. Bostock*, Fitzg. 51, 94 Eng. Rep. 648, 649 (K. B. 1729) (“the custom . . . being general, and such a one as may extend to every subject, whether a citizen or a stranger, is void”).

As I have described, petitioners' takings claim rests upon the assertion both that the new-found "doctrine of custom" is a fiction, and that if it exists the facts do not support its application to their property. The validity of both those assertions turns upon the facts regarding public entry – but that is no obstacle to our review. What is an obstacle to our review, however, is the fact that neither in the present case (because it was decided on motion to dismiss) nor even in Thornton itself (because the doctrine of custom was first injected into the case at the Supreme Court level) was any record concerning the facts compiled. It is beyond our power – unless we take the extraordinary step of appointing a master to conduct factual inquiries – to evaluate petitioners' takings claim.

Petitioners' due process claim, however, is another matter. I believe that petitioners have sufficiently preserved their due process claim, and believe further that the claim is a serious one. Petitioners, who owned this property at the time Thornton was decided, were not parties to that litigation. Particularly in light of the utter absence of record support for the crucial factual determinations in that case, whether the Oregon Supreme Court chooses to treat it as having established a "custom" applicable to Cannon Beach alone, or one applicable to all "dry-sand" beach in the State, petitioners must be afforded an opportunity to make out their constitutional claim by demonstrating that the asserted custom is pretextual. If we were to find for petitioners on this point, we would not only set right a procedural injustice, but would hasten the clarification of Oregon substantive law that casts a shifting shadow upon federal constitutional rights the length of the State.

**STOP THE BEACH RENOURISHMENT v. FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION
2009 U.S. LEXIS 4458**

Justice Scalia announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, IV, and V, and an opinion with respect to Parts II and III, in which The Chief Justice, Justice Thomas, and Justice Alito join.

We consider a claim that the decision of a State's court of last resort took property without just compensation in violation of the Takings Clause of the Fifth Amendment, as applied against the States through the Fourteenth, see *Dolan v. City of Tigard*, 512 U. S. 374, 383-384 (1994).

I

A

Generally speaking, state law defines property interests, *Phillips v. Washington Legal Foundation*, 524 U. S. 156, 164 (1998), including property rights in navigable waters and the lands underneath them. In Florida, the State owns in trust for the public the land permanently submerged beneath navigable waters and the foreshore (the land between the low-tide line and the mean high-water line). Fla. Const., Art. X, §11. Thus, the mean high-water line (the average reach of high tide over the preceding 19 years) is the ordinary boundary between private beachfront, or littoral property, and state-owned land.

Littoral owners have, in addition to the rights of the public, certain "special rights" with regard to the water and the foreshore, rights which Florida considers to be property, generally akin to easements.¹⁷⁰ These include the right of access to the water, the right to use the water for certain purposes, the right to an unobstructed view of the water, and the right to receive accretions and relictions to the littoral property. This is generally in accord with well-established common law, although the precise property rights vary among jurisdictions.

At the center of this case is the right to accretions and relictions. Accretions are additions of alluvion (sand, sediment, or other deposits) to waterfront land; relictions are lands once covered by water that become dry when the water recedes. F. Maloney, S. Plager, & F. Baldwin, *Water Law and Administration: The Florida Experience* §126, pp. 385-386 (1968) (For simplicity's sake, we shall refer to accretions and relictions collectively as accretions, and the process whereby they occur as accretion.) In order for an addition to dry land to qualify as an

¹⁷⁰ Many cases and statutes use "riparian" to mean abutting any body of water. The Florida Supreme Court, however, has adopted a more precise usage whereby "riparian" means abutting a river or stream and "littoral" means abutting an ocean, sea, or lake. *Walton Cty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1105, n. 3 (2008). When speaking of the Florida law applicable to this case, we follow the Florida Supreme Court's terminology.

accretion, it must have occurred gradually and imperceptibly--that is, so slowly that one could not see the change occurring, though over time the difference became apparent. When, on the other hand, there is a "sudden or perceptible loss of or addition to land by the action of the water or a sudden change in the bed of a lake or the course of a stream," the change is called an avulsion.

In Florida, as at common law, the littoral owner automatically takes title to dry land added to his property by accretion; but formerly submerged land that has become dry land by avulsion continues to belong to the owner of the seabed (usually the State. 2 W. Blackstone, Commentaries on the Laws of England 261-262 (1766) (hereinafter Blackstone). Thus, regardless of whether an avulsive event exposes land previously submerged or submerges land previously exposed, the boundary between littoral property and sovereign land does not change; it remains (ordinarily) what was the mean high-water line before the event. It follows from this that, when a new strip of land has been added to the shore by avulsion, the littoral owner has no right to subsequent accretions. Those accretions no longer add to his property, since the property abutting the water belongs not to him but to the State.

B

In 1961, Florida's Legislature passed the Beach and Shore Preservation Act. The Act establishes procedures for "beach restoration and nourishment projects," designed to deposit sand on eroded beaches (restoration) and to maintain the deposited sand (nourishment). A local government may apply to the Department of Environmental Protection for the funds and the necessary permits to restore a beach. When the project involves placing fill on the State's submerged lands, authorization is required from the Board of Trustees of the Internal Improvement Trust Fund which holds title to those lands.

Once a beach restoration "is determined to be undertaken," the Board sets what is called "an erosion control line." It must be set by reference to the existing mean high-water line, though in theory it can be located seaward or landward of that. Much of the project work occurs seaward of the erosion-control line, as sand is dumped on what was once submerged land. The fixed erosion-control line replaces the fluctuating mean high-water line as the boundary between privately owned littoral property and state property. Once the erosion-control line is recorded, the common law ceases to increase upland property by accretion (or decrease it by erosion). Thus, when accretion to the shore moves the mean high-water line seaward, the property of beachfront landowners is not extended to that line (as the prior law provided), but remains bounded by the permanent erosion-control line. Those landowners "continue to be entitled," however, "to all common-law riparian rights" other than the right to accretions. If the beach erodes back landward of the erosion-control line over a substantial portion of the shoreline covered by the project, the Board may, on its own initiative, or must, if asked by the owners or lessees of a majority of the property affected, direct the agency responsible for maintaining the beach to return the beach to the condition contemplated by the project. If that is not done within

a year, the project is canceled and the erosion-control line is null and void. Finally, by regulation, if the use of submerged land would "unreasonably infringe on riparian rights," the project cannot proceed unless the local governments show that they own or have a property interest in the upland property adjacent to the project site.

C

In 2003, the city of Destin and Walton County applied for the necessary permits to restore 6.9 miles of beach within their jurisdictions that had been eroded by several hurricanes. The project envisioned depositing along that shore sand dredged from further out. It would add about 75 feet of dry sand seaward of the mean high-water line (to be denominated the erosion-control line). The Department issued a notice of intent to award the permits, and the Board approved the erosion-control line.

The petitioner here, Stop the Beach Renourishment, Inc., is a nonprofit corporation formed by people who own beachfront property bordering the project area (we shall refer to them as the Members). It brought an administrative challenge to the proposed project which was unsuccessful; the Department approved the permits. Petitioner then challenged that action in state court under the Florida Administrative Procedure Act, Fla. The District Court of Appeal for the First District concluded that, contrary to the Act's preservation of "all common-law riparian rights," the order had eliminated two of the Members' littoral rights: (1) the right to receive accretions to their property; and (2) the right to have the contact of their property with the water remain intact. *Save Our Beaches, Inc. v. Florida Dept. of Environmental Protection*. This, it believed, would be an unconstitutional taking, which would "unreasonably infringe on riparian rights," and therefore require the showing under Fla. Admin. Code Rule 18-21.004(3)(b) that the local governments owned or had a property interest in the upland property. It set aside the Department's final order approving the permits and remanded for that showing to be made. It also certified to the Florida Supreme Court the following question (as rephrased by the latter court):

"On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?" 998 So. 2d, at 1105

The Florida Supreme Court answered the certified question in the negative, and quashed the First District's remand. It faulted the Court of Appeal for not considering the doctrine of avulsion, which it concluded permitted the State to reclaim the restored beach on behalf of the public. It described the right to accretions as a future contingent interest, not a vested property right, and held that there is no littoral right to contact with the water independent of the littoral right of access, which the Act does not infringe. *Id.*, at 1112, 1119-1120. Petitioner sought rehearing on the ground that the Florida Supreme Court's decision itself effected a taking of the

Members' littoral rights contrary to the Fifth and Fourteenth Amendments to the Federal Constitution. The request for rehearing was denied. We granted certiorari, 557 U. S. ____ (2009).

II

Before coming to the parties' arguments in the present case, we discuss some general principles of our takings jurisprudence. The Takings Clause--"nor shall private property be taken for public use, without just compensation," U. S. Const., Amdt. 5--applies as fully to the taking of a landowner's riparian rights as it does to the taking of an estate in land. See *Yates v. Milwaukee*, 10 Wall. 497, 504 (1871). Moreover, though the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions that achieve the same thing. Thus, when the government uses its own property in such a way that it destroys private property, it has taken that property. See *United States v. Causby*, 328 U. S. 256, 261-262 (1946); *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 177-178 (1872). Similarly, our doctrine of regulatory takings "aims to identify regulatory actions that are functionally equivalent to the classic taking." *Lingle v. Chevron U.S.A. Inc.*, 544 U. S. 528, 539 (2005). Thus, it is a taking when a state regulation forces a property owner to submit to a permanent physical occupation, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 425-426 (1982), or deprives him of all economically beneficial use of his property, *Lucas v. South Carolina Coastal Council*, 505 U. S. 1003, 1019 (1992). Finally (and here we approach the situation before us), States effect a taking if they re-characterize as public property what was previously private property. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U. S. 155, 163-165 (1980).

The Takings Clause (unlike, for instance, the Ex Post Facto Clauses, see Art. I, §9, cl. 3; §10, cl. 1) is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor ("nor shall private property be taken" (emphasis added)). There is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation. Nor does common sense recommend such a principle. It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat. See *Stevens v. Cannon Beach*, 510 U. S. 1207, 1211-1212 (1994) (Scalia, J., dissenting from denial of certiorari).

Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary. *PruneYard Shopping Center v. Robins*, 447 U. S. 74 (1980), involved a decision of the California Supreme Court overruling one of its prior decisions which had held that the California Constitution's guarantees of freedom of speech and of the press, and of the right to petition the government, did not require the owner of private property to accord those rights on his premises. The appellants, owners of a shopping center, contended that their private property rights could not "be denied by invocation of a state constitutional provision or by judicial reconstruction of a State's laws of private

property," We held that there had been no taking, citing cases involving legislative and executive takings, and applying standard Takings Clause analysis. We treated the California Supreme Court's application of the constitutional provisions as a regulation of the use of private property, and evaluated whether that regulation violated the property owners' "right to exclude others," Our opinion addressed only the claimed taking by the constitutional provision. Its failure to speak separately to the claimed taking by "judicial reconstruction of a State's laws of private property" certainly does not suggest that a taking by judicial action cannot occur, and arguably suggests that the same analysis applicable to taking by constitutional provision would apply.

Webb's Fabulous Pharmacies, *supra*, is even closer in point. There the purchaser of an insolvent corporation had interpleaded the corporation's creditors, placing the purchase price in an interest-bearing account in the registry of the Circuit Court of Seminole County, to be distributed in satisfaction of claims approved by a receiver. The Florida Supreme Court construed an applicable statute to mean that the interest on the account belonged to the county, because the account was "considered 'public money,' " We held this to be a taking. We noted that "[t]he usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal," 449 U. S., at 162. "Neither the Florida Legislature by statute, nor the Florida courts by judicial decree," we said, "may accomplish the result the county seeks simply by re-characterizing the principal as 'public money.' "

In sum, the Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking. To be sure, the manner of state action may matter: Condemnation by eminent domain, for example, is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent. But the particular state actor is irrelevant. If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation. "[A] State, by ipse dixit, may not transform private property into public property without compensation." *Ibid*.

III

Respondents put forward a number of arguments which contradict, to a greater or lesser degree, the principle discussed above, that the existence of a taking does not depend upon the branch of government that effects it. First, in a case claiming a judicial taking they would add to our normal takings inquiry a requirement that the court's decision have no "fair and substantial basis." This is taken from our jurisprudence dealing with the question whether a state-court decision rests upon adequate and independent state grounds, placing it beyond our jurisdiction to review. To assure that there is no "evasion" of our authority to review federal questions, we insist that the nonfederal ground of decision have "fair support." *Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U. S. 537, 540 (1930). A test designed to determine whether there

has been an evasion is not obviously appropriate for determining whether there has been a taking of property. But if it is to be extended there it must mean (in the present context) that there is a "fair and substantial basis" for believing that petitioner's Members did not have a property right to future accretions which the Act would take away. This is no different, we think, from our requirement that petitioners' Members must prove the elimination of an established property right.

Next, respondents argue that federal courts lack the knowledge of state law required to decide whether a judicial decision that purports merely to clarify property rights has instead taken them. But federal courts must often decide what state property rights exist in nontakings contexts, see, e.g., *Board of Regents of State Colleges v. Roth*, 408 U. S. 564, 577-578 (1972) (Due Process Clause). And indeed they must decide it to resolve claims that legislative or executive action has effected a taking. For example, a regulation that deprives a property owner of all economically beneficial use of his property is not a taking if the restriction "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas*, 505 U. S., at 1029. A constitutional provision that forbids the uncompensated taking of property is quite simply unsusceptible of enforcement by federal courts unless they have the power to decide what property rights exist under state law.

Respondents also warn us against depriving common-law judging of needed flexibility. That argument has little appeal when directed against the enforcement of a constitutional guarantee adopted in an era when, as we courts had no power to "change" the common law. But in any case, courts have no peculiar need of flexibility. It is no more essential that judges be free to overrule prior cases that establish property entitlements than that state legislators be free to revise pre-existing statutes that confer property entitlements, or agency-heads pre-existing regulations that do so. And insofar as courts merely clarify and elaborate property entitlements that were previously unclear, they cannot be said to have taken an established property right.

Finally, the city and county argue that applying the Takings Clause to judicial decisions would force lower federal courts to review final state-court judgments. The finality principles that we regularly apply to takings claims, see *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U. S. 172, 186-194 (1985), would require the claimant to appeal a claimed taking by a lower court to the state supreme court, whence certiorari would come to this Court. If certiorari were denied, the claimant would no more be able to launch a lower-court federal suit against the taking effected by the state supreme-court opinion than he would be able to launch such a suit against a legislative or executive taking approved by the state supreme-court opinion; the matter would be *res judicata*. And where the claimant was not a party to the original suit, he would be able to challenge in federal court the taking effected by the state supreme-court opinion to the same extent that he would be able to challenge in federal court a legislative or executive taking previously approved by a state supreme-court opinion.

For its part, petitioner proposes an unpredictability test. Quoting Justice Stewart's concurrence in *Hughes v. Washington*, 389 U. S. 290, 296 (1967), petitioner argues that a judicial taking consists of a decision that " 'constitutes a sudden change in state law, unpredictable in terms of relevant precedents.' " The focus of petitioner's test is misdirected. What counts is not whether there is precedent for the allegedly confiscatory decision, but whether the property right allegedly taken was established. A "predictability of change" test would cover both too much and too little. Too much, because a judicial property decision need not be predictable, so long as it does not declare that what had been private property under established law no longer is. A decision that clarifies property entitlements (or the lack thereof) that were previously unclear might be difficult to predict, but it does not eliminate established property rights. And the predictability test covers too little, because a judicial elimination of established private-property rights that is foreshadowed by dicta or even by holdings years in advance is nonetheless a taking. If, for example, a state court held in one case, to which the complaining property owner was not a party, that it had the power to limit the acreage of privately owned real estate to 100 acres, and then, in a second case, applied that principle to declare the complainant's 101st acre to be public property, the State would have taken an acre from the complainant even though the decision was predictable.

IV

Petitioner argues that the Florida Supreme Court took two of the property rights of the Members by declaring that those rights did not exist: the right to accretions, and the right to have littoral property touch the water (which petitioner distinguishes from the mere right of access to the water). Under petitioner's theory, because no prior Florida decision had said that the State's filling of submerged tidal lands could have the effect of depriving a littoral owner of contact with the water and denying him future accretions, the Florida Supreme Court's judgment in the present case abolished those two easements to which littoral property owners had been entitled. This puts the burden on the wrong party. There is no taking unless petitioner can show that, before the Florida Supreme Court's decision, littoral-property owners had rights to future accretions and contact with the water superior to the State's right to fill in its submerged land. Though some may think the question close, in our view the showing cannot be made.

Two core principles of Florida property law intersect in this case. First, the State as owner of the submerged land adjacent to littoral property has the right to fill that land, so long as it does not interfere with the rights of the public and the rights of littoral landowners. Second, as we described if an avulsion exposes land seaward of littoral property that had previously been submerged, that land belongs to the State even if it interrupts the littoral owner's contact with the water. The issue here is whether there is an exception to this rule when the State is the cause of the avulsion. Prior law suggests there is not. In *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927), the Florida Supreme Court held that when the State drained water from a lakebed belonging to the State, causing land that was formerly below the mean high-water line to become dry land, that land continued to belong to the State. *Id.*, at 574, 112 So., at 287; see also *Bryant*,

supra, at 838-839 (analogizing the situation in *Martin* to an avulsion). " 'The riparian rights doctrine of accretion and reliction,' " the Florida Supreme Court later explained, " 'does not apply to such lands.' " *Bryant*, supra, at 839 (quoting *Martin*, supra, at 578, 112 So., at 288 (Brown, J., concurring)). This is not surprising, as there can be no accretions to land that no longer abuts the water.

Thus, Florida law as it stood before the decision below allowed the State to fill in its own seabed, and the resulting sudden exposure of previously submerged land was treated like an avulsion for purposes of ownership. The right to accretions was therefore subordinate to the State's right to fill. *Thiesen v. Gulf, Florida & Alabama R. Co.* suggests the same result. That case involved a claim by a riparian landowner that a railroad's state-authorized filling of submerged land and construction of tracks upon it interfered with the riparian landowners' rights to access and to wharf out to a shipping channel. The Florida Supreme Court determined that the claimed right to wharf out did not exist in Florida, and that therefore only the right of access was compensable. 75 Fla., at 58-65, 78 So., at 501-503. Significantly, although the court recognized that the riparian-property owners had rights to accretion, see *id.*, at 64-65, 78 So., at 502-503, the only rights it even suggested would be infringed by the railroad were the right of access (which the plaintiff had claimed) and the rights of view and use of the water (which it seems the plaintiff had not claimed), see *id.*, at 58-59, 78, 78 So., at 501, 507.

The Florida Supreme Court decision before us is consistent with these background principles of state property law. Cf. *Lucas*, 505 U. S., at 1028-1029. It did not abolish the Members' right to future accretions, but merely held that the right was not implicated by the beach-restoration project, because the doctrine of avulsion applied. See 998 So. 2d, at 1117, 1120-1121. The Florida Supreme Court's opinion describes beach restoration as the reclamation by the State of the public's land, just as *Martin* had described the lake drainage in that case. Although the opinion does not cite *Martin* and is not always clear on this point, it suffices that its characterization of the littoral right to accretion is consistent with *Martin* and the other relevant principles of Florida law we have discussed.

What we have said shows that the rule of *Sand Key*, which petitioner repeatedly invokes, is inapposite. There the Florida Supreme Court held that an artificial accretion does not change the right of a littoral-property owner to claim the accreted land as his own (as long as the owner did not cause the accretion himself). 512 So. 2d, at 937-938. The reason *Martin* did not apply, *Sand Key* explained, is that the drainage that had occurred in *Martin* did not lower the water level by " 'imperceptible degrees,' " and so did not qualify as an accretion. 512 So. 2d, at 940-941.

The result under Florida law may seem counter-intuitive. After all, the Members' property has been deprived of its character (and value) as oceanfront property by the State's artificial creation of an avulsion. Perhaps state-created avulsions ought to be treated differently from other avulsions insofar as the property right to accretion is concerned. But nothing in prior

Florida law makes such a distinction, and Martin suggests, if it does not indeed hold, the contrary. Even if there might be different interpretations of Martin and other Florida property-law cases that would prevent this arguably odd result, we are not free to adopt them. The Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established. We cannot say that the Florida Supreme Court's decision eliminated a right of accretion established under Florida law.

Petitioner also contends that the State took the Members' littoral right to have their property continually maintain contact with the water. To be clear, petitioner does not allege that the State relocated the property line, as would have happened if the erosion-control line were landward of the old mean high-water line (instead of identical to it). Petitioner argues instead that the Members have a separate right for the boundary of their property to be always the mean high-water line. Petitioner points to dicta in *Sand Key* that refers to "the right to have the property's contact with the water remain intact," 512 So. 2d, at 936. Even there, the right was included in the definition of the right to access, *ibid.*, which is consistent with the Florida Supreme Court's later description that "there is no independent right of contact with the water" but it "exists to preserve the upland owner's core littoral right of access to the water," 998 So. 2d, at 1119. Petitioner's expansive interpretation of the dictum in *Sand Key* would cause it to contradict the clear Florida law governing avulsion. One cannot say that the Florida Supreme Court contravened established property law by rejecting it.

V

Because the Florida Supreme Court's decision did not contravene the established property rights of petitioner's Members, Florida has not violated the Fifth and Fourteenth Amendments. The judgment of the Florida Supreme Court is therefore affirmed.

It is so ordered.

Justice Stevens took no part in the decision of this case.

Justice Kennedy, with whom Justice Sotomayor joins, concurring in part and concurring in the judgment.

The Court's analysis of the principles that control ownership of the land in question, and of the rights of petitioner's members as adjacent owners, is correct in my view, leading to my joining Parts I, IV, and V of the Court's opinion. As Justice Breyer observes, however, this case does not require the Court to determine whether, or when, a judicial decision determining the rights of property owners can violate the Takings Clause of the Fifth Amendment of the United States Constitution. This separate opinion notes certain difficulties that should be considered before accepting the theory that a judicial decision that eliminates an "established property right," *ante*, at 21, constitutes a violation of the Takings Clause.

The Takings Clause is an essential part of the constitutional structure, for it protects private property from expropriation without just compensation; and the right to own and hold property is necessary to the exercise and preservation of freedom. The right to retain property without the fact or even the threat of that sort of expropriation is, of course, applicable to the States under the Due Process Clause of the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 239 (1897).

The right of the property owner is subject, however, to the rule that the government does have power to take property for a public use, provided that it pays just compensation. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U. S. 304, 314-315 (1987). This is a vast governmental power. And typically, legislative bodies grant substantial discretion to executive officers to decide what property can be taken for authorized projects and uses. As a result, if an authorized executive agency or official decides that Blackacre is the right place for a fire station or Greenacre is the best spot for a freeway interchange, then the weight and authority of the State are used to take the property, even against the wishes of the owner, who must be satisfied with just compensation.

In the exercise of their duty to protect the fisc, both the legislative and executive branches monitor, or should monitor, the exercise of this substantial power. Those branches are accountable in their political capacity for the proper discharge of this obligation.

This is just one aspect of the exercise of the power to select what property to condemn and the responsibility to ensure that the taking makes financial sense from the State's point of view. And, as a matter of custom and practice, these are matters for the political branches--the legislature and the executive--not the courts. See *First English*, *supra*, at 321 ("[T]he decision to exercise the power of eminent domain is a legislative function").

If a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law. The Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power. And this Court has long recognized that property regulations can be invalidated under the Due Process Clause. See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U. S. 528, 542 (2005); *Goldblatt v. Hempstead*, 369 U. S. 590, 591, 592-593 (1962); *Nectow v. Cambridge*, 277 U. S. 183, 188 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 395 (1926); see also *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 413 (1922) (there must be limits on government's ability to diminish property values by regulation "or the contract and due process clauses are gone"). It is thus natural to read the Due Process Clause as limiting the power of courts to eliminate or change established property rights.

The Takings Clause also protects property rights, and it "operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge." *Eastern*

Enterprises v. Apfel, 524 U. S. 498, 545 (1998) (Kennedy, J., concurring in judgment and dissenting in part). Unlike the Due Process Clause, therefore, the Takings Clause implicitly recognizes a governmental power while placing limits upon that power. Thus, if the Court were to hold that a judicial taking exists, it would presuppose that a judicial decision eliminating established property rights is "otherwise constitutional" so long as the State compensates the aggrieved property owners. *Ibid.* There is no clear authority for this proposition.

When courts act without direction from the executive or legislature, they may not have the power to eliminate established property rights by judicial decision. "Given that the constitutionality" of a judicial decision altering property rights "appears to turn on the legitimacy" of whether the court's judgment eliminates or changes established property rights "rather than on the availability of compensation, ... the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause." *Ibid.* Courts, unlike the executive or legislature, are not designed to make policy decisions about "the need for, and likely effectiveness of, regulatory actions." Lingle, *supra*, at 545. State courts generally operate under a common-law tradition that allows for incremental modifications to property law, but "this tradition cannot justify a carte blanche judicial authority to change property definitions wholly free of constitutional limitations." Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 *Utah L. Rev.* 379, 435.

The Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is "arbitrary or irrational" under the Due Process Clause. Lingle, 544 U. S., at 542; see *id.*, at 548-549 (Kennedy, J., concurring); see also *Perry v. Sindermann*, 408 U. S. 593, 601 (1972) (" '[P]roperty' " interests protected by the Due Process Clauses are those "that are secured by 'existing rules or understandings' " (quoting *Board of Regents of State Colleges v. Roth*, 408 U. S. 564, 577 (1972))). Thus, without a judicial takings doctrine, the Due Process Clause would likely prevent a State from doing "by judicial decree what the Takings Clause forbids it to do by legislative fiat." The objection that a due process claim might involve close questions concerning whether a judicial decree extends beyond what owners might have expected is not a sound argument; for the same close questions would arise with respect to whether a judicial decision is a taking. See *Apfel*, *supra*, at 541 (opinion of Kennedy, J.) ("Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law"); *Penn Central Transp. Co. v. New York City*, 438 U. S. 104, 123 (1978) ("The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty").

To announce that courts too can effect a taking when they decide cases involving property rights, would raise certain difficult questions. Since this case does not require those questions to be addressed, in my respectful view, the Court should not reach beyond the necessities of the case to announce a sweeping rule that court decisions can be takings, as that phrase is used in the Takings Clause. The evident reason for recognizing a judicial takings

doctrine would be to constrain the power of the judicial branch. Of course, the judiciary must respect private ownership. But were this Court to say that judicial decisions become takings when they overreach, this might give more power to courts, not less.

Consider the instance of litigation between two property owners to determine which one bears the liability and costs when a tree that stands on one property extends its roots in a way that damages adjacent property. See, e.g., *Fancher v. Fagella*, 274 Va. 549, 650 S. E. 2d 519 (2007). If a court deems that, in light of increasing urbanization, the former rule for allocation of these costs should be changed, thus shifting the rights of the owners, it may well increase the value of one property and decrease the value of the other. This might be the type of incremental modification under state common law that does not violate due process, as owners may reasonably expect or anticipate courts to make certain changes in property law. The usual due process constraint is that courts cannot abandon settled principles. See, e.g., *Rogers v. Tennessee*, 532 U. S. 451, 457 (2001) (citing *Bouie v. City of Columbia*, 378 U. S. 347, 354 (1964)); *Apfel*, 524 U. S., at 548-549 (opinion of Kennedy, J.).

But if the state court were deemed to be exercising the power to take property, that constraint would be removed. Because the State would be bound to pay owners for takings caused by a judicial decision, it is conceivable that some judges might decide that enacting a sweeping new rule to adjust the rights of property owners in the context of changing social needs is a good idea. Knowing that the resulting ruling would be a taking, the courts could go ahead with their project, free from constraints that would otherwise confine their power. The resulting judgment as between the property owners likely could not be set aside by some later enactment. And if the litigation were a class action to decide, for instance, whether there are public rights of access that diminish the rights of private ownership, a State might find itself obligated to pay a substantial judgment for the judicial ruling. Even if the legislature were to subsequently rescind the judicial decision by statute, the State would still have to pay just compensation for the temporary taking that occurred from the time of the judicial decision to the time of the statutory fix. See *First English*, 482 U. S., at 321.

The idea, then, that a judicial takings doctrine would constrain judges might just well have the opposite effect. It would give judges new power and new assurance that changes in property rights that are beneficial, or thought to be so, are fair and proper because just compensation will be paid. The judiciary historically has not had the right or responsibility to say what property should or should not be taken.

Indeed, it is unclear whether the Takings Clause was understood, as a historical matter, to apply to judicial decisions. The Framers most likely viewed this Clause as applying only to physical appropriation pursuant to the power of eminent domain. See *Lucas v. South Carolina Coastal Council*, 505 U. S. 1003, 1028, n. 15 (1992). And it appears these physical appropriations were traditionally made by legislatures. See 3 J. Story, *Commentaries on the Constitution of the United States* §1784, p. 661 (1833). Courts, on the other hand, lacked the

power of eminent domain. See 1 W. Blackstone, Commentaries 135 (W. Lewis ed. 1897). The Court's Takings Clause jurisprudence has expanded beyond the Framers' understanding, as it now applies to certain regulations that are not physical appropriations. See *Lucas*, supra, at 1014 (citing *Mahon*, 260 U. S. 393). But the Court should consider with care the decision to extend the Takings Clause in a manner that might be inconsistent with historical practice.

There are two additional practical considerations that the Court would need to address before recognizing judicial takings. First, it may be unclear in certain situations how a party should properly raise a judicial takings claim. "[I]t is important to separate out two judicial actions--the decision to change current property rules in a way that would constitute a taking, and the decision to require compensation." Thompson, *Judicial Takings*, 76 Va. L. Rev. 1449, 1515 (1990). In some contexts, these issues could arise separately. For instance, assume that a state-court opinion explicitly holds that it is changing state property law, or that it asserts that is not changing the law but there is no "fair or substantial basis" for this statement. *Broad River*, 281 U. S., at 540. (Most of these cases may arise in the latter posture, like inverse condemnation claims where the State says it is not taking property and pays no compensation.) Call this Case A. The only issue in Case A was determining the substance of state property law. It is doubtful that parties would raise a judicial takings claim on appeal, or in a petition for a writ of certiorari, in Case A, as the issue would not have been litigated below. Rather, the party may file a separate lawsuit--Case B--arguing that a taking occurred in light of the change in property law made by Case A. After all, until the state court in Case A changes the law, the party will not know if his or her property rights will have been eliminated. So *res judicata* probably would not bar the party from litigating the takings issue in Case B.

Second, it is unclear what remedy a reviewing court could enter after finding a judicial taking. It appears under our precedents that a party who suffers a taking is only entitled to damages, not equitable relief: The Court has said that "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use ... when a suit for compensation can be brought against the sovereign subsequent to the taking," *Ruckelshaus v. Monsanto Co.*, 467 U. S. 986, 1016 (1984), and the Court subsequently held that the Takings Clause requires the availability of a suit for compensation against the States, *First English*, supra, at 321-322. It makes perfect sense that the remedy for a Takings Clause violation is only damages, as the Clause "does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U. S. 172, 194 (1985).

It is thus questionable whether reviewing courts could invalidate judicial decisions deemed to be judicial takings; they may only be able to order just compensation. In the posture discussed above where Case A changes the law and Case B addresses whether that change is a taking, it is not clear how the Court, in Case B, could invalidate the holding of Case A. If a single case were to properly address both a state court's change in the law and whether the change was a taking, the Court might be able to give the state court a choice on how to proceed if there were a

judicial taking. The Court might be able to remand and let the state court determine whether it wants to insist on changing its property law and paying just compensation or to rescind its holding that changed the law. Cf. *First English*, 482 U. S., at 321 ("Once a court determines that a taking has occurred, the government retains the whole range of options already available-- amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain"). But that decision would rest with the state court, not this Court; so the state court could still force the State to pay just compensation. And even if the state court decided to rescind its decision that changed the law, a temporary taking would have occurred in the interim. See *ibid.*

These difficult issues are some of the reasons why the Court should not reach beyond the necessities of the case to recognize a judicial takings doctrine. It is not wise, from an institutional standpoint, to reach out and decide questions that have not been discussed at much length by courts and commentators. This Court's dicta in *Williamson County*, , regarding when regulatory takings claims become ripe, explains why federal courts have not been able to provide much analysis on the issue of judicial takings. See *San Remo Hotel, L. P. v. City and County of San Francisco*, 545 U. S. 323, 351 (2005) (Rehnquist, C. J., concurring in judgment) ("*Williamson County's* state-litigation rule has created some real anomalies, justifying our revisiting the issue"). Until *Williamson County* is reconsidered, litigants will have to press most of their judicial takings claims before state courts, which are "presumptively competent ... to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493 U. S. 455, 458 (1990). If and when future cases show that the usual principles, including constitutional principles that constrain the judiciary like due process, are somehow inadequate to protect property owners, then the question whether a judicial decision can effect a taking would be properly presented. In the meantime, it seems appropriate to recognize that the substantial power to decide whose property to take and when to take it should be conceived of as a power vested in the political branches and subject to political control.

Justice Breyer, with whom Justice Ginsburg joins, concurring in part and concurring in the judgment.

I agree that no unconstitutional taking of property occurred in this case, and I therefore join Parts I, IV, and V of today's opinion. I cannot join Parts II and III, however, for in those Parts the plurality unnecessarily addresses questions of constitutional law that are better left for another day.

In Part II of its opinion, the plurality concludes that courts, including federal courts, may review the private property law decisions of state courts to determine whether the decisions unconstitutionally take "private property" for "public use without just compensation." U. S. Const., Amdt. 5. And in doing so it finds "irrelevant" that the "particular state actor" that takes private property (or unconstitutionally redefines state property law) is the judicial branch, rather

than the executive or legislative branch. cf. *Hughes v. Washington*, 389 U. S. 290, 296-298 (1967) (Stewart, J., concurring).

In Part III, the plurality determines that it is "not obviously appropriate" to apply this Court's "fair and substantial basis" test when evaluating whether a state-court property decision enacts an unconstitutional taking. The plurality further concludes that a state-court decision violates the Takings Clause not when the decision is "unpredictab[le]" on the basis of prior law, but rather when the decision takes private property rights that are "established." And finally, it concludes that all those affected by a state-court property law decision can raise a takings claim in federal court, but for the losing party in the initial state-court proceeding, who can only raise her claim (possibly for the first time) in a petition for a writ of certiorari here.

I do not claim that all of these conclusions are unsound. I do not know. But I do know that, if we were to express our views on these questions, we would invite a host of federal takings claims without the mature consideration of potential procedural or substantive legal principles that might limit federal interference in matters that are primarily the subject of state law. Property owners litigate many thousands of cases involving state property law in state courts each year. Each state-court property decision may further affect numerous nonparty property owners as well. Losing parties in many state-court cases may well believe that erroneous judicial decisions have deprived them of property rights they previously held and may consequently bring federal takings claims. And a glance at Part IV makes clear that such cases can involve state property law issues of considerable complexity. Hence, the approach the plurality would take today threatens to open the federal court doors to constitutional review of many, perhaps large numbers of, state-law cases in an area of law familiar to state, but not federal, judges. And the failure of that approach to set forth procedural limitations or canons of deference would create the distinct possibility that federal judges would play a major role in the shaping of a matter of significant state interest— state property law.

In the past, Members of this Court have warned us that, when faced with difficult constitutional questions, we should "confine ourselves to deciding only what is necessary to the disposition of the immediate case." *Whitehouse v. Illinois Central R. Co.*, 349 U. S. 366, 373 (1955); see also *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U. S. 439, 445 (1988) I heed this advice here. There is no need now to decide more than what the Court decides in Parts IV and V, namely, that the Florida Supreme Court's decision in this case did not amount to a "judicial taking."

Session 32. Regulatory Taking Miscellany

CIENEGA GARDENS v. UNITED STATES 331 F.3d 1319 (Fed. Cir. 2003)

Before NEWMAN, Circuit Judge, ARCHER, Senior Circuit Judge, and MICHEL, Circuit Judge.

MICHEL, Circuit Judge.

In this Fifth Amendment regulatory takings case, Plaintiffs Cienega Gardens ("the Owners") appeal the United States Court of Federal Claims' grant of summary judgment to the government. Specifically, the Owners contend that when Congress enacted the Emergency Low Income Housing Preservation Act of 1987 (hereinafter "ELIHPA"), and the Low-Income Housing Preservation and Resident Homeownership Act of 1990 (hereinafter "LIHPRHA"), it abrogated the Owners' contractual rights to prepay their forty-year mortgage loans after twenty years. In doing so, the Owners argue, the government prevented them from regaining possession and control of their real estate because only extinguishment of their mortgages released the Owners from the Department of Housing and Urban Development ("HUD") low-rent housing programs. This harmed the Owners because, under the programs, rental rates were held below market rates. On exiting the programs, however, the Owners could charge market rentals or sell their properties.

We conclude that on this record the trial court erred in holding: (1) that developers who voluntarily participated in the HUD housing programs had no vested property rights despite their two agreements -- one with the lenders and one with HUD -- and despite their ownership in fee simple of the land; and (2) that if any taking occurred, it could not, as a matter of law, be a compensable taking. Under constitutional, real estate, and contract law, we conclude a property right vested in the Owners that was temporarily taken. We also conclude that there is no reason this taking is not, as a matter of law, compensable under the Takings Clause of the Fifth Amendment to the United States Constitution. We further hold that (the Owners) are entitled to "just compensation." We therefore reverse the trial court's grant of summary judgment of no taking as to the plaintiffs.

BACKGROUND

The Owners are real estate developers who received loans from private lenders to construct housing projects that for a period of years would be under the housing programs established by sections 221(d)(3) and 236 of the National Housing Act (generally codified at 12 U.S.C. §§701 et seq.). HUD provided participants' mortgage insurance, which facilitated low-interest, forty-year mortgages. In return, each participant entered into a "Regulatory Agreement" with HUD.

Each Regulatory Agreement placed a variety of restrictions on the Owners, including restrictions on the income levels of tenants, allowable rental rates, and the maximum rate of return on initial equity that the Owners could receive from their housing projects. The Regulatory Agreement also prohibited sale or further mortgage of the property without HUD approval and required each participant to submit to extensive HUD audits, inspections, and management reviews. The Regulatory Agreements were to remain in effect only "so long as the contract of mortgage insurance continues in effect." The Regulatory Agreements also referenced the relevant provisions of the National Housing Act.

HUD's regulations then in effect included recognition of the Owners' rights to prepay their forty-year mortgages after twenty years and the mortgage documents themselves were reviewed by HUD and drafted to conform to existing HUD regulations. The mortgage trust notes provided that the Owners could not prepay their mortgages (without HUD approval) during the first twenty years of the mortgage, but could do so "without such approval" after twenty years. Though not a party to the mortgage contracts, HUD reviewed, endorsed, and approved them and their terms mirrored HUD regulations. Thus, under the original regulatory scheme, the Regulatory Agreements and their attendant restrictions were to remain in effect for at least twenty years, at which point the Owners would have the option of prepaying the mortgages and thereby dissolve the mortgage insurance and hence the restrictive Regulatory Agreements.

The relevant HUD regulations also provided that they could be amended but not to the prejudice of the lenders. The mortgage documents themselves, however, contained no explicit reference to the amendment provision. The Regulatory Agreements each mention either section 221(d)(3) or section 236 and the corresponding regulations in their preambles but do not otherwise cite any further provision of the statutes or regulations.

As the Owners' participation in the housing programs approached the twenty-year mark, it became clear to Congress that large numbers of owners would prepay their mortgages and remove their properties from the federally-assisted low-income housing pool. Loss of this federally-assisted, low-income housing "would inflict unacceptable harm on current tenants and would precipitate a grave national crisis in the supply of low income housing that was neither anticipated nor intended when contracts for these units were entered into." ELIHPA §202(a)(4). To avert the problem, Congress enacted ELIHPA in 1987 as a temporary measure. Under ELIHPA, even after twenty years, all housing program participants had to obtain HUD approval in order to prepay their mortgages despite their mortgage contracts containing a provision guaranteeing prepayment "without [HUD] approval." Moreover, HUD could grant approval only if prepayment would not "materially increase economic hardship for current tenants" by increasing monthly rental payments by more than 10 percent or "involuntarily displace current tenants (except for good cause) where comparable and affordable housing is not readily available." *Id.* §225.

LIHPRHA was enacted three years later to replace ELIHPA. It extended indefinitely the prohibition on prepayment without HUD approval. Thus, these statutes annulled the provision of the mortgage trust notes that prepayment was allowed after twenty years "without [HUD] approval." The restrictions imposed by ELIHPA and LIHPRHA were essentially lifted by the Housing Opportunity Program Extension (HOPE) Act of 1996. Thus, this case involves the economic effects of ELIHPA and LIHPRHA during a period of up to eight years.

The immediate effect of ELIHPA and LIHPRHA was to nullify the Owners' option to prepay their mortgages. This lawsuit arose from the Owners' resulting inability to exit the housing programs after twenty years and thereby regain normal rights of ownership.

After the second remand from this court (holding that the regulatory takings claims of the plaintiffs' cases were ripe for adjudication), the Court of Federal Claims judge ordered summary judgment for the government without further analysis. (No summary judgment motion was filed by either party, but rather, the court acted *sua sponte*.) This appeal reviews that grant of summary judgment.

DISCUSSION

There are two principal questions in this appeal. First: did a property interest vest in the Owners, which was then taken by the enactment of ELIHPA and LIHPRHA? For any Fifth Amendment takings claim, the complaining party must show it owned a distinct property interest at the time it was allegedly taken, even for regulatory takings (holding that "the existence of a valid property interest is necessary in all takings claims"). Second: if plaintiffs owned such a vested property interest, did the regulatory restrictions in the new statutes go "too far" in constraining them, thereby entitling the plaintiffs to compensation? For this inquiry, the complaining party must offer evidence to show that the government has improperly shifted a public burden to a small class of private parties.

The Court of Federal Claims answered both of these principal questions in the negative. We hold that the Court of Federal Claims erred in granting summary judgment in this case because the conclusion that housing program participants did not suffer a compensable taking was incorrect.

I

Addressing the first principal question, we hold that the Owners did have vested property interests at the time of the passage of ELIHPA and LIHPRHA. Specifically, in abrogating the Owners' contractual prepayment rights, the statutes intentionally defeated the Owners' real property rights to sole and exclusive possession after twenty years and to convey or encumber their properties after twenty years. The Owners thus had property interests and these were based on the interaction of both real property rights and contractual rights. Also, the Owners' property

interests vested long before the statutes were enacted, for they arose immediately upon execution of the mortgage loan agreement and the purchase of the land, both occurring in the 1970's.

A

1. Considering the real property interests first, as titleholders to land on which the apartment buildings were erected, the plaintiffs had fee simple ownership.¹⁷¹ An owner of land in fee simple generally has inherent rights to rent his or her land at any price he or she can command. Precedent shows that the ability to exercise every one of the "sticks" (rights) in the "bundle" of fee simple rights at the time of a taking is not a prerequisite to establishing a valid property interest under the Fifth Amendment. Present possessory rights are not necessary. It is also clear that fee owners who transfer a leasehold interest are still entitled to compensation. *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 303, 47 L. Ed. 2d 1, 96 S. Ct. 910 (1976) (explaining that a lessor is entitled to compensation for the taking of leased land regardless of whether the lessor has possession of the land at the time it is taken -- the measure of damages simply does not include the value of the leasehold interest if the lessor does not have possession). In fact, "every sort of [real property] interest the citizen may possess" counts as a property interest under the Fifth Amendment. *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378, 89 L. Ed. 311, 65 S. Ct. 357 (1945).

In this case, the Owners contractually deferred enjoyment of a limited number of rights in their land. They relinquished only the right to exclude certain tenants, and only for a fixed period of time -- twenty years. They never conveyed to HUD any interest in their land; they merely contracted with the government not to assert rights that they otherwise could. The owners are not somehow deprived of their Fifth Amendment rights merely because they temporarily relinquished some of their rights of fee simple ownership. Their retained rights put them well within the categories shown by precedent to invoke the Takings Clause of the Fifth Amendment.

2. Turning next to the plaintiffs' contractual rights, there is also ample precedent for acknowledging a property interest in contract rights under the Fifth Amendment. Here the Owners had unequivocal contractual rights after twenty years to prepay their mortgages; thus they had a property interest in those rights -- both in the subject matter of the contract (the real property rights) and in the contract itself.

Thus, the mortgage contracts were the basis of the time constraints in the Regulatory Agreements that were essentially land use contracts. This interrelation was obvious from the start of the Owners' participation in the HUD programs. When Congress enacted ELIHPA and LIHPRHA, it intentionally deferred the Owners' ability to exit the housing programs and make more profitable use of their land from twenty years to forty years (or whenever in between those

¹⁷¹ Their ownership was not affected by their mortgages. "A mortgage creates only a security interest in real estate and confers no right to possession of that real estate on the mortgagee." Restatement 3d of Property: Mortgages §4.1(a) (1997).

dates HUD consented). The significance of the contract right here lies not in the right to prepay as such, but the exercise of the contract right as a prerequisite of the Owners' right to exit the program.

3. Having concluded that the Owners did have a property interest in the contractual right to prepay and exit the housing programs, we next focus on the question whether this property interest vested before enactment of the statutes. The plaintiffs' real property rights automatically vested upon their taking title to the property. Their contract rights vested when the contracts were signed, because there was no explicit contract provision to the contrary. As already explained, the plaintiffs in this case contracted to waive certain ownership rights and to be entitled to end the waivers after twenty years. There was no condition, precedent or subsequent, in their contracts. Their contracts, and thereby their consequent property interests were, thus, unquestionably vested by the time Congress enacted ELIHPA and LIHPRHA more than a decade later. Contrary to the view of the government, that the contract rights were not assertable until twenty years passed did not mean they were not vested.

B

On the question whether the Owners had vested property interests, the government's position is that "enforceable rights sufficient to support a taking claim against the United States cannot arise in an area voluntarily entered into and one which, from the start, is subject to pervasive Government control, such as the Section 221(d)(3) and 236 insured housing programs." Because the prepayment right at issue in this case was created by the Owners' private contracts with private lenders, the position urged by the government means that all such contract rights are purely illusory if they concern activity "subject to pervasive Government control." To understand what is wrong with this argument it is necessary to understand the true scope of the effect implied by this viewpoint. The government, essentially, asks us to hold that nothing in the Owners' private mortgage agreements has any force and effect. The government, thus, advocates a legal regime that eviscerates century-old understandings of the stable and enduring nature of contract and real property rights. This interpretation of the implications of a regulatory program on the existence of property interests is unwarranted. The government can point to nothing in either the mortgage contracts or the Regulatory Agreements that supports the position that contract and real property rights were premature, suspended or diluted almost to the point of meaninglessness. Instead, the government boldly asserts that this court should read into private contracts limitations that are not even hinted at in their text. The government's position is unconvincing. The government's contention is, in effect, that Congress could retroactively alter the Owners' mortgage contracts in any way it chose without any recourse for the Owners. That cannot be, and is not, the law.

C

Yet the trial court accepted this very same argument. The court further explained that "plaintiffs did not have compensable property rights for purposes of the Fifth Amendment because regulations authorizing the program reserved to the Department of Housing and Urban Development the right to amend those regulations at any time."

The trial court's assertion that owners could not acquire vested rights is unsound. This case is comparable to *Winstar*, 518 U.S. 839, 135 L. Ed. 2d 964, 116 S. Ct. 2432. Though *Winstar* was a breach of contract case and not a takings case, it showed that the abrogation by legislation of clear, unqualified contract rights requires a remedy, even in a highly regulated industry, there banking, because the contracts embodied the commitments of the contracting parties. The Owners' contractual prepayment rights are such clear, unqualified rights. The purpose of contracts is precisely to fix obligations and entitlements so that they will not be affected by subsequent background changes. Nor were the Owners' rights subject to divestiture simply because of their voluntary participation in a housing program under government control. To hold otherwise would mean that Congress could have changed the mortgage contracts in any way to affect any of the rights established by the contracts -- including changing the contracts to extend their term from forty to, for example, eighty years -- and the Owners would be without a remedy. Again, this is not and cannot be the law.

II

As we hold that each of the Owners did have a vested property interest that was affected by the enactment of ELIHPA and LIHPRHA, we must next decide whether the enactments constituted a compensable taking. A regulatory action only becomes a compensable taking under the Fifth Amendment if the government interference has gone "too far." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."). Under the Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation, the designation that a government action has gone "too far" refers to circumstances where the government has forced "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49

Whether a given regulation goes "too far" for purposes of the Fifth Amendment is determined by an "ad hoc, factual inquiry." *Penn Central*, 438 U.S. at 124. Under *Penn Central*, courts use a three-factor analysis to assess claimed regulatory takings: (1) character of the governmental action, (2) economic impact of the regulation on the claimant, and (3) extent to which the regulation interfered with distinct investment-backed expectations.

The trial court held that the taking of owners' property interests failed, by definition, to be compensable. This was error. We hold that Congress' enactment of ELIHPA and LIHPRHA did

go "too far" with respect to the Model Plaintiffs and therefore the Model Plaintiffs are entitled to compensation.

We are able to make this decision for the Plaintiffs outright, instead of simply remanding the case for further analysis for several reasons: (1) the extensive fact-finding already completed for these plaintiffs; (2) our ability to construe the relevant contracts, regulations, and legislation as a matter of law because there are no disputed facts pertaining to these sources, only disputed implications; (3) the lack of arguments by the government controverting the plaintiffs' specific arguments with respect to each of the three Penn Central factors.

A. Character of Governmental Action

The plaintiffs identify two rights that ELIHPA and LIHPRHA curtailed, namely, their right to exclude low-rent tenants and their right to sell or lease their properties to parties not included in the programs. With respect to the first right, they argue that by requiring the Owners to continue to rent their properties at below-market rents to government-approved low-income tenants beyond twenty years, ELIHPA and LIHPRHA eviscerated the Owners' right to exclude, and this is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

The plaintiffs also argue that ELIHPA and LIHPRHA had the character of a taking because the statutes authorize the continuing physical occupation of particular developers' properties to address a societal shortage of low-income housing and that this is intrusive beyond the level of traditional governmental limits on land titles. The plaintiffs analogize the government in this case to a holdover tenant -- HUD effectively rented apartment buildings from the Owners beyond the term of the agreed leasehold and then sublet apartments to low-income tenants. We agree that the enactment of ELIHPA and LIHPRHA could fairly be characterized as akin to this type of physical invasion. See, e.g., *United States v. Gen. Motors Corp.*, 323 U.S. at 380 (holding that a tenant was entitled to compensation for being required to give up tenancy of property even beyond the fair market rental value because "the right to occupy, for a day, a month, a year, or a series of years, in and of itself and without reference to the actual use, needs, or collateral arrangements of the occupier, has a value.").

As for the abrogation of the second right, the right to transfer, the plaintiffs argue that ELIHPA and LIHPRHA had the character of a taking under *Hodel v. Irving*, 481 U.S. 704 (1987), which held that a statute abrogating the common-law right to devise to one's heirs even a small portion of a property was a taking -- even absent a showing of economic harm or interference with investment-backed expectations -- because the character of the government regulation was "extraordinary."

We agree with the plaintiffs' characterization of the effects of the statutes. The character of the government's action is that of a taking of a property interest, albeit temporarily, and not an

example of government regulation under common law nuisance or other similar doctrines, which we would treat differently.

Unquestionably, Congress acted for a public purpose (to benefit a certain group of people in need of low-cost housing), but just as clearly, the expense was placed disproportionately on a few private property owners. Congress' objective in passing ELIHPA and LIHPRHA -- preserving low-income housing -- and method -- forcing some owners to keep accepting below-market rents -- is the kind of expense-shifting to a few persons that amounts to a taking. This is especially clear where, as here, the alternative was for all taxpayers to shoulder the burden. Congress could simply have appropriated more money for mortgage insurance and thereby induced more developers to build low-rent apartments in the public housing program to replace housing, such as the plaintiffs', that was no longer part of the program.

Congress' purpose in enacting the statutes may have been entirely legitimate but the government has not shown that the actions Congress took -- the enactment of ELIHPA and LIHPRHA -- were within its powers to exercise without also granting compensation. The disproportionate imposition on the Owners of the public's burden of providing low-income housing is not rendered any more acceptable by worthiness of purpose. The principles, as used by the trial court in this context, misconstrue what type of government action counts as a compensable taking by focusing on the purpose rather than the nature of the action.

We conclude, as matter of law, that the government's actions in enacting ELIHPA and LIHPRHA, insofar as they abrogated the Plaintiffs' contractual rights to prepay their mortgages and thereby exit the housing programs, had a character that supports a holding of a compensable taking.

B. Economic Impact

What has evolved in the case law is a threshold requirement that plaintiffs show "serious financial loss" from the regulatory imposition in order to merit compensation. *Loveladies*, 28 F.3d at 1177. There is not, however, "an automatic numerical barrier preventing compensation, as a matter of law, in cases involving a smaller percentage diminution in value." *Yancey v. United States*, 915 F.2d 1534, 1539, 1541 (Fed. Cir. 1990).

The Plaintiffs freely conceded at oral argument that not every owner who participated in the housing programs suffered a compensable taking. Whether or not there was a compensable taking, the Plaintiffs admitted, depends on whether, after twenty years, a program participant was not allowed to prepay its mortgage and, as a result, suffered a financial loss during the years when ELIHPA and LIHPRHA were in effect. The implication of this admission, which is also a correct statement of the law, is that specific findings of fact about the effects of the legislation on the plaintiffs are necessary to complete the analysis of the economic impact factor. The trial court erred by not using specific facts pertaining to these plaintiffs to analyze this factor.

With respect to the Plaintiffs we do not need to remand because the trial court already made findings of fact that are dispositive of the question of economic impact.. The fact-finding at trial was sufficient in scope and depth to permit an economic impact analysis." Using the trial court's findings we can be confident of the plaintiffs' expert's calculation that the aggregate amount of the Plaintiffs' annual earnings at the time of their respective prepayment eligibility dates totaled \$45,741. The Plaintiffs' actual equity in their properties -- the agreed-upon market values less their mortgage balances -- shortly after their respective prepayment dates was calculated by the plaintiffs' expert as \$17,452,045. The Plaintiffs were, thus, on average, limited to an annual return of approximately 0.3% on their real equity in their properties.

By comparing this rate of return to low-risk Fannie Mae bonds, which, according to Dr. Peiser, would have generated an 8.5% rate of return, we can make a rough estimate of the Plaintiffs' percentage loss of return. Indeed, doing so, we calculate that the Plaintiffs would have received, by exiting the programs and reinvesting their money, on average, at least, 28 times greater return than they did have by being forced to stay in the programs. (An 8.5% rate of return is about 28 times more than a 0.3% rate of return.) This calculation of an approximately 96% percent loss of return on equity offers us a way to understand that a 0.3% rate of return actually demonstrates that the abrogation of the Plaintiffs' prepayment rights had sufficient economic impact to merit compensation even under stringent conceptions in the case law of the percent diminution necessary to merit compensation. The loss of 96% of the possible rate of return on the investment is, even under the most conservative view, a "serious financial loss."

In opposing this interpretation of the economic impact, the government cites Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) for the principle that "logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." This citation is inapt because of a fundamental error in the government's characterization of this lawsuit. The Owners' theory of recovery is not that their fee simple estates were taken or their land rendered "valueless." The Owners' entitlement to compensation is based on the taking of the real property interests reflected in the mortgage loan notes and the Regulatory Agreements. The difference is that the Owners' loss of the contractual prepayment rights was both total and immediate. They were barred from the unregulated rental market and other more lucrative property uses.

This court's assessment of the economic impact is that the Plaintiffs' expert's calculations (and the finding by the trial court about the credibility of their expert's methods) proved sufficient financial loss on the part of the Plaintiffs for this factor to favor compensation for each of them, especially in view of the lack of any specific challenge by the government of the trial court's findings or of the Plaintiffs' methods and data.

C. Reasonable Investment-Backed Expectations

The purpose of consideration of plaintiffs' investment-backed expectations is to limit recoveries to property owners who can demonstrate that "they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Loveladies Harbor*, 28 F.3d at 1177. This factor also incorporates an objective test -- to support a claim for a regulatory taking, an investment-backed expectation must be "reasonable." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005, 81 L. Ed. 2d 815, 104 S. Ct. 2862 (1984). Here, the issue is not an imposition of a new "regulatory regime," but legislative abrogation of the key rule of a pre-existing regime. The critical question is whether a reasonable developer confronted with the particular circumstances facing the Owners would have expected the government to nullify the twentieth-year prepayment right in the mortgage contract and in the regulations. This is an objective, but fact-specific inquiry into what, under all the circumstances, the Owners should have anticipated.

We are able to complete an analysis of this Penn Central factor for the Plaintiffs based on earlier fact-finding by the trial court, a number of undisputed facts, our own authority to construe contracts, statutes, and regulations as a matter of law, and the lack of specific arguments by the government alleging error in the plaintiffs' arguments.

Before examining the critical question about reasonableness for the Plaintiffs, we start with an analysis of the Plaintiffs' actual expectation because we require actual expectation of, or reliance on the government not nullifying the Plaintiffs' contractual and regulatory rights as a threshold matter. The Plaintiffs' expectation about prepayment would not really be "investment-backed" unless they actually believed in a certain outcome and entered the program in reliance on it.

1. The trial court made findings of fact in earlier phases of the lawsuit that have direct relevance to the question of the actual expectations of the Plaintiffs. First, the trial court found that "the evidence presented during the trial strongly indicates that plaintiffs intended from the beginning to prepay their existing mortgage balances on the original prepayment date and to convert their subsidized properties to conventional ones," and that the right to do so was "an essential aspect of Sections 221(d)(3) and 236." *Cienega III*, 38 Fed. Cl. at 75 (emphasis added). The trial court also found as a fact that the right to prepay and terminate the HUD restrictions without HUD approval after twenty years was one of the primary incentives HUD offered precisely to encourage their voluntary participation in the public housing programs.. We think the clear implication of these findings is that the Plaintiffs did not expect cancellation of their primary incentive or the nullification of their long-term plan.

Second, the trial court's findings in also show that the Plaintiffs' business plan anticipated a higher rate of return after the twenty years upon entry into the commercial market, sale of their properties, or refinancing of their properties. The trial court found that each of the Plaintiffs'

properties had "great potential for refinancing well above the amount owed and reinvesting the proceeds in other investment opportunities or for conversion and resale as condominium complexes." *Id.* at 76 (citation omitted). In view of these findings, we conclude that it would be only normal business judgment under the circumstances for the Model Plaintiffs to plan from the start to terminate their Regulatory Agreements as soon as possible to take advantage of more profitable opportunities. These findings, therefore, further establish that the Plaintiffs expected all along to be able to exit the housing programs after twenty years.

The Plaintiffs, we conclude, are the type of landowners who bought their property and entered into contracts in reliance on a different regulatory regime. The effect of ELIHPA and LIHPRHA— the Owners being indefinitely constrained by the Regulatory Agreements after twenty years —was contrary to what they were explicitly guaranteed by the mortgage contract and the regulations that were referenced in the Regulatory Agreement. ELIHPA and LIHPRHA cancelled the consideration for their entering the program. The Plaintiffs agreed to enter the programs in reliance on prepayment as the consideration for signing the Regulatory Agreement. The later legislation thus conflicted with the Plaintiffs' investment-backed expectations.

2. Next, we must determine whether a reasonable developer in the Model Plaintiffs' circumstances would believe that the twentieth-year prepayment right was guaranteed by the regulations and that HUD "authorized"¹⁷² and endorsed mortgage contracts expressly including it. We start from the assumption that a contract term that was both material, in that it gave the duration of a business arrangement with limited profit, and apparently justified, in that it was consistent with (and identical to) the relevant regulation, if not also explicitly prescribed by the agency, is one that gives rise to reasonable expectations of fulfillment of the contract term. We then consider whether there are grounds for changing this supposition because additional circumstances or facts show that a reasonable developer should not have expected fulfillment of the contract term despite its presence in the contract.

In contrast to the government's argument, a Regulatory Agreement referring to regulations that contain a provision that they are amendable does not mean that program participants are reasonably on notice for every possible change and therefore could not have had a reasonable investment-backed expectation of no change to the prepayment right. Some changes would have been outside of the realm of the reasonably expected. See *United Nuclear*, 912 F.2d at 1436 ("The fact that United agreed that the leases would be subject to future regulations does not indicate that United fairly can be said to have anticipated that the Secretary would apply a new policy requiring tribal approval of mining plans to leases entered into almost six years earlier, in reliance on which United had expended some \$5 million."). Abrogating the

¹⁷² The trial court noted that "plaintiffs' prepayment expectations were based on express language contained in their deed of trust notes and authorized by HUD." *Cienega I*, 33 Fed. Cl. at 222 (emphasis added). The government also does not contest the Owners' characterization that HUD "approved and prescribed" the mortgage contracts.

prepayment right was such an unexpected change. It was reasonable for the Model Plaintiffs to have expected the twentieth-year prepayment right to remain unchanged because it was a material inducement to the Model Plaintiffs signing the mortgage contracts and Regulatory Agreements, and the government presented no evidence of notice to the contrary. Once a plaintiff has shown that its expectation is reflected by a material contract term of which the government is aware, the government cannot establish a lack of reasonable expectations simply by showing that the regulations were amendable by HUD or nullifiable by Congress. We conclude that a prepayment term would be presumptively material for any housing program participant with similar documents. This is because by fixing an exit date from participation in the programs, the prepayment right would be a significant factor in the calculation of the total profit that could be expected over the lifetime of the investment in the property. The prepayment right specifies at what year revenue from the property could potentially be increased through higher rental rates, sale, or refinancing. This total profit calculation would, in turn, determine whether a developer decided to participate in the program in the first place. Because without the prepayment right the developers might have earned more profit investing elsewhere and therefore have declined to enter the programs, abrogation of this right would not reasonably be expected simply because the regulations were amendable or subject to legislative alteration. Moreover, the mortgage contract and the regulations incorporated by reference into the Regulatory Agreements both explicitly established a prepayment right which allowed them to end the mortgage contracts and, thereby the Regulatory Agreements. HUD reviewed, approved, and endorsed the deed of trust notes, including the riders containing the express prepayment right. The Model Plaintiffs, thus, also had every indication from HUD that this term in their private mortgage contracts was acceptable and would continue to control the duration of the Regulatory Agreements.

Similarly, no legislation was cited that contradicts the reasonableness of the Model Plaintiffs' expectation that the prepayment right would be undisturbed. At the time of the Model Plaintiffs' entry into the housing programs the only legislative reference to their ability to exit from the housing programs were broad delegations by Congress to HUD that, for example the Secretary "may at any time, under such terms and conditions as he may prescribe, consent to the release of the mortgagor from his liability under the mortgage or the credit instrument secured thereby, or consent to the release of parts of the mortgaged property from the lien of the mortgage." Housing Act of 1954, amended by Housing Act of 1964, Pub. L. No. 88-560, tit. I, §114, 78 Stat. 778-79 (codified as amended at 12 U.S.C. §1715l(e)(2)(2000)). The explicit legislative delegation to HUD also, thus, makes reliance on the mandatory prepayment provision in HUD's then-regulations reasonable; Congress broadly authorized such a regulation. The regulations were self-executing and gave HUD no discretion to specify who could prepay. Rather, they mandated that certain categories of housing program participants could prepay after twenty years at their own discretion. See, e.g., 24 C.F.R. §221.524 ("A mortgage indebtedness may be prepaid in full and the Commissioner's controls terminated without the prior consent of the Commissioner . . .").

We conclude, on this well-developed record, our own analysis of the explicit language of the relevant documents and relevant legislation, and given the limited arguments advanced by the government, described post, that the Model Plaintiffs' expectations were not only distinct and backed by investment, but were also reasonable.

3. The government focuses its arguments mainly on one theory: that the Owners could not have formed a reasonable expectation because the Owners could not reasonably have assumed that if faced with a shortage in the supply of low-income rental housing, Congress would respond with a solution other than abrogating the right of prepayment. To this end, the government points out the trial court's statements that the "plaintiffs knew that they were entering a sensitive and highly regulated field that was subject to continuing congressional interest and attention" and they "could have anticipated that Congress might concern itself with the possibility of a low-income housing shortage and act to prevent or delay such a shortage." *Alexander Investment*, 51 Fed. Cl. at 110. Indeed, the court also suggested that owners could have "insisted on contract language that would have shifted the risk of later congressional action to the Government." *Id.* The housing programs themselves, the government argues, were entirely creatures of statute and regulation and therefore the Owners would have had no reasonable expectation that Congress would not change provisions of the programs' requirements during the first twenty years of each Owner's participation.

We, however, do not think the reasoning used by the trial court or anything else in the record compels the result sought by the government. Certainly, Congress could have met the need for replacement housing by funding new mortgage insurance to induce new participation under these very programs. We know that this is what Congress had done before because these housing programs were not new, but were instead long-standing programs (the first relevant legislation is from 1961). We conclude then that it was reasonable to assume that Congress would continue down the path it had long pursued to alleviate a housing shortage. At the very least, one would not reasonably expect Congress to make legislative changes that would actually discourage parties from participating in the programs in the future.

Nor is the fact that the industry is regulated dispositive. A business that operates in a heavily-regulated industry should reasonably expect certain types of regulatory changes that may affect the value of its investments. But that does not mean that all regulatory changes are reasonably foreseeable or that regulated businesses can have no reasonable investment-backed expectations whatsoever. See *United Nuclear*, 912 F.2d at 1436.

The government cites *Branch ex. rel. Maine National Bank v. United States*, 69 F.3d 1571, 1581 (Fed. Cir. 1995), for the proposition that investment-backed expectations are "greatly reduced in a highly regulated field." This is an accurate statement of law but its simplicity of language conceals a complexity of analysis. The statement is not a rule dictating how we must proceed, but rather, a generalized description of prior decisions. For expectations to be "greatly reduced" does not mean that the reasonableness of every expectation of the status quo is by

definition eliminated. It is our task then to determine whether the expectations the Model Plaintiffs had were reasonable ones. The range of expectations that is reasonable may be reduced in proportion to the amount of regulation, but this is not a blanket rule that disqualifies parties' expectations without inquiry. Also, what "highly regulated" and "field" are is not self-defining. Branch concerned the banking industry, and the power of the government to allocate the burdens of bank failures in a way that protects the public, regardless of the principle of limited corporate liability. *Id.* All this shows is that at the extremes, where history shows consistent, intrusive and changing government regulation of all facets of all transactions even arguably within a field, for example, banking, the effect of being in so highly a regulated field is clear. We have no evidence that the housing programs involved here were part of such an extreme field and therefore cannot, as the government urges, rely solely on the fact of regulation, but must probe into its content and other considerations. We thus conclude that Congress' abrogation of what was an explicit and material term of their mortgage contracts is simply not a change the Model Plaintiffs should have expected.

In sum, in light of the unchallenged findings of fact made by the trial court in *Cienega III*, we must conclude that the Model Plaintiffs did in fact expect to retain the right to prepay and exit the housing programs after twenty years. Our analysis of the circumstances surrounding their participation, the indications given to them by the written agreements -- the explicit right to twentieth-year prepayment in the mortgage contracts and the regulations mandating that HUD grant twentieth-year prepayment -- and the ultimately unpersuasive nature of all of the contrary arguments presented to us by the government, moreover, lead us to conclude as a matter of law that their expectations were reasonable.

The trial court thus erred in accepting the government's assertion that no expectation of the continuation of the prepayment term in a housing program participant's mortgage contract could be reasonable in light of the applicable regulation. "Knowledge of the Government's role in their chosen business venture," *Alexander Investment*, 51 Fed. Cl. at 110, we hold, is not enough to destroy the reasonableness of the expectation of this right to prepay that was expressly granted both by contract and by regulation when the Owners entered the programs. Where a trial court erred in granting summary judgment, ordinarily we would have to remand the case. Here, however, the reasonableness of the Model Plaintiffs' expectations can be confidently adjudicated without a remand because of the very specific factual findings following a trial on a contract claim about the two housing programs, the text of the relevant documents, regulations, and legislation, and the role of HUD in approving and endorsing the mortgage contracts and the riders therefore which contain the express prepayment right. We, therefore, hold that ELIHPA and LIHPRHA frustrated the Model Plaintiffs' reasonable investment-backed expectations that they would be entitled to prepay. We thus hold that all three of the Penn Central factors individually and together establish that the Model Plaintiffs are entitled to compensation without need for further fact-finding.

CONCLUSION

We vacate the trial court's sua sponte grant of judgment in favor of the government. Contrary to the trial court, we hold that all of the Owners had vested property interests under the Fifth Amendment in their contractual and regulatory rights to post-twentieth-year prepayment and under real property law to repossess. These property interests were expressly and deliberately abrogated by ELIHPA and LIHPRHA. Unlike the trial court we see no basis in takings case law for holding that as a matter of law ELIHPA and LIHPRHA could not effect a compensable taking under Penn Central. In addition, because whether or not a taking has occurred is a question of law based on factual underpinnings, *Bass Enters.*, 133 F.3d at 895, and because we have findings of fact by the trial court adequate for a Penn Central analysis, we can and do conclude that the Plaintiffs suffered a compensable, temporary, regulatory taking. As to these plaintiffs, we reverse. We further direct that the original damages judgment entered in *Cienega III*, 38 Fed. Cl. 64, be reinstated in the amount awarded therein for each of the four Model Plaintiffs. We hold that for the thirty-eight non-model plaintiffs for whom this court has no findings of fact, it is not possible to complete a Penn Central analysis. Thus, because the record before us is not developed at all as to, for example, economic impact, we remand for the trial court to allow the parties to develop an appropriate record and to rule on liability, and if liability is found, also on damages.

VACATED-IN-PART, REVERSED-IN-PART, and REMANDED.

COSTS

Costs to be awarded to the appellants.

GUGGENHEIM v. CITY OF GOLETA
582 F.3d 996; 2009 U.S. App. LEXIS 21313

SUBSEQUENT HISTORY: Rehearing, en banc, granted by *Guggenheim v. City of Goleta*, 2010 U.S. App. LEXIS 5211 (9th Cir., Mar. 12, 2010)

BYBEE, Circuit Judge:

Daniel Guggenheim and others bring a facial challenge to the City of Goleta's mobile home rent control ordinance. Guggenheim argues that the ordinance, which effects a transfer of nearly 90 percent of the property value from mobile home park owners to mobile home tenants, constitutes a regulatory taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). We have fielded such challenges before, but have never reached the merits of the takings claim.

To determine whether a taking has occurred we must decide several issues. We must first determine whether the mobile home park owners have standing to bring this case. Additionally, we must consider whether this case is ripe under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). If so, then we must determine whether the city ordinance constitutes a regulatory taking under *Penn Central*.

The district court did not address either the standing or ripeness questions due to the unusual procedural history of the case, but implicitly found the case was properly brought. The district court found that no taking had occurred. For the reasons explained below, we agree with the district court that this case is properly brought and ripe for decision, but we disagree with the district court on the merits of the takings claim. Because we find that a taking has occurred, we reverse and remand to the district court to determine what compensation is due.

A

The Takings Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, see *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 236, 17 S. Ct. 581, 41 L. Ed. 979 (1897), provides that "private property [shall not] be taken for public use, without just compensation." The Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987). The Takings Clause was drafted so as "not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *Id.* at 315. The Takings Clause "'bar[s] 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.'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528,

537, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960)).

To determine whether a mobile-home rent control ordinance constitutes a taking under the Constitution, we must first understand some unique characteristics of mobile homes. "The fact that these homes can be moved does not mean that they do move." JOHN STEINBECK, *TRAVELS WITH CHARLEY: IN SEARCH OF AMERICA* 96 (Penguin Books 1986) (1962). As described by the Supreme Court:

The term "mobile home" is somewhat misleading. Mobile homes are largely immobile as a practical matter, because the cost of moving one is often a significant fraction of the value of the mobile home itself. They are generally placed permanently in parks; once in place, only about 1 in every 100 mobile homes is ever moved A mobile home owner typically rents a plot of land, called a "pad," from the owner of a mobile home park. The park owner provides private roads within the park, common facilities such as washing machines or a swimming pool, and often utilities. The mobile home owner often invests in site-specific improvements such as a driveway, steps, walkways, porches, or landscaping. When the mobile home owner wishes to move, the mobile home is usually sold in place, and the purchaser continues to rent the pad on which the mobile home is located.

Yee v. City of Escondido, 503 U.S. 519, 523, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992) (citation omitted).

The County of Santa Barbara, California (the "County"), first enacted its Rent Control Ordinance (the "RCO") in 1979, and amended it in 1987. In 2002, the City of Goleta incorporated within the County. As required by California law, the new City of Goleta immediately adopted by reference the County's code in its entirety, including the RCO, as its provisional new code. See CAL. GOV'T CODE §57376 (2008); City of Goleta Ordinance No. 02-01. About two months later, the City re-adopted by reference most provisions of the County code, including the RCO, as permanent city ordinances. City of Goleta Ordinance No. 02-17.

The statement of "Purpose" in the RCO has remained unchanged since the RCO was first passed by the County in 1979. The purpose was to prevent mobile home park owners from charging exorbitant rents to exploit local housing shortages and the fact that mobile home owners could not easily move their homes:

A growing shortage of housing units resulting in a critically low vacancy rate and rapidly rising and exorbitant rents exploiting this shortage constitutes serious housing problems affecting a substantial portion of those Santa Barbara County residents who reside in rental housing Especially acute is the problem of low vacancy rates and rapidly rising and exorbitant rents in mobile home parks in the County of Santa Barbara. Because of such factors and the high cost of moving mobilehomes, . . . the board of supervisors finds and declares it necessary to protect the owners and occupiers of mobilehomes from unreasonable rents while at the same time

recognizing the need for mobile home park owners to receive a fair return on their investment and rent increases sufficient to cover their increased costs. RCO §11A-1.

The RCO limits any increases in mobile home rents on an annual basis to 75 percent of the increase in the local Consumer Price Index ("CPI"). This increase is referred to as the "automatic increase." Mobile home park owners may also increase the rent by an additional amount to pass through increased operating costs, capital expenses, and capital improvements. This increase is referred to as the "discretionary increase." The RCO sets out an arbitration process by which park owners must work with the mobile home owners and an arbitrator to determine the total amount of the permissible rent increase for each year.

The RCO also contains a vacancy control provision, which limits the permissible rent increase to 10 percent when a unit is sold. In sum, the RCO mandates that a "just and reasonable return" for the park owners must always be less than or equal to exactly one half of 75 percent of the annual increase of the CPI. The RCO permits park owners to go to arbitration to pass through additional costs, but such costs must be re-captured without any return on investment. In the event a tenant sells his or her unit, the park owners are entitled to a one-time rent increase of 10 percent; subsequent increases are capped by the regular formula.

B

1

Appellants Daniel Guggenheim, Susan Guggenheim, and Maureen H. Pierce (collectively, the "Park Owners") purchased the Ranch Mobile Estates mobile home park ("the Park") in 1997, at which time the Park was located in an unincorporated part of the County. At the time of the purchase, therefore, the Park was subject to the County's RCO as amended in 1987. When the City incorporated in 2002, the Park fell within the new city's jurisdiction. Because the City adopted the RCO by reference, the Park continued to be subject to the RCO after the City incorporated.

A month after the City incorporated, the Park Owners brought suit in federal court, alleging only facial challenges to the RCO. The Park Owners claimed violations of the Takings Clause.

The district court stayed the viable federal claims under the Pullman doctrine, to permit the resolution of certain complex state law claims that might "moot or narrow the constitutional questions." *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1104 (9th Cir.

1998). The parties settled their state law claims after litigating in Santa Barbara Superior Court, and then returned to federal court for a second time.¹⁷³

2

Back in federal court, the Park Owners moved for partial summary judgment. The district court reviewed the undisputed facts and the affidavits and documents proffered by the parties. The court found that during the time the Park Owners owned the Park, housing costs in the City increased approximately 225 percent. Because of the RCO, the rents charged by the Park Owners did not keep pace with this increase. The below-market rents resulted in the ability of mobile home owners to sell their homes at a significant premium (the transfer premium). The district court found, based on a report provided by the Park Owners, that the transfer premium amounted to, on average, 88 percent of the sale price. "In other words," the district court found, "an average mobile home worth \$12,000 would sell for approximately \$100,000." The district court found that "the uncontroverted facts . . . establish the existence of a premium," and that even "[t]he City has acknowledged the existence of such a premium."

The district court granted summary judgment on the takings claim in favor of the Park Owners on October 29, 2004. At the time the district court made its determination, the law in the Ninth Circuit was that a government regulation effected a taking if such regulation did not "substantially advance" legitimate state interests. See, e.g., *Agin v. City of Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980). The district court found it undisputed that the RCO effected a one-time wealth transfer from the Park Owners to the incumbent tenants, and that the RCO failed to substantially advance its stated purpose of providing affordable housing. The court found, therefore, that the RCO was an unconstitutional regulatory taking and the Park Owners were entitled to just compensation. The City timely appealed.

On May 23, 2005, while the case was on appeal, the Supreme Court decided *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). *Lingle* repudiated the "substantially advances" theory upon which the Park Owners had prevailed. In light of this development, the parties stipulated to vacate the district court's judgment and return for what would now be their fourth round of litigation before a trial court.

¹⁷³ Of particular relevance to this appeal, the parties stipulated that there was a gap in time when no rent control ordinance was in effect over the Park. This stipulated fact was necessary to support the timeliness of the Park Owners' facial challenges to the RCO. The statute of limitations for a facial takings claim begins to run with the passage of the challenged law. See *Equity Lifestyle*, 548 F.3d at 1193. The supposed "gap in time" clarified that the City's RCO, for purposes of this litigation, was enacted in 2002. Thus, the Park Owners' suit, initiated in 2002, was timely.

After some renewed pre-trial litigation, the district court issued a series of summary judgment rulings in which it found in favor of the City on each of the Park Owners' remaining constitutional claims. On April 5, 2006, the district court denied the Park Owners' motion for partial summary judgment, finding that the Park Owners were not entitled to judgment as a matter of law as to whether the RCO constituted a regulatory taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). The court reviewed both parties' expert reports and found that the evidence as to the economic impact of the regulation was "mixed":

Although [the Park Owners] have enjoyed a rate of return comparable to other real estate investments, [the Park Owners'] evidence tends to suggest that they would have earned more--perhaps much more--in the absence of the RCO.

The parties continued to prepare for trial--designating experts, agreeing to witness and exhibit lists, and filing motions in limine.

On July 27, 2006, the district court sua sponte issued an Order to Show Cause why the court should not, on its own motion, enter summary judgment in favor of the City. On September 6, 2006, after reviewing the parties' responses, the district court entered summary judgment in favor of the City on all of the Park Owners' remaining causes of action. The court stated:

Because this is a facial challenge to the ordinance in question, the evidence [the Park Owners] seek to present at trial vis[-]a[-]vis their Fifth Amendment [T]akings [C]ause claim is irrelevant. To facially attack the ordinance as an uncompensated "taking," [the Park Owners] must demonstrate that the mere enactment of the ordinance constitutes a taking.

The court then complained that the Park Owners had "impermissibly attempted to convert this action, de facto, into an as-applied challenge." The district court did not, however, identify which evidence it found "irrelevant" or "impermissible" in a facial takings claim. The district court also did not make explicit whether it incorporated its April 5 analysis of the Park Owners' Penn Central claim into its final judgment or whether it entered final judgment solely on the ground the Park Owners were barred from presenting evidence in a facial challenge. The Park Owners appealed in a timely manner.

This case has already been litigated through three full rounds at the trial level, including one in state court and two in federal court, producing one victory for the Park Owners, one for the City, and one tie (the settlement). Accordingly, it may come as a surprise that before we reach the merits of the Park Owners' appeal, we must consider whether the plaintiffs have standing to bring this case and whether this case is ripe for decision.

A

Under Article III, our power to adjudicate is limited to "cases" and "controversies." U.S. CONST. art. III, §2, cl. 1. Accordingly, we are not authorized to decide a dispute "merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982). Rather, we must first determine whether a litigant has "standing" to bring suit in the federal forum for his alleged injury.

The Supreme Court has defined standing generally as "the question of . . . whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). A plaintiff must first "have suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotations omitted). "

We must still determine whether the Park Owners have an "actual injury"--that they have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

In this case the Park Owners satisfy Article III's case or controversy requirements. Although the Park Owners purchased the burdened property in 1997, eighteen years after the County first passed the RCO and ten years after it was amended, the City adopted the RCO in 2002, after the Park Owners were in possession of the Park. Additionally, the parties stipulated that there was some time period between the City's incorporation and the City's adoption of the RCO in which no rent control ordinance was in effect. The Park Owners are precisely the sort of plaintiffs *Carson Harbor Village* envisioned bringing a facial challenge to the City's RCO. "[F]acial [takings] claims necessarily rest on the premise that an interest in property was taken from all mobile home property owners upon the statute's enactment." *Carson Harbor Village*, 37 F.3d at 476 . We therefore find that the Park Owners have standing to bring their takings claim.

B

"[A] takings claim must [also] . . . comply with timeliness requirements. It must be filed neither too early (unripe) nor too late (barred by a statute of limitations)." In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 185 (1985), the Supreme Court held that a takings claim is not ripe until the property owner has attempted to obtain just compensation for the loss of his or her property through the procedures provided

by the state for obtaining such compensation and been denied. Williamson also set forth an additional hurdle, applicable only to as-applied challenges: the property owner must have received a "final decision" from the appropriate regulatory entity as to how the challenged law will be applied to the property at issue. The latter requirement is not applicable here because the Park Owners have raised only a facial challenge. "Facial challenges are exempt from the ["final decision"] prong of the Williamson ripeness analysis because a facial challenge by its nature does not involve a decision applying the statute or regulation." *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003) (citation omitted).

In order to determine whether the Park Owners's claims are ripe under Williamson, and, if so, whether they have satisfied the Williamson requirements, we must look closely at Williamson and its progeny. The Court has explicitly held that the Williamson requirements are merely prudential requirements. In *Lucas v. South Carolina Coastal Council*, the Court stated that the Williamson requirements were prudential.

The Court's clarification that Williamson created mere "prudential requirements" is crucial to our analysis for two reasons. First, if Williamson were grounded in Article III ripeness, we would be required to raise the issue sua sponte even though neither party raised it. Because Williamson has been held to be merely a set of prudential, exhaustion-type requirements, although we asked the parties for their views, we were not obligated to raise the issue. Second, because Williamson exhaustion is prudential only, the requirement may be waived or forfeited. Here, the City of Goleta forfeited the claim that this case was not ripe for review by failing to raise it.

In this case, then, where the Park Owners have obviously presented a live case or controversy, , it is clear that any further questions under Williamson do not raise the spectre of an Article III jurisdictional bar. Having reviewed the Williamson jurisprudence, we find that we may reach the merits of the Park Owners' takings claim. Given the Park Owners' substantial compliance with the Williamson requirements, and the City's forfeiture of the ripeness claim, we believe that Lucas compels us to reach the merits of this case.

III

Having held that we may reach the merits of the Park Owners' takings claims, we now turn to those claims. As we have recently summarized, the Supreme Court has identified three basic categories of regulatory takings claims.¹⁷⁴ We must first address each factor in turn, and

¹⁷⁴ [1] where government requires an owner to suffer a permanent physical invasion of property, see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982); [2] where a regulation deprives an owner of all economically beneficial use of property, see *Lucas v. South Carolina Coastal*

then weigh the factors together, in what has famously been described as an "essentially ad-hoc, factual inquir[y]." *Penn Central*, 438 U.S. at 124. Before we can apply the *Penn Central* factors, however, we must consider the viability of a facial challenge under *Penn Central*, and determine what facts we may consider when engaging in *Penn Central*'s ad-hoc factual inquiry.

A

The Park Owners have brought only a facial challenge to the RCO under *Penn Central*--they have not brought a corollary as-applied claim. Unlike an as-applied challenge, which asserts that a statute or regulation "by its own terms, infringe[s] constitutional freedoms in the circumstances of the particular case," *United States v. Christian Echoes Nat'l Ministry, Inc.*, 404 U.S. 561, 565, 92 S. Ct. 663, 30 L. Ed. 2d 716 (1972), a facial challenge alleges that the statute or regulation is unconstitutional in the abstract: that "no set of circumstances exists under which the [a]ct would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

The Park Owners' decision to refrain from an as-applied challenge has two important consequences. First, as noted above, the decision exempts the Park Owners from the "final decision" prong of *Williamson*. See *Hacienda Valley Mobile Estates*, 353 F.3d at 655 ("Facial challenges are exempt from the ["final decision"] prong of the *Williamson* ripeness analysis because a facial challenge by its nature does not involve a decision applying the statute or regulation."). Second, the Park Owners' decision to cast their *Penn Central* claim as a facial challenge places limits on the types of evidence that can be considered in adjudicating the claim. "In facial takings claims, our inquiry is limited to 'whether the mere enactment of the [regulation] constitutes a taking.'" *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 773 (9th Cir. 2000) (quoting *Agins*, 447 U.S. at 260); see also *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981). More specifically, in a facial challenge "we look only to the regulation's general scope and dominant features, rather than to the effect of the application of the regulation in specific circumstances." *Tahoe-Sierra*, 216 F.3d at 773.

For this reason, the Supreme Court has noted that property owners bringing a facial takings challenge "face an uphill battle." *Suitum*, 520 U.S. at 736 n.10. The fact that the Park Owners have characterized their facial challenge under *Penn Central* creates further complications. In a typical *Penn Central* claim, the court must consider factors that will usually not be found in the text of the statute, such as the economic impact on the claimant and the claimant's investment-backed expectations. Nevertheless, when adjudicating a facial challenge, the court must be careful not to simply look at "the effect of the application of the regulation in

Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992); and [3] where the *Penn Central* factors are met, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

specific circumstances." *Tahoe-Sierra*, 216 F.3d at 773. The Park Owner's facial Penn Central claim requires us to address this apparent paradox: we must confront the question of whether a facial challenge under Penn Central is actually a viable legal claim; and if we determine that it is, we must then consider what evidence the Park Owners may present to prove their claim.

1

In the district court's summary judgment ruling of April 5, 2006, the court reviewed the record and engaged in a detailed Penn Central analysis. Each party had proffered an expert report in support of its position: the Park Owners proffered a report by Dr. John M. Quigley, 175 and the City responded with a report by Mr. William Thomsen.¹⁷⁶ The district court found in favor of the City under Penn Central. The district court stated that the evidence the Park Owners sought to present "at trial" was "irrelevant" to a facial challenge, and complained that the Park Owners had "impermissibly attempted to convert this action, de facto, into an as-applied challenge." Because of the necessarily "ad hoc" nature of a Penn Central challenge, if the district court was adopting a rule that a property owner may present no evidence of the effect of a regulation on his property in a facial challenge, the court would essentially be adopting the rule that there is no such thing as a facial challenge under Penn Central.

Both logic and Supreme Court precedent support our conclusion that a facial challenge under Penn Central must exist as a viable legal claim. Certainly it is apparent that a facial challenge is easier to mount under either *Loretto* or *Lucas*. It is far easier to prove that a regulation effects a physical invasion or that it denies an owner of all economically viable use of his property without considering evidence beyond the face of the regulation than it is to demonstrate that the regulation's effect satisfies the multi-factor test of Penn Central. However, we have recently described the *Loretto* and *Lucas* tests as categorical "exceptions to the application of the regulatory takings test" as set forth in Penn Central. In fact, the Supreme Court has emphasized that per se takings claims are disfavored, whereas Penn Central claims are preferred. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321, 339, 342, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002). It would seem incongruous indeed if only the disfavored exceptions to Penn Central could be brought as facial challenges, where a claim under the general rule of Penn Central could not.

Supreme Court precedent also demonstrates the viability of a facial challenge under Penn Central. In *Keystone*, the Court emphasized the difficulty of prevailing on a facial challenge under Penn Central, and ultimately concluded that the mere enactment of the challenged statute

¹⁷⁵ Dr. Quigley is a professor of economics, business, and policy at the University of California, Berkeley and serves as the Director of the Berkeley Program on Housing and Urban Policy. He served as President and Director of the American Real Estate and Urban Economics Association and has been a member of the National Academy of Sciences/National Research Council Committee on National Urban Policy.

Mr. Thomsen is an MBA/CFA with the accounting firm of Grobstein, Horwath & Company, LLP.

did not effect a taking. See *Keystone*, 480 U.S. at 493-99. The Court's ruling implicitly recognizes that a facial Penn Central challenge is feasible. Moreover, in *Keystone*, the Court considered the limited evidence that the property owners had proffered, including the actual tonnage of coal that the challenged statutes prevented the owners from removing, and the percentage of total coal in the mine that the restricted tonnage represented. The Court found that the property owners' facial challenge under Penn Central failed because the evidence the property owners provided was insufficient to demonstrate economic harm in any significant amount. Thus, the Court found against the property owners not because the Court was not permitted to consider the evidence provided, but rather because the property owners' evidence did not show that the mere enactment of the statute amounted to a taking.

The fact that the Court's precedents approve of a facial challenge under Penn Central requires us to consider what kinds of evidence beyond the text of the challenged regulation the reviewing court may consider. The proper inquiry in a facial challenge is not whether the property owners can demonstrate that property has been taken without providing evidence beyond the text of the regulation; the inquiry is whether the "mere enactment" of the regulation constitutes a taking. Thus, in a takings claim, we must look not only at what the statute says, but also at what its mere enactment does. At a minimum, we must look to the general economic principles that allow us to interpret the statute's effect, so that we may understand the regulation's general scope and dominant features. In addition, there must be a way to understand the economic impact on the complaining property owner. A property owner who is not permitted at least to present evidence that proves that he has actually suffered the kind of economic harm of which he complains would be precluded from even proving his own standing to bring the claim--the property owner must be permitted to adduce evidence that he has suffered the injury for which he seeks redress. Thus, even in a facial challenge, the court may consider evidence related to the individual property owner that illustrates the economic impact that the mere enactment of the statute had on that owner and proves that the owner has suffered the injury of which he complains.

In this case, the Park Owners submitted evidence of the effect that the mere enactment of the RCO had on their property. The Park Owners principally relied on the report by Dr. Quigley. The City did not object to the use of this report; on the contrary, the City responded by producing its own expert report by Mr. Thomsen. The district court reviewed both parties' expert reports in preparation for its summary judgment ruling in April. In conducting its analysis, the district court did not rely on the detailed information provided in each report about the actual economic impact of the RCO on each particular mobile home within the Park, nor did it rely on the information about the actual impact on the Park as a whole. Instead, the district court relied on the core findings of the expert reports and the general findings taken from economic studies and academic literature about the effects of mobile rent control ordinances generally. On appeal to this court, the City has defended the district court's analysis and its use of core findings from each party's expert report. It has argued, however, that attempts by the Park Owners to provide evidence

beyond the core findings of the Quigley Report is an impermissible attempt to convert a facial challenge into an as-applied challenge. The City has not identified which evidence would be so property-specific as to be impermissible in a facial challenge.

We need not, however, determine the exact boundaries between permissible and impermissible kinds of evidence to support a facial challenge. The City has defended the district court's use of core findings from each party's report. Therefore, we will confine ourselves to review of these same core findings in our review of the Park Owners' facial Penn Central challenge. We will provide additional figures from the Quigley Report only for purposes of demonstrating that the Park Owners have suffered the actual economic injury of which they complain and illustrating in concrete terms the economic impact that the "mere enactment" of the RCO had in Goleta. In addition, we may consider the district court's undisputed factual findings about property values in the City of Goleta, as these values affect the entire City, and thus everyone subject to the City's RCO, and are not specific to the RCO's application to the Park Owners. With these limitations in mind, we consider the three factors of the Penn Central analysis.

B

The three factors described in Penn Central are: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with investment-backed expectations; and (3) the character of the governmental action. We consider each in turn.

1

The first consideration under Penn Central is the "economic impact of the regulation on the claimant." Lingle, 544 U.S. at 538-39 (quoting Penn Central, 438 U.S. at 124). There is no mathematical formula provided by the Constitution, but "if [the] regulation goes too far it will be recognized as a taking." Pa. Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322 (1922). By definition, under Penn Central, the property owners need not show a complete deprivation of all economically viable use of the property. Deprivation of all economically viable use would entitle the property owners to just compensation under Lucas, and there would be no need to apply a Penn Central analysis. See Palazzolo, 533 U.S. at 617 ("Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred"). In sum, to prevail under Penn Central, the property owner must demonstrate a loss of value that may be less than 100 percent, but high enough to have "go[ne] too far." Id.

There is a broad consensus that a mobile home rent control ordinance like the RCO causes a wealth transfer from the mobile home park owners to the incumbent mobile home tenants. The Quigley Report explained how the RCO affects the mobile home market. Mobile homes have a divided ownership. A park owner owns the real estate, consisting of the home sites, while the home itself is owned by the tenant who rents the site. When a jurisdiction enacts

a rent control ordinance, the right to occupy a mobile home site at a below-market rent acquires its own intrinsic value distinct from the value of the land. The owner of a given mobile home at the time the RCO is passed will capitalize this value (equal to the present value of the future stream of rent discounts) into the selling price of the home. This is referred to as the "transfer premium." A new mobile home tenant, anxious to acquire the right to regulated, below-market rent, pays the transfer premium in the form of a higher purchase price for the home. The net effect is that the cost of the home and the rental site is approximately the same whether there is an RCO or not; the difference is that under the RCO, the value of the capitalized rent is paid to the mobile home owner instead of to the park owner.¹⁷⁷ Accordingly, in the end, the RCO does not actually decrease housing costs at all for the new tenant. If a new tenant purchases the home, the new tenant will have to pay an amount equal to the rental discount in the form of the transfer premium.

The Quigley Report summarizes the effect of the RCO:

For every dollar by which housing costs are reduced through lower mobile home rents, consumers are forced to pay higher purchase prices for these mobile homes. These two effects roughly cancel. Thus, the principal effect of the rent control regulation is to inhibit increases in the supply of affordable housing in the market and consequently to increase rents in the local

¹⁷⁷ The Quigley Report illustrated these points with figures for the average property in its sample of dwellings sold in the Park during the relevant period. The Report estimated that, based on comparable land rental rates, the annual unregulated market rental rate of the average site in the Park would be \$13,344. The RCO-regulated rental rate on the average site is only \$3,256. Thus, a home owner pays roughly \$10,000 less in annual rent to the Park Owners. This annual savings, however, is reflected in the selling price of the mobile home. The Report estimated that the average mobile home, but for the RCO, would be worth \$14,037. Because of the RCO, however, the average mobile home sold for \$119,091. This difference equals \$105,054, or a full 88 percent of the entire sale price, and represents the net present value to the mobile home owner of being able to save roughly \$10,000 a year in rent.

As a hypothetical, the Quigley Report then calculated what would happen if a mobile home owner financed the average home with a typical mortgage product used for these kinds of purchases. The Quigley Report found that, under the RCO, the average annual housing-related payments of the purchaser would be: \$13,968 in loan repayment plus \$3,256 in regulated rent. Without the RCO, because the same home would have sold for \$105,054 less, but rent would have been more, the average annual housing-related payments would be: \$1,646 in loan repayment plus \$13,344 in rent. As the Quigley Report noted, in this particular example, the mobile home owner would actually be paying more annually under the City's RCO than he would in an unregulated market. This is due in part to the fact that mobile home mortgage products tend to have higher interest rates and their purchasers often have low asset levels or weaker credit histories. In general, however, the Quigley Report suggests that mobile home owners will end up paying roughly the same amount in annual expenses whether or not the RCO is in effect. The difference is in who captures the value of the rent-controlled site in the Park. Without the RCO, the Park owners receive roughly \$10,000 more a year in rent. With the RCO, the incumbent mobile home owners receive a one-time premium of \$105,054, captured in the sale value of their home.

economy. The principal costs are borne by those consumers who otherwise would have been able to reside in lower cost housing in the region.

The Quigley Report estimated that the RCO forced the Park Owners to rent the entire Park at close to an 80 percent discount below the market rate. The RCO has resulted in transfer premiums of approximately 90 percent of the sale price of mobile homes, enjoyed by the incumbent tenants.

The district court credited the Quigley Report's findings and found that the RCO causes a wealth transfer from the Park Owners to their tenants. The district court found that housing costs in the City of Goleta increased "approximately 205% from 1997 to 2003, and increased another 21.1% in 2004. The rent on the rent-controlled spaces in the Park [has] not kept up with the increase in housing costs." The court found:

The RCO has resulted in what is known as "transfer premiums" in the sale of mobile homes. These transfer premiums constitute approximately 90% of the sale price of mobile homes in the Park. No provisions in the RCO prevents the seller of a mobile home from capturing transfer premiums.

More simply, "an average mobile home worth \$12,000 would sell for approximately \$100,000." The district court concluded that "the uncontroverted facts . . . establish the existence of a premium." Indeed, it found that even "[t]he City has acknowledged the existence of such a premium." The Supreme Court observed the same wealth transfer phenomenon in *Yee*:

[T]he effect of the rent control ordinance, coupled with the restrictions on the park owner's freedom to reject new tenants, is to increase significantly the value of the mobile home. This increased value normally benefits only the tenant in possession at the time the rent control is imposed. Petitioners are correct in citing the existence of this premium as a difference between the alleged effect of the [challenged] ordinance and that of an ordinary apartment rent control statute. Most apartment tenants do not sell anything to their successors (and are often prohibited from charging "key money"), so a typical rent control statute will transfer wealth from the landlord to the incumbent tenant and all future tenants. By contrast, petitioners contend that the [challenged] ordinance transfers wealth only to the incumbent mobile home owner. 503 U.S. at 530 (internal citation omitted).

The Court in *Yee*, however, left open the question of whether the wealth transfer constitutes a regulatory taking under *Penn Central* because the only issue before the Court was whether the wealth transfer constituted a per se taking under *Loretto*.

Our past cases have observed the wealth transfer effect as well, but the posture of those cases or differences in takings law when those cases were decided made it unnecessary to reach the question of whether the wealth transfer effected a regulatory taking under Penn Central.¹⁷⁸

The wealth transfer from the Park Owners to their tenants is a naked transfer accomplished by the mere enactment of the RCO. By taking the value of the Park Owners' mobile home sites and transferring it to the Park's incumbent tenants, the RCO has effected "the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984). In the classic naked transfer, the government takes property from A to give to B for the sole benefit of B. See *Kelo v. City of New London*, 545 U.S. 469, 477, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005) ("[I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation."). In this case, the RCO works slightly differently, as the government does not act as a fiscal intermediary. Because of the divided ownership of mobile homes--the Park Owners own the real estate and the tenants own the home itself--the transfer can be effected directly by the mere enactment of the RCO. The RCO takes wealth from A, the Park Owners, and transfers it to B, the incumbent tenants, who reap the benefits in the form of mobile homes worth several times their original value.¹⁷⁹

Incumbent tenants are not the only group that benefit from the City's passage of the RCO. The RCO also benefits another group: those who would like to support affordable housing initiatives without paying for it themselves, for example, owners and developers of other forms of housing such as apartments that might otherwise be forced to provide subsidized housing, and taxpayers who want to subsidize affordable housing without actually increasing their own tax liability to pay for it. See *Pennell*, 485 U.S. at 22 (Scalia, J., concurring in part and dissenting in

¹⁷⁸ Academic literature has also discussed the wealth transfer created by mobile home rent control ordinances. See, e.g., William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?*, 67 CHI.-KENT. L. REV. 865, 872-75 (1991); Werner Z. Hirsch & Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. REV. 399, 405, 423-31 (1988); Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 758-59 (1988).

¹⁷⁹ As a result, the RCO is unlikely to increase the availability of affordable housing in the City of Goleta, for the widely-recognized reasons summarized in the Quigley Report. The RCO only affects a small portion of the total housing market in the City, and because of the potential to capitalize the value of the regulated rent into the sale price of the mobile home, even within the mobile home market, the RCO does not actually generate mobile home sites that are cheaper to live on than they would be if rents were unregulated. It is easy to see why mobile home tenants would encourage the City to adopt the County's RCO without further investigation as to whether such regulation was necessary in the real estate market of 2002.

part) ("The politically attractive feature of [rent control] regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved 'off budget,'") Thus, the City, "solely on the ground that those favored have exercised the raw political power to obtain what they want," has taken from A to give to B, both for the benefit of B (the incumbent tenants) and for a larger group, who does not wish to support affordable housing through more politic means. The Takings Clause does not prohibit this use of the police power, see *Kelo*, 545 U.S. at 489-90, but the Takings Clause does not ask us to pretend that such a naked transfer does not cause a severe, observable economic impact on the property owner whose property has been conscripted for the public's use.

The City's principal argument in response is that, even conceding the wealth transfer, the RCO's economic impact on the Park Owners does not amount to a Penn Central taking because the Park Owners can still earn a return on their investment.¹⁸⁰ The City supplied some evidence in the Thomsen Report to show that the Park Owners have earned, depending on the analysis, roughly 10 percent on their investment annually. According to the report, this return is, again depending on the analysis, comparable to or occasionally better than the return on investment earned by real estate investment trusts and other kinds of investments according to national indices.

The district court credited both the Park Owners' evidence of the wealth transfer and the City's evidence of return on investment. Reviewing the reports together it found:

Considering all this evidence, a reasonable inference that may be drawn is that although Plaintiffs have received a rate of return on investment comparable to other real estate investments, and although they have enjoyed a significant appreciation in value of their property, Plaintiffs could have received higher rates of return in the absence of the [regulations].

The district court concluded that the wealth transfer was greater than any return on investment:

The evidence of the rate of return is mixed. Although Plaintiffs have enjoyed a rate of return comparable to other real estate investments, Plaintiffs' evidence tends to suggest that they would have earned more--perhaps much more--in the absence of the RCO.

¹⁸⁰ The City also claimed that incumbent tenants do not necessarily benefit from the one-time wealth transfer in the form of the "transfer premium" because the transfer is not realized until the tenants sell their homes, and they do not all sell their homes. This claim is irrelevant to the point that real wealth has been transferred. Even if an incumbent tenant does not sell his mobile home, he may have realized value in it. He might, for example, be permitted to borrow against the increased value of the home created by the RCO while he remained in the home. To use the district court's figures, an incumbent tenant who purchased his home before the passage of the RCO for \$12,000 could, after the passage of the RCO, take out a home equity loan against a \$100,000 house.

Nevertheless, the district court reasoned that because the Park Owners could receive some return on investment--even though it was less, perhaps even substantially less, than their wealth transfer loss--the Park Owners had not suffered a regulatory taking.

We disagree with the district court's reasoning. The fact that the Park Owners earned some return on investment is not, as the district court reasoned, the end of their Penn Central claim. Even if the Park Owners earned some return on investment, a taking may have occurred. If the Park Owners could show that the RCO denies them all return on investment, they could, of course, prevail on a per se takings claim under Lucas, and we would not have to labor through the Penn Central analysis. Penn Central thus practically assumes that the Park Owners may be able to earn some return on investment. Our challenge under Penn Central is to figure out what loss of potential return on investment, greater than zero but less than 100 percent, is significant enough to constitute a regulatory taking. See *Tahoe-Sierra*, 535 U.S. at 330. The district court thus erred in the conclusion that because plaintiffs can realize a "rate of return comparable to other real estate investments," the Park Owners have not suffered significant economic harm. Cf. *Hall*, 833 F.2d at 1278 ("The city's argument that [the mobile home park owners] are adequately compensated by the rents they receive is irrelevant to the determination of whether a taking has occurred Whether compensation is adequate is an inquiry separate from whether there has been a taking.").

The Park Owners may have enjoyed a positive rate of return, perhaps even a rate of return comparable to some other real estate investments, but the district court found, and neither the City nor the Thomsen Report denies, that the Park Owners "would have earned more--perhaps much more" if not for the RCO. Although the "much more" does not appear to have been reduced to a total dollars-and-cents loss, the district court also found--again without contradiction--that the loss could be as high as almost 90 percent of the sale price on a site-by-site, home-by-home basis. To illustrate this impact, the Quigley Report did estimate possible losses for individual units in the Park, and some of the figures run upwards of \$100,000 per site. By any measure, that is a significant economic transfer from the Park Owners to the tenants, one that must be characterized as a loss for the Park Owners. Cf. *Cienega Gardens v. United States*, 331 F.3d 1319, 1343 (Fed. Cir. 2003) (finding that an extraction of 96 percent of the property's value was severe enough to constitute a taking under Penn Central). The undisputed evidence shows that the mere enactment of the RCO has caused a significant economic loss for the Park Owners. This factor weighs heavily in the Park Owners' favor.

2

The next consideration is "the extent to which the regulation has interfered with distinct investment-backed expectations." *Lingle*, 544 U.S. at 539 (quoting *Penn Central*, 438 U.S. at 124). Here, it is undisputed that the RCO was passed in Santa Barbara County in 1979 and amended in 1987, and that the Park Owners purchased the Park in 1997. The purchase was eighteen years after the RCO was first passed by the County, but five years before the City of

Goleta adopted the RCO in 2002. We agree with the finding of the district court, therefore, that the Park Owners "got exactly what they bargained for when they purchased the Park--a mobile-home park subject to a detailed rent control ordinance."¹⁸¹ Thus, we take pause at the notion that the Park Owners can claim that the challenged regulation took between 80 and 90 percent of the value out of their rental park when, apparently, this value had been extracted before they purchased the park.

Our analysis of this issue is controlled by *Palazzolo*. In that case, a corporation owned property at the time the government enacted the challenged regulation. 533 U.S. at 613. *Palazzolo* came into possession of the property in 1978 when the corporation's charter was revoked and title to the property passed, by operation of law, to *Palazzolo* as the sole shareholder. *Id.* at 614. At that time, the property was already subject to the regulation that designated the property as part of protected "coastal wetlands" upon which development would be limited. The Rhode Island Supreme Court held that *Palazzolo* could not, therefore, bring a takings claim because "[a] purchaser or a successive title holder like [*Palazzolo*] is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking.". As the Supreme Court described the state high court's reasoning, "by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased . . . with notice of the limitation." *Id.*

The Supreme Court reversed:

The State may not put so potent a Hobbesian stick into the Lockean bundle Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.¹⁸²

¹⁸¹ The parties stipulated in their state-court settlement agreement that the RCO, originally a County ordinance, was not in effect for a brief period during the City's process of incorporation, as we have previously noted, *supra* n.2. This fact is relevant to the timeliness of the suit. Nonetheless, for the purposes of considering the Park Owners' investment-backed expectations, the district court found that the RCO had, for all practical purposes, been in effect "unchanged in substance, for all times relevant to the present action."

¹⁸² The Court limited its reasoning to regulatory takings claims; physical takings claims resulting from a state's direct condemnation of property were distinguished as properly brought only by the property owner at the time of the condemnation. 533 U.S. at 628.

Further, the Court pointed out that "[t]he State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. . . . A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken." *Id.* at 627.

The Court's concern, that a rule precluding post-enactment purchasers from bringing a regulatory taking claim would undesirably insulate the government from liability and allow the state to "secure a windfall for itself," is particularly salient on the facts before us. In 2002, the City of Goleta adopted the County's RCO, created to manage housing problems as they existed in 1979, apparently without any formal consideration of whether the problems still existed. Were the fact that the Park Owners purchased the Park when the County RCO was already in existence sufficient to bar their takings claim, the City of Goleta would be insulated from liability for the effects of adopting the RCO when the City incorporated in 2002. All of the existing park owners at that time had bought their parks when the land was still part of unincorporated Santa Barbara County. Unless any of these park owners had purchased their park prior to the original RCO enactment in 1979, all the park owners would have purchased with notice of the original RCO. By its own theory, the City was free to adopt the law with complete impunity, notwithstanding its obvious effects.

The Palazzolo Court explained why subsequent property owners do not lose their right to challenge the government's actions:

Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), presented the question whether it was consistent with the Takings Clause for a state regulatory agency to require oceanfront landowners to provide lateral beach access to the public as the condition for a development permit. The principal dissenting opinion observed it was a policy of the California Coastal Commission to require the condition, and that the Nollans, who purchased their home after the policy went into effect, were "on notice that new developments would be approved only if provisions were made for lateral beach access." *Id.*, at 860 (Brennan, J., dissenting). A majority of the Court rejected the proposition. "So long as the Commission could not have deprived the prior owners of the easement without compensating them," the Court reasoned, "the prior owners must be understood to have transferred their full property rights in conveying the lot." *Palazzolo*, 533 U.S. at 629 (internal citations omitted)

The Court also rejected analogies between purchasing a property subject to a challenged land-use regulation and purchasing a property whose contours are shaped by background principles of state law:

It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by

mere virtue of the passage of title. . . . A regulation or common-law rule cannot be a background principle for some owners but not for others.

. . . A law does not become a background principle for subsequent owners by enactment itself. Lucas did not overrule our holding in *Nollan*, which, as we have noted, is based on essential Takings Clause principles. *Palazzolo*, 533 U.S. at 629-30.

The Court concluded by remanding for consideration of *Palazzolo's* Penn Central claim, stating, "[t]hat claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction."¹⁸³

Palazzolo left open the question of how to apply the "investment-backed expectations" analysis to property owners who purchased subject to the regulation. It merely remanded the case with instructions to address the merits of *Palazzolo's* claim under Penn Central. 533 U.S. at 630. Our sister circuits have yet to address the issue. Penn Central will not aid us because it never supplied "any 'set formula'" in the first place. Penn Central, 438 U.S. at 124. Instead, it "identified several factors that have particular significance" in what the Court described as an "ad hoc, factual inquir[y]." *Id.* After *Palazzolo*, we must continue to consider "[t]he economic impact of the regulation on the claimant" and the "character of the governmental action," *id.*, but we must not deem a regulatory takings claim forfeited simply because the property changed hands after the regulations went into effect.

We read *Palazzolo* to mean that even though the Park Owners purchased the Park in a regulated state similar to the one imposed by the City, the Park Owners may still prevail under Penn Central. How we are to apply Penn Central post-*Palazzolo* is less clear. The question of investment-backed expectations yields mixed results. On the one hand, as the district court found, the Park Owners' "expectations of the value of the Park when purchased, as well as the income to be received from the Park, should have been, at all times, tempered by the knowledge that the RCO would have an adverse effect on their investment." On the other hand, when the Park Owners acquired the property, they also arguably acquired the prior owner's interest in the property, including the right to bring a takings action. See *Palazzolo*, 533 U.S. at 627; see also *CAMSI IV v. Hunter Tech. Corp.*, 230 Cal. App. 3d 1525, 282 Cal. Rptr. 80, 85 (Cal. Ct. App. 1991) ("the harm implicit in a tortious injury to property is harm to the property itself, and thus to any owner of the property once the property has been injured and not necessarily to a

¹⁸³ Finally, we note that even before *Palazzolo*, the Supreme Court permitted property owners who purchased property subsequent to the enactment of the challenged regulation to bring regulatory takings claims. In *Penn Central* itself, one of the appellants, Union General Properties, acquired its leasehold interest in Grand Central Terminal in 1968, a year after the Terminal was designated as a landmark in 1967. *Penn Central*, 438 U.S. at 115-16.

particular owner"). At the very least, the Park Owners have the right to bring a takings action based on the City's 2002 adoption of the RCO.

These two interests are in tension and are, in some respects, self-referential: The new owner's investment-backed expectation depends on the value of any takings claim, but whether there is a regulatory taking turns on the owner's investment-backed expectations. In other words, in this context we cannot address the investment-backed expectation prong of Penn Central without referring to the merits of the takings claim, but in order to decide the takings claim, we must determine the Park Owners' investment-backed expectations. There is no easy way out of this conundrum. For now we will acknowledge the dilemma: the Park Owners took possession of the Park knowing that it was subject to the County's (but not the City's) RCO. They also assumed ownership with some hope that they would be able to challenge the RCO under the Takings Clause and, as they have done here, on equal protection, due process and state law grounds. We conclude, therefore, that the question of investment-backed expectations is not determinative but must be considered in tandem with the economic impact of the regulation on the Park Owners, and the character of the governmental action. See *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring) ("[I]nterference with investment-backed expectations is one of a number of factors that a court must examine.").

3

The final consideration is "the character of the governmental action." *Lingle*, 544 U.S. at 539 (quoting *Penn Central*, 438 U.S. at 124). We have seen two divergent interpretations of this test, both of which appear to derive from different portions of *Penn Central*. We consider each in turn.

One test, applied less frequently in practice, considers "whether [the governmental action] amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'" *Lingle*, 544 U.S. at 538 (quoting *Penn Central*, 438 U.S. at 124). The application of this test to our case is controlled by *Yee*, in which mobile home park owners claimed that a rent control ordinance almost identical to the RCO amounted to a physical taking under *Loretto*. See 503 U.S. at 529-30. The Supreme Court held that the rent control ordinance did not amount to the imposition of a physical invasion. *Id.* The Court, however, proceeded to state in no uncertain terms that the fact that the regulations caused a one-time wealth transfer from landlord to the incumbent tenants "might have some bearing on whether the ordinance causes a regulatory taking." *Id.* at 530.

The district court thought "the character of the governmental action is less like a per se taking and more like a permissible shifting of economic benefits and burdens." We disagree. Although we understand that the RCO does not amount to a physical taking, the RCO is substantially more like a "regulatory taking," *Yee*, 503 U.S. at 530, than a "mere[diminution of

the Park Owners'] property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'" Lingle, 544 U.S. at 539 (quoting Penn Central, 438 U.S. at 124). The RCO is quite unlike zoning or other restrictions that apply broadly to businesses and residences and inevitably restrict the property's uses. The Court has explained that its various formulations of the test for regulatory takings "(reflected in Loretto, Lucas, and Penn Central) . . . aim to identify regulatory actions that are functionally equivalent to the classic taking." The RCO effects a transfer of the right to rents for the use of the property from the Park Owners to the tenants. The Park Owners may own the property on which the mobile homes rest, but under the RCO the tenants have the right to convey the home with the right to remain on the site at a much-reduced rent. This looks much more like a classic taking than a mere regulatory burden. This iteration of the "character of the governmental action" test weighs in favor of the Park Owners.

The second, more frequently applied iteration of the "character of the governmental action" test considers whether the tax base. See *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960) ("The [Takings Clause] was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."); see also Lingle, 544 U.S. at 542-43 (discussing *Armstrong* with approval); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-19, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987) (applying *Armstrong* in a regulatory takings claim); *Penn Central*, 438 U.S. at 123.

We find *Cienega Gardens* persuasive as to the application of the *Armstrong* analysis in this case. See 331 F.3d at 1338. *Cienega Gardens* found a *Penn Central* taking where two federal statutes abrogated property developers' contractual rights to prepay their forty-year mortgage loans after twenty years. The effect of the statutes was to prevent the developers from exiting the low-rent housing programs in which they were required to participate while carrying the loans. These statutes led to a 96 percent loss of return on equity for the developers. *Cienega Gardens* found that the government action at issue placed the expense of low-income housing on a few private property owners (those who had previously participated in the federal loan program but now wanted to exit), instead of distributing the expense among all taxpayers in the form of incentives for developers to construct more low-rent apartments. See 331 F.3d at 1338-39.¹⁸⁴

¹⁸⁴ The City argues that *Cienega Gardens* involved an abrogation of the plaintiffs' contractual property rights whereas this case involves an abrogation of the Park Owners' right to charge market rental rates. This distinction is not relevant here. Regulatory takings cases necessarily involve economic analyses, in which the formal characteristics of the transaction are less relevant than the economic substance. For example, in this case, the fact that Park Owners are not allowed to raise rents could also be considered an abrogation of contract rights--their right to contract for annual market-based rent increases. Similarly, the case could be analogized (creatively) to a land-use extraction case: the Park Owners are only permitted to operate a mobile home park in exchange for an agreement to rent it at 80 percent below existing market rates (which in turn could be analogized as an extraction that they may

Here, the RCO applies only to mobile home park owners. The district court found that the City did not impose comparable costs on any other property owners in the City, except as a condition of new development. The City has singled out the Park Owners and imposed solely on them a burden to support affordable housing. We find the Federal Circuit's reasoning persuasive and applicable to the facts of this case:

Unquestionably, Congress acted for a public purpose (to benefit a certain group of people in need of low-cost housing), but just as clearly, the expense was placed disproportionately on a few private property owners. Congress' objective in passing ELIHPA and LIHPRHA -- preserving low-income housing--and method--forcing some owners to keep accepting below-market rents--is the kind of expense-shifting to a few persons that amounts to a taking. This is especially clear where, as here, the alternative was for all taxpayers to shoulder the burden. Congress could simply have appropriated more money for mortgage insurance and thereby induced more developers to build low-rent apartments in the public housing program to replace housing, such as the plaintiffs', that was no longer part of the program. 331 F.3d at 1338-39; see also *Pa. Coal*, 260 U.S. at 416

We do not doubt that the City's objective in passing the RCO was to increase the availability of low-cost housing. Singling out mobile home park owners, however, and forcing them to rent their property at a discount of 80 percent below its market value, "is the kind of expense-shifting to a few persons that amounts to a taking." *Cienega Gardens*, 331 F.3d at 1338-39. Moreover, the City has numerous alternatives for supporting affordable housing--such as tax incentives, low-cost loans, rent supports, or vouchers--without directing the burden at such a limited group. In sum, taking account of the "character of the governmental action" test in this case also weighs strongly in the Park Owners' favor.

C

Having reviewed each factor individually, we must weigh them together. We conclude that the RCO has caused substantial economic hardship to the Park Owners. Property values in the area have increased by 225 percent in the time that the Park Owners have owned the Park, yet the Park Owners have not been permitted to increase rents beyond 75 percent of the annual increase in the CPI. This is a zero-sum game; loss to the Park Owners has become gain to their tenants. The RCO has forced the Park Owners to rent their property at an 80 percent discount below the market value, esulting in transfer premiums equal to approximately 90 percent of the

rent 20 percent of the park at full market rates if they agree to permit 80 percent of the tenants to live rent-free). See, e.g., *Yee*, 503 U.S. at 530 (suggesting that a mobile home rent control ordinance may be analogized to a land-use extraction and referencing *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987)).

selling price of a mobile home. Thus, the savings created by these below-market rents are transferred directly into the pockets of the incumbent mobile home tenants, who can now sell their mobile homes for almost ten times their purchase price. See *Yee*, 503 U.S. at 530. Next, we agree with the district court that the RCO has not strongly interfered with the Park Owners' investment-backed expectations because the Park Owners purchased the Park when the Park was already regulated. Nevertheless, the mere fact that the Park Owners bought the Park in its regulated state does not mean that the City has not taken property by regulation or that the Park Owners cannot bring such a claim. See *Palazzolo*, 533 U.S. at 627-28. Finally, we conclude that the RCO looks more like a classic taking than a mere shifting of benefits and burdens, see *Yee*, 503 U.S. at 530, and that the RCO singles out mobile home park owners and forces them to bear a burden of providing affordable housing in the City that should fairly be born by the taxpayers as a whole. See *Armstrong*, 364 U.S. at 49.

On balance, the City's RCO "goes too far" and constitutes a regulatory taking under the Fifth and Fourteenth Amendments for which just compensation must be paid. If the City of Goleta wishes to attempt to increase the availability of affordable housing by transferring the value of renting land within its jurisdiction from the Park Owners to the incumbent tenants, there is no constitutional impediment to doing so. The Fifth Amendment of the U.S. Constitution, however, requires that the City compensate the Park Owners for taking their property by regulation.

VI

State and local governments have a legitimate interest in increasing the availability of affordable housing for their citizens. Translating that interest into effective public policy, however, has proven difficult. The Supreme Court and our court have addressed regulations like the City's RCO with some regularity; we have consistently questioned their ineffectiveness at increasing the availability of affordable housing, and we have commented on their pernicious side effects. See, e.g., *Yee*, 503 U.S. at 530

Nevertheless, so long as these rent control ordinances are "designed to accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and the purpose of the ordinances," the Constitution affords state and local governments the flexibility to experiment to find a workable approach to the problem.

When such ordinances "go too far," however, and require some property owners to support policies that "in all fairness and justice, should be borne by the public as a whole," the Constitution requires that the government provide just compensation. *Lingle*, 544 U.S. at 537 (citation omitted). The Williamson prudential ripeness requirements have, for the most part, forced us to close the courthouse door to aggrieved property owners like the Park Owners, and to close our eyes to the extreme effects of laws like the City's RCO. The Park Owners, however, have managed to pry these doors open a bit by developing their case through three rounds of

litigation in state and federal court, and the City has forfeited any objection that the case is not fit for review. We will not, therefore, throw these property owners back out and slam the courthouse door shut behind them. Today, our eyes are open. We have weighed the Penn Central factors, and we find that the RCO has effected a regulatory taking. Just compensation is due.

We therefore reverse the district court's judgment on the takings claim and remand to the district court for further proceedings. On remand, the district court may of course consider any materials presented by either party that are relevant to determining the total amount of just compensation due to the Park Owners. See, e.g., *Cienega Gardens*, 331 F.3d at 1354. We have now held that a facial challenge under Penn Central exists as a viable legal claim, and affirmed that this court's precedents and the nature of a takings inquiry allow for some evidence outside the text of the statute to be admissible. The district court may therefore properly consider such "detailed figures," in addition to any other evidence it deems relevant, in conducting its analysis to ascertain the precise amount of just compensation owed to the Park Owners.

Costs shall be awarded to the Appellants.

REVERSED and REMANDED.

KLEINFELD, Circuit Judge, dissenting:

[OMITTED]

PART VIII. PROPERTY RIGHTS AND FREE EXPRESSION

“[F]reedom of thought and speech... is the matrix, the indispensable condition, of nearly every other form of freedom.” JUSTICE CARDOZA in *Pafko v. Connecticut*, 302 U.S. 319 (1937)

Session 33. First Amendment Primer

SCHENCK v. UNITED STATES

249 U.S. 47 (1919)

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment in three counts. The first charges a conspiracy to violate the Espionage Act of June 15, 1917, c. 30, §3, 40 Stat. 217, 219, by causing and attempting to cause insubordination, &c., in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire, to-wit, that the defendants wilfully conspired to have printed and circulated to men who had been called and accepted for military service under the Act of May 18, 1917, a document set forth and alleged to be calculated to cause such insubordination and obstruction. The defendants were found guilty on all the counts. They set up the First Amendment to the Constitution forbidding Congress to make any law abridging the freedom of speech, or of the press, and bringing the case here on that ground have argued some other points also of which we must dispose.

The documents would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.

But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution. Two of the strongest expressions are said to be quoted respectively from well-known public men. It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in *Patterson v. Colorado*, 205 U.S. 454, 462. We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be

endured so long as men fight and that no Court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917 in §4 punishes conspiracies to obstruct as well as actual obstruction. If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime. *Goldman v. United States*, 245 U.S. 474, 477. Indeed that case might be said to dispose of the present contention if the precedent covers all media *concludendi*. But as the right to free speech was not referred to specially, we have thought fit to add a few words.

It was not argued that a conspiracy to obstruct the draft was not within the words of the Act of 1917. The words are "obstruct the recruiting or enlistment service," and it might be suggested that they refer only to making it hard to get volunteers.

Judgments affirmed.

GITLOW v. NEW YORK
268 U.S. 652 (1923)

MR. JUSTICE SANFORD delivered the opinion of the Court.

Benjamin Gitlow was indicted in the Supreme Court of New York, with three others, for the statutory crime of criminal anarchy. He was separately tried, convicted, and sentenced to imprisonment. The judgment was affirmed by the Appellate Division and by the Court of Appeals. The case is here on writ of error to the Supreme Court.

The indictment was in two counts. The first charged that the defendant had advocated, advised and taught the duty, necessity and propriety of overthrowing and overturning organized government by force, violence and unlawful means, by certain writings therein set forth entitled "The Left Wing Manifesto"; the second that he had printed, published and knowingly circulated and distributed a certain paper called "The Revolutionary Age," containing the writings set forth in the first count advocating, advising and teaching the doctrine that organized government should be overthrown by force, violence and unlawful means.

The following facts were established on the trial by undisputed evidence and admissions: The defendant is a member of the Left Wing Section of the Socialist Party, a dissenting branch or faction of that party formed in opposition to its dominant policy of "moderate Socialism." Membership in both is open to aliens as well as citizens. The Left Wing Section was organized nationally at a conference in New York City in June, 1919, attended by ninety delegates from twenty different States. The conference elected a National Council, of which the defendant was a member, and left to it the adoption of a "Manifesto." This was published in The Revolutionary Age, the official organ of the Left Wing. The defendant was on the board of managers of the paper and was its business manager. He arranged for the printing of the paper and took to the printer the manuscript of the first issue which contained the Left Wing Manifesto, and also a Communist Program and a Program of the Left Wing that had been adopted by the conference. Sixteen thousand copies were printed, which were delivered at the premises in New York City used as the office of the Revolutionary Age and the headquarters of the Left Wing, and occupied by the defendant and other officials. These copies were paid for by the defendant, as business manager of the paper. Employees at this office wrapped and mailed out copies of the paper under the defendant's direction; and copies were sold from this office. It was admitted that the defendant signed a card subscribing to the Manifesto and Program of the Left Wing, which all applicants were required to sign before being admitted to membership; that he went to different parts of the State to speak to branches of the Socialist Party about the principles of the Left Wing and advocated their adoption; and that he was responsible for the Manifesto as it appeared, that "he knew of the publication, in a general way and he knew of its publication afterwards, and is responsible for its circulation."

The precise question presented, and the only question which we can consider under this writ of error, then is, whether the statute, as construed and applied in this case by the state courts, deprived the defendant of his liberty of expression in violation of the due process clause of the Fourteenth Amendment.

That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of overthrowing organized government by force, violence and unlawful means, but action to that end, is clear.

For present purposes we may and do assume that freedom of speech and of the press -- which are protected by the First Amendment from abridgment by Congress -- are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. Reasonably limited this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. *Mugler v. Kansas*, 123 U.S. 623, 661. And the case is to be considered "in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare;" and that its police "statutes may only be declared unconstitutional where they are arbitrary or unreasonable. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration.

We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality. In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.

Affirmed.

MR. JUSTICE HOLMES, dissenting.

MR. JUSTICE BRANDEIS and I are of opinion that this judgment should be reversed. The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States. If I am right, then I think that the criterion sanctioned by the full Court in *Schenck v. United States*, 249 U.S. 47, 52, applies. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the State] has a right to prevent." If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

LOVELL v. CITY OF GRIFFIN
303 U.S. 444 (1938)

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Appellant, Alma Lovell, was convicted in the Recorder's Court of the City of Griffin, Georgia, of the violation of a city ordinance and was sentenced to imprisonment for fifty days in default of the payment of a fine of fifty dollars. The Superior Court of the county refused sanction of a petition for review; the Court of Appeals affirmed the judgment of the Superior Court (55 Ga. App. 609; 191 S. E. 152); and the Supreme Court of the State denied an application for certiorari. The case comes here on appeal.

The ordinance in question is as follows:

"Section 1. That the practice of distributing, either by hand or otherwise, circulars, handbooks, advertising, or literature of any kind, whether said articles are being delivered free, or whether same are being sold, within the limits of the City of Griffin, without first obtaining written permission from the City Manager of the City of Griffin, such practice shall be deemed a nuisance, and punishable as an offense against the City of Griffin.

"Section 2. The Chief of Police of the City of Griffin and the police force of the City of Griffin are hereby required and directed to suppress the same and to abate any nuisance as is described in the first section of this ordinance."

The violation, which is not denied, consisted of the distribution without the required permission of a pamphlet and magazine in the nature of religious tracts, setting forth the gospel of the "Kingdom of Jehovah." Appellant did not apply for a permit, as she regarded herself as sent "by Jehovah to do His work" and that such an application would have been "an act of disobedience to His commandment."

Upon the trial, with permission of the court, appellant demurred to the charge and moved to dismiss it upon a number of grounds, among which was the contention that the ordinance violated the Fourteenth Amendment of the Constitution of the United States in abridging "the freedom of the press" and prohibiting "the free exercise of petitioner's religion." This contention was thus expressed:

"Because said ordinance is contrary to and in violation of the first amendment to the Constitution of the United States, which reads:

'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.'

"Said ordinance is also contrary to and in violation of the fourteenth amendment to the Constitution of the United States, which had the effect of making the said first amendment applicable to the States, and which reads:

'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"Said ordinance absolutely prohibits the distribution of any literature of any kind within the limits of the City of Griffin without the permission of the City Manager and thus abridges the freedom of the press, contrary to the provisions of said quoted amendments.

"Said ordinance also prohibits the free exercise of petitioner's religion and the practice thereof by prohibiting the distribution of literature about petitioner's religion in violation of the terms of said quoted amendments."

The Court of Appeals, overruling these objections, sustained the constitutional validity of the ordinance, saying –

"The ordinance is not unconstitutional because it abridges the freedom of the press or prohibits the distribution of literature about the petitioner's religion, in violation of the fourteenth amendment to the constitution of the United States."

Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action. It is also well settled that municipal ordinances adopted under state authority constitute state action and are within the prohibition of the amendment.

The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation "either by hand or otherwise." There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets. The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager.

We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by

subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing." And the liberty of the press became initially a right to publish "without a license what formerly could be published only with one."¹⁸⁵ While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision. See *Patterson v. Colorado*, 205 U.S. 454, 462; *Near v. Minnesota*, 283 U.S. 697, 713-716; *Grosjean v. American Press Co.*, 297 U.S. 233, 245, 246. Legislation of the type of the ordinance in question would restore the system of license and censorship in its baldest form.

The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated. *Near v. Minnesota*, *supra*; *Grosjean v. American Press Co.*, *supra*; *De Jonge v. Oregon*, *supra*.

As the ordinance is void on its face, it was not necessary for appellant to seek a permit under it. She was entitled to contest its validity in answer to the charge against her. *Smith v. Cahoon*, 283 U.S. 553, 562.

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

Reversed.

¹⁸⁵ See Wickwar, "The Struggle for the Freedom of the Press," p. 15.

MARSH v. ALABAMA
326 U.S. 501 (1945)

MR. JUSTICE BLACK delivered the opinion of the Court.

In this case we are asked to decide whether a State, consistently with the First and Fourteenth Amendments, can impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management. The town, a suburb of Mobile, Alabama, known as Chickasaw, is owned by the Gulf Shipbuilding Corporation. Except for that it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which cannot be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.

Appellant, a Jehovah's Witness, came onto the sidewalk we have just described, stood near the post office and undertook to distribute religious literature. In the stores the corporation had posted a notice which read as follows: "This Is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted." Appellant was warned that she could not distribute the literature without a permit and told that no permit would be issued to her. She protested that the company rule could not be constitutionally applied so as to prohibit her from distributing religious writings. When she was asked to leave the sidewalk and Chickasaw she declined. The deputy sheriff arrested her and she was charged in the state court with violating Title 14, §426 of the 1940 Alabama Code which makes it a crime to enter or remain on the premises of another after having been warned not to do so. Appellant contended that to construe the state statute as applicable to her activities would abridge her right to freedom of press and religion contrary to the First and Fourteenth Amendments to the Constitution. This contention was rejected and she was convicted. The Alabama Court of Appeals affirmed the conviction, holding that the statute as applied was constitutional because

the title to the sidewalk was in the corporation and because the public use of the sidewalk had not been such as to give rise to a presumption under Alabama law of its irrevocable dedication to the public. 21 So. 2d 558. The State Supreme Court denied certiorari, 246 Ala. 539, 21 So. 2d 564, and the case is here on appeal under §237 (a) of the Judicial Code, 28 U. S. C. §344 (a).

Had the title to Chickasaw belonged not to a private but to a municipal corporation and had appellant been arrested for violating a municipal ordinance rather than a ruling by those appointed by the corporation to manage a company town it would have been clear that appellant's conviction must be reversed. Under our decision in *Lovell v. Griffin*, 303 U.S. 444 and others which have followed that case, neither a State nor a municipality can completely bar the distribution of literature containing religious or political ideas on its streets, sidewalks and public places or make the right to distribute dependent on a flat license tax or permit to be issued by an official who could deny it at will. We have also held that an ordinance completely prohibiting the dissemination of ideas on the city streets cannot be justified on the ground that the municipality holds legal title to them. *Jamison v. Texas*, 318 U.S. 413. And we have recognized that the preservation of a free society is so far dependent upon the right of each individual citizen to receive such literature as he himself might desire that a municipality could not, without jeopardizing that vital individual freedom, prohibit door to door distribution of literature. *Martin v. Struthers*, 319 U.S. 141, 146, 147. From these decisions it is clear that had the people of Chickasaw owned all the homes, and all the stores, and all the streets, and all the sidewalks, all those owners together could not have set up a municipal government with sufficient power to pass an ordinance completely barring the distribution of religious literature. Our question then narrows down to this: Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town? For it is the State's contention that the mere fact that all the property interests in the town are held by a single company is enough to give that company power, enforceable by a state statute, to abridge these freedoms.

We do not agree that the corporation's property interests settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.

We do not think it makes any significant constitutional difference as to the relationship between the rights of the owner and those of the public that here the State, instead of permitting the corporation to operate a highway, permitted it to use its property as a town, operate a "business block" in the town and a street and sidewalk on that business block. Cf. *Barney v. Keokuk*, 94 U.S. 324, 340. Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we have heretofore stated, the town

of Chickasaw does not function differently from any other town. The "business block" serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.

Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.

When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment "lies at the foundation of free government by free men" and we must in all cases "weigh the circumstances and . . . appraise the . . . reasons . . . in support of the regulation . . . of the rights." *Schneider v. State*, 308 U.S. 147, 161. In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute. Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand. The case is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

CHAPLINSKY v. NEW HAMPSHIRE
315 U.S. 568 (1942)

MR. JUSTICE MURPHY delivered the opinion of the Court.

Appellant, a member of the sect known as Jehovah's Witnesses, was convicted in the municipal court of Rochester, New Hampshire, for violation of Chapter 378, §2, of the Public Laws of New Hampshire:

"No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."

The complaint charged that appellant, "with force and arms, in a certain public place in said city of Rochester, to wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall, did unlawfully repeat, the words following, addressed to the complainant, that is to say, 'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists,' the same being offensive, derisive and annoying words and names." He was found guilty and the judgment of conviction was affirmed by the Supreme Court of the State. 91 N.H. 310, 18 A. 2d 754.

By motions and exceptions, appellant raised the questions that the statute was invalid under the Fourteenth Amendment of the Constitution of the United States, in that it placed an unreasonable restraint on freedom of speech, freedom of the press, and freedom of worship, and because it was vague and indefinite. These contentions were overruled and the case comes here on appeal.

There is no substantial dispute over the facts. It is now clear that "Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by action." *Lovell v. Griffin*, 303 U.S. 444, 450. Freedom of worship is similarly sheltered. *Cantwell v. Connecticut*, 310 U.S. 296, 303.

Appellant assails the statute as a violation of all three freedoms, speech, press and worship, but only an attack on the basis of free speech is warranted. The spoken, not the written, word is involved. And we cannot conceive that cursing a public officer is the exercise of religion in any sense of the term. But even if the activities of the appellant which preceded the incident could be viewed as religious in character, and therefore entitled to the protection of the Fourteenth Amendment, they would not cloak him with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute. We turn, therefore, to an examination of the statute itself.

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

On the authority of its earlier decisions, the state court declared that the statute's purpose was to preserve the public peace, no words being "forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed." 7 It was further said: "The word 'offensive' is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker -- including 'classical fighting words', words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats."

We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech. Argument is unnecessary to demonstrate that the appellations "damned racketeer" and "damned Fascist" are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

Our function is fulfilled by a determination that the challenged statute, on its face and as applied, does not contravene the Fourteenth Amendment.

Affirmed.

GRAYNED v. CITY OF ROCKFORD
408 U.S. 104 (1972)

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Appellant Richard Grayned was convicted for his part in a demonstration in front of West Senior High School in Rockford, Illinois. Negro students at the school had first presented their grievances to school administrators. When the principal took no action on crucial complaints, a more public demonstration of protest was planned. On April 25, 1969, approximately 200 people -- students, their family members, and friends -- gathered next to the school grounds. Appellant, whose brother and twin sisters were attending the school, was part of this group. The demonstrators marched around on a sidewalk about 100 feet from the school building, which was set back from the street. Many carried signs which summarized the grievances: "Black cheerleaders to cheer too"; "Black history with black teachers"; "Equal rights, Negro counselors." Others, without placards, made the "power to the people" sign with their upraised and clenched fists.

In other respects, the evidence at appellant's trial was sharply contradictory. Government witnesses reported that the demonstrators repeatedly cheered, chanted, baited policemen, and made other noise that was audible in the school; that hundreds of students were distracted from their school activities and lined the classroom windows to watch the demonstration; that some demonstrators successfully yelled to their friends to leave the school building and join the demonstration; that uncontrolled latenesses after period changes in the school were far greater than usual, with late students admitting that they had been watching the demonstration; and that, in general, orderly school procedure was disrupted. Defense witnesses claimed that the demonstrators were at all times quiet and orderly; that they did not seek to violate the law, but only to "make a point"; that the only noise was made by policemen using loudspeakers; that almost no students were noticeable at the schoolhouse windows; and that orderly school procedure was not disrupted.

After warning the demonstrators, the police arrested 40 of them, including appellant. For participating in the demonstration, Grayned was tried and convicted of violating [a] Rockford ordinances, hereinafter referred to as the "antinoise" ordinance. A \$25 fine was imposed. Since Grayned challenged the constitutionality of [the] ordinance, he appealed directly to the Supreme Court of Illinois. Ill. Sup. Ct. Rule 302. He claimed that the ordinances were invalid on their face, but did not urge that, as applied to him, the ordinances had punished constitutionally protected activity. The Supreme Court of Illinois held that [the] ordinance constitutional on ...[its] face. 46 Ill. 2d 492, 263 N. E. 2d 866 (1970). We noted probable jurisdiction, 404 U. S. 820 (1971). We affirm the court below with respect to the antinoise ordinance. .

The antinoise ordinance reads, in pertinent part, as follows:

"No person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof. . . ." Code of Ordinances, c. 28, §19.2 (a).

Appellant claims that, on its face, this ordinance is both vague and overbroad, and therefore unconstitutional. We conclude, however, that the ordinance suffers from neither of these related infirmities.

A. Vagueness

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms,"¹⁸⁶ it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Although the question is close, we conclude that the antinoise ordinance is not impermissibly vague.

Condemned to the use of words, we can never expect mathematical certainty from our language. Although the prohibited quantum of disturbance is not specified in the ordinance, it is apparent from the statute's announced purpose that the measure is whether normal school activity has been or is about to be disrupted. We do not have here a vague, general "breach of the peace" ordinance, but a statute written specifically for the school context, where the prohibited disturbances are easily measured by their impact on the normal activities of the school. Given this "particular context," the ordinance gives "fair notice to those to whom [it] is directed."

[The] Rockford's antinoise ordinance does not permit punishment for the expression of an unpopular point of view, and it contains no broad invitation to subjective or discriminatory enforcement. Rockford does not claim the broad power to punish all "noises" and "diversions."

¹⁸⁶ *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

The vagueness of these terms, by themselves, is dispelled by the ordinance's requirements that (1) the "noise or diversion" be actually incompatible with normal school activity; (2) there be a demonstrated causality between the disruption that occurs and the "noise or diversion"; and (3) the acts be "willfully" done. The ordinance does not permit people to "stand on a public sidewalk . . . only at the whim of any police officer." Rather, there must be demonstrated interference with school activities. As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible. The Rockford City Council has made the basic policy choices, and has given fair warning as to what is prohibited. "The ordinance defines boundaries sufficiently distinct" for citizens, policemen, juries, and appellate judges. It is not impermissibly vague.

B. Overbreadth

A clear and precise enactment may nevertheless be "overbroad" if in its reach it prohibits constitutionally protected conduct. Although appellant does not claim that, as applied to him, the antinoise ordinance has punished protected expressive activity, he claims that the ordinance is overbroad on its face. Because overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge. The crucial question, then, is whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments. Specifically, appellant contends that the Rockford ordinance unduly interferes with First and Fourteenth Amendment rights to picket on a public sidewalk near a school. We disagree.

In considering the right of a municipality to control the use of public streets for the expression of religious [or political] views, we start with the words of Mr. Justice Roberts that 'Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' *Hague v. CIO*, 307 U.S. 496, 515 (1939)." *Kunz v. New York*, 340 U.S. 290, 293 (1951). The right to use a public place for expressive activity may be restricted only for weighty reasons.

Clearly, government has no power to restrict such activity because of its message. Our cases make equally clear, however, that reasonable "time, place and manner" regulations may be necessary to further significant governmental interests, and are permitted. For example, two parades cannot march on the same street simultaneously, and government may allow only one. A demonstration or parade on a large street during rush hour might put an intolerable burden on the essential flow of traffic, and for that reason could be prohibited. If overamplified loudspeakers assault the citizenry, government may turn them down. Subject to such reasonable regulation, however, peaceful demonstrations in public places are protected by the First Amendment. Of course, where demonstrations turn violent, they lose their protected quality as expression under the First Amendment.

The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." Wright, *The Constitution on the Campus*, 22 Vand. L. Rev. 1027, 1042 (1969) Although a silent vigil may not unduly interfere with a public library, *Brown v. Louisiana*, 383 U.S. 131 (1966), making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest. Access to the "streets, sidewalks, parks, and other similar public places . . . for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly . . . *Food Employees v. Logan Valley Plaza*, 391 U.S., at 315." Free expression "must not, in the guise of regulation, be abridged or denied." *Hague v. CIO*, 307 U.S., at 516.

In light of these general principles, we do not think that Rockford's ordinance is an unconstitutional regulation of activity around a school. Our touchstone is *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), in which we considered the question of how to accommodate First Amendment rights with the "special characteristics of the school environment." Just as *Tinker* made clear that school property may not be declared off limits for expressive activity by students, we think it clear that the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public. But in each case, expressive activity may be prohibited if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker v. Des Moines School District*, 393 U.S., at 513.

Rockford's antinoise ordinance goes no further than *Tinker* says a municipality may go to prevent interference with its schools. It is narrowly tailored to further Rockford's compelling interest in having an undisrupted school session conducive to the students' learning, and does not unnecessarily interfere with First Amendment rights. Far from having an impermissibly broad prophylactic ordinance, 43 Rockford punishes only conduct which disrupts or is about to disrupt normal school activities. That decision is made, as it should be, on an individualized basis, given the particular fact situation. Peaceful picketing which does not interfere with the ordinary functioning of the school is permitted. And the ordinance gives no license to punish anyone because of what he is saying.

We recognize that the ordinance prohibits some picketing that is neither violent nor physically obstructive. Noisy demonstrations that disrupt or are incompatible with normal school activities are obviously within the ordinance's reach. Such expressive conduct may be constitutionally protected at other places or other times but next to a school, while classes are in session, it may be prohibited. The antinoise ordinance imposes no such restriction on expressive activity before or after the school session, while the student/faculty "audience" enters and leaves the school.

Such a reasonable regulation is not inconsistent with the First and Fourteenth Amendments. The antinoise ordinance is not invalid on its face.

The judgment is

Affirmed .

MR. JUSTICE DOUGLAS, dissenting in part.

While I join Part I of the Court's opinion, I would also reverse the appellant's conviction under the antinoise ordinance.

The municipal ordinance on which this case turns is c. 28, §19.2 (a) which provides in relevant part:

"That no person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof."

Appellant was one of 200 people picketing a school and carrying signs promoting a black cause -- "Black cheerleaders to cheer too," "Black history with black teachers," "We want our rights," and the like. Appellant, however, did not himself carry a picket sign. There was no evidence that he yelled or made any noise whatsoever. Indeed, the evidence reveals that appellant simply marched quietly and on one occasion raised his arm in the "power to the people" salute.

The pickets were mostly students; but they included former students, parents of students, and concerned citizens. They had made proposals to the school board on their demands and were turned down. Hence the picketing. The picketing was mostly by black students who were counseled and advised by a faculty member of the school. The school contained 1,800 students. Those counseling the students advised they must be quiet, walk hand in hand, no whispering, no talking.

Twenty-five policemen were stationed nearby. There was noise but most of it was produced by the police who used loudspeakers to explain the local ordinance and to announce that arrests might be made. The picketing did not stop, and some 40 demonstrators, including appellant, were arrested.

The picketing lasted 20 to 30 minutes and some students went to the windows of the classrooms to observe it. It is not clear how many there were. The picketing was, however, orderly or, as one officer testified, "very orderly." There was no violence. And appellant made no noise whatever.

What Mr. Justice Roberts said in *Hague v. CIO*, 307 U.S. 496, 515-516, has never been questioned:

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

The school where the present picketing occurred was the center of a racial conflict. Most of the pickets were indeed students in the school. The dispute doubtless disturbed the school; and the blaring of the loudspeakers of the police was certainly a "noise or diversion" in the meaning of the ordinance. But there was no evidence that appellant was noisy or boisterous or rowdy. He walked quietly and in an orderly manner. As I read this record, the disruptive force loosed at this school was an issue dealing with race -- an issue that is preeminently one for solution by First Amendment means. That is all that was done here; and the entire picketing, including appellant's part in it, was done in the best First Amendment tradition.

Session 34. Public Fora

AMALGAMATED FOOD UNION v. LOGAN VALLEY PLAZA 391 U.S. 308 (1968)

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether peaceful picketing of a business enterprise located within a shopping center can be enjoined on the ground that it constitutes an unconsented invasion of the property rights of the owners of the land on which the center is situated. We granted certiorari to consider petitioners' contentions that the decisions of the state courts enjoining their picketing as a trespass are violative of their rights under the First and Fourteenth Amendments of the United States Constitution. We reverse.

Logan Valley Plaza, Inc. (Logan), one of the two respondents herein, owns a large, newly developed shopping center complex, known as the Logan Valley Mall, located near the City of Altoona, Pennsylvania. The shopping center is situated at the intersection of Plank Road, which is to the east of the center, and Good's Lane, which is to the south. Plank Road, also known as U.S. Route 220, is a heavily traveled highway along which traffic moves at a fairly high rate of speed. There are five entrance roads into the center, three from Plank Road and two from Good's Lane. Aside from these five entrances, the shopping center is totally separated from the adjoining roads by earthen berms. The berms are 15 feet wide along Good's Lane and 12 feet wide along Plank Road.

At the time of the events in this case, Logan Valley Mall was occupied by two businesses, Weis Markets, Inc. (Weis), the other respondent herein, and Sears, Roebuck and Co. (Sears), although other enterprises were then expected and have since moved into the center. Weis operates a supermarket and Sears operates both a department store and an automobile service center. The Weis property consists of the enclosed supermarket building, an open but covered porch along the front of the building, and an approximately five-foot-wide parcel pickup zone that runs 30 to 40 feet along the porch. The porch functions as a sidewalk in front of the building and the pickup zone is used as a temporary parking place for the loading of purchases into customers' cars by Weis employees.

Between the Weis building and the highway berms are extensive macadam parking lots with parking spaces and driveways lined off thereon. These areas, to which Logan retains title, provide common parking facilities for all the businesses in the shopping center. The distance across the parking lots to the Weis store from the entrances on Good's Lane is approximately 350 feet and from the entrances on Plank Road approximately 400 to 500 feet. The entrance on Plank Road farthest from the Weis property is the main entrance to the shopping center as a whole and is regularly used by customers of Weis. The entrance on Plank Road nearest to Weis is almost exclusively used by patrons of the Sears automobile service station into which it leads directly.

On December 8, 1965, Weis opened for business, employing a wholly nonunion staff of employees. A few days after it opened for business, Weis posted a sign on the exterior of its building prohibiting trespassing or soliciting by anyone other than its employees on its porch or parking lot. On December 17, 1965, members of Amalgamated Food Employees Union, Local 590, began picketing Weis. They carried signs stating that the Weis market was nonunion and that its employees were not "receiving union wages or other union benefits." The pickets did not include any employees of Weis, but rather were all employees of competitors of Weis. The picketing continued until December 27, during which time the number of pickets varied between four and 13 and averaged around six. The picketing was carried out almost entirely in the parcel pickup area and that portion of the parking lot immediately adjacent thereto. Although some congestion of the parcel pickup area occurred, such congestion was sporadic and infrequent. The picketing was peaceful at all times and unaccompanied by either threats or violence.

On December 27, Weis and Logan instituted an action in equity in the Court of Common Pleas of Blair County, and that court immediately issued an ex parte order enjoining petitioners from, inter alia, "picketing and trespassing upon . . . the [Weis] storeroom, porch and parcel pick-up area . . . [and] the [Logan] parking area and all entrances and exits leading to said parking area." The effect of this order was to require that all picketing be carried on along the berms beside the public roads outside the shopping center. Picketing continued along the berms and, in addition, handbills asking the public not to patronize Weis because it was nonunion were distributed, while petitioners contested the validity of the ex parte injunction. After an evidentiary hearing, which resulted in the establishment of the facts set forth above, the Court of Common Pleas continued indefinitely its original ex parte injunction without modification.

That court explicitly rejected petitioners' claim under the First Amendment that they were entitled to picket within the confines of the shopping center. The trial judge held that the injunction was justified both in order to protect respondents' property rights and because the picketing was unlawfully aimed at coercing Weis to compel its employees to join a union. On appeal the Pennsylvania Supreme Court, with three Justices dissenting, affirmed the issuance of the injunction on the sole ground that petitioners' conduct constituted a trespass on respondents' property.

We start from the premise that peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment. To be sure, this Court has noted that picketing involves elements of both speech and conduct, i. e., patrolling, and has indicated that because of this intermingling of protected and unprotected elements, picketing can be subjected to controls that would not be constitutionally permissible in the case of pure speech. Nevertheless, no case decided by this Court can be found to support the proposition that the nonspeech aspects of peaceful picketing are so great as to render the provisions of the First Amendment inapplicable to it altogether.

The case squarely presents the question whether Pennsylvania's generally valid rules against trespass to private property can be applied in these circumstances to bar petitioners from the Weis and Logan premises. It is clear that if the shopping center premises were not privately owned but instead constituted the business area of a municipality, which they to a large extent resemble, petitioners could not be barred from exercising their First Amendment rights there on the sole ground that title to the property was in the municipality. *Lovell v. Griffin*, 303 U.S. 444 (1938); *Hague v. CIO*, 307 U.S. 496 (1939). The essence of those opinions is that streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.

This Court has ...held, in *Marsh v. Alabama*, 326 U.S. 501 (1946), that under some circumstances property that is privately owned may, at least for First Amendment purposes, be treated as though it were publicly held. In *Marsh*, the appellant, a Jehovah's Witness, had undertaken to distribute religious literature on a sidewalk in the business district of Chickasaw, Alabama. Chickasaw, a so-called company town, was wholly owned by the Gulf Shipbuilding Corporation.

The corporation had posted notices in the stores stating that the premises were private property and that no solicitation of any kind without written permission would be permitted. Appellant Marsh was told that she must have a permit to distribute her literature and that a permit would not be granted to her. When she declared that the company rule could not be utilized to prevent her from exercising her constitutional rights under the First Amendment, she was ordered to leave Chickasaw. She refused to do so and was arrested for violating Alabama's criminal trespass statute. In reversing her conviction under the statute, this Court held that the fact that the property from which appellant was sought to be ejected for exercising her First Amendment rights was owned by a private corporation rather than the State was an insufficient basis to justify the infringement on appellant's right to free expression occasioned thereby. Likewise the fact that appellant Marsh was herself not a resident of the town was not considered material.

The similarities between the business block in *Marsh* and the shopping center in the present case are striking. The perimeter of Logan Valley Mall is a little less than 1.1 miles. Inside the mall were situated, at the time of trial, two substantial commercial enterprises with numerous others soon to follow. Immediately adjacent to the mall are two roads, one of which is a heavily traveled state highway and from both of which lead entrances directly into the mall. Adjoining the buildings in the middle of the mall are sidewalks for the use of pedestrians going to and from their cars and from building to building. In the parking areas, roadways for the use of vehicular traffic entering and leaving the mall are clearly marked out. The general public has unrestricted access to the mall property. The shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh*.

All we decide here is that because the shopping center serves as the community business block "and is freely accessible and open to the people in the area and those passing through," *Marsh v. Alabama*, 326 U.S., at 508, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put.

It is clear that the restraints on picketing and trespassing approved by the Pennsylvania courts here substantially hinder the communication of the ideas which petitioners seek to express to the patrons of Weis. The fact that the nonspeech aspects of petitioners' activity are also rendered less effective is not particularly compelling in light of the absence of any showing, or reliance by the state courts thereon, that the patrolling accompanying the picketing sought to be carried on was significantly interfering with the use to which the mall property was being put by both respondents and the general public. The... mere fact that speech is accompanied by conduct does not mean that the speech can be suppressed under the guise of prohibiting the conduct. Here it is perfectly clear that a prohibition against trespass on the mall operates to bar all speech within the shopping center to which respondents object. Yet this Court stated many years ago, "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939).

The sole justification offered for the substantial interference with the effectiveness of petitioners' exercise of their First Amendment rights to promulgate their views through handbilling and picketing is respondents' claimed absolute right under state law to prohibit any use of their property by others without their consent. However, unlike a situation involving a person's home, no meaningful claim to protection of a right of privacy can be advanced by respondents here. Nor on the facts of the case can any significant claim to protection of the normal business operation of the property be raised. Naked title is essentially all that is at issue.

The economic development of the United States in the last 20 years reinforces our opinion of the correctness of the approach taken in *Marsh*. The large-scale movement of this country's population from the cities to the suburbs has been accompanied by the advent of the suburban shopping center, typically a cluster of individual retail units on a single large privately owned tract. It has been estimated that by the end of 1966 there were between 10,000 and 11,000 shopping centers in the United States and Canada, accounting for approximately 37% of the total retail sales in those two countries.

These figures illustrate the substantial consequences for workers seeking to challenge substandard working conditions, consumers protesting shoddy or overpriced merchandise, and minority groups seeking nondiscriminatory hiring policies that a contrary decision here would

have. Business enterprises located in downtown areas would be subject to on-the-spot public criticism for their practices, but businesses situated in the suburbs could largely immunize themselves from similar criticism by creating a cordon sanitaire of parking lots around their stores. Neither precedent nor policy compels a result so at variance with the goal of free expression and communication that is the heart of the First Amendment.

Therefore, as to the sufficiency of respondents' ownership of the Logan Valley Mall premises as the sole support of the injunction issued against petitioners, we simply repeat what was said in *Marsh v. Alabama*, 326 U.S., at 506, "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." Logan Valley Mall is the functional equivalent of a "business block" and for First Amendment purposes must be treated in substantially the same manner.

The judgment of the Supreme Court of Pennsylvania is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, dissenting.

While I generally accept the factual background of this case presented in the Court's opinion, I think it is important to focus on just where this picketing which was enjoined by the state courts was actually taking place

Respondent Weis Markets, Inc., the owner-occupant of the supermarket here being picketed, owns the real property on which it constructed its store, porch, and parcel pickup zone. Respondent Logan Valley Plaza, Inc. owns the other property in the shopping center, including the large area which has been paved and marked off as a general parking lot for customers of the shopping center.

In affirming petitioners' contentions the majority opinion relies on *Marsh v. Alabama*, *supra*, and holds that respondents' property has been transformed to some type of public property. But *Marsh* was never intended to apply to this kind of situation. *Marsh* dealt with the very special situation of a company-owned town, complete with streets, alleys, sewers, stores, residences, and everything else that goes to make a town. I think it is fair to say that the basis on which the *Marsh* decision rested was that the property involved encompassed an area that for all practical purposes had been turned into a town; the area had all the attributes of a town and was exactly like any other town in Alabama. I can find very little resemblance between the shopping center involved in this case and Chickasaw, Alabama. There are no homes, there is no sewage disposal plant, there is not even a post office on this private property which the Court now considers the equivalent of a "town." Indeed, at the time this injunction was issued, there were only two stores on the property.

But I respectfully suggest that this reasoning completely misreads Marsh and begs the question. The question is, under what circumstances can private property be treated as though it were public? The answer that Marsh gives is when that property has taken on all the attributes of a town, i. e., "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated." 326 U.S., at 502. I can find nothing in Marsh which indicates that if one of these features is present, e. g ., a business district, this is sufficient for the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it.

In allowing the trespass here, the majority opinion indicates that Weis and Logan invited the public to the shopping center's parking lot. This statement is contrary to common sense. Of course there was an implicit invitation for customers of the adjacent stores to come and use the marked off places for cars. But the whole public was no more wanted there than they would be invited to park free at a pay parking lot. Is a store owner or are several owners together less entitled to have a parking lot set aside for customers than other property owners? To hold that store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country. And of course picketing, that is patrolling, is not free speech and not protected as such.

For these reasons I respectfully dissent.

LLOYD CORP., LTD. v. TANNER
407 U.S. 551 (1972)

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question reserved by the Court in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968), as to the right of a privately owned shopping center to prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations. Relying primarily on *Marsh v. Alabama*, 326 U.S. 501 (1946), and *Logan Valley*, the United States District Court for the District of Oregon sustained an asserted First Amendment right to distribute handbills in petitioner's shopping center, and issued a permanent injunction restraining petitioner from interfering with such right. 308 F.Supp. 128 (1970). The Court of Appeals for the Ninth Circuit affirmed, 446 F.2d 545 (1971). We granted certiorari to consider petitioner's contention that the decision below violates rights of private property protected by the Fifth and Fourteenth Amendments. 404 U.S. 1037 (1972).

Lloyd Corp., Ltd. (Lloyd), owns a large, modern retail shopping center in Portland, Oregon. Lloyd Center embraces altogether about 50 acres, including some 20 acres of open and covered parking facilities which accommodate more than 1,000 automobiles. It has a perimeter of almost one and one-half miles, bounded by four public streets. It is crossed in varying degrees by several other public streets, all of which have adjacent public sidewalks. Lloyd owns all land and buildings within the Center, except these public streets and sidewalks. There are some 60 commercial tenants, including small shops and several major department stores.

The Center embodies a relatively new concept in shopping center design. The stores are all located within a single large, multi-level building complex sometimes referred to as the "Mall." Within this complex, in addition to the stores, there are parking facilities, malls, private sidewalks, stairways, escalators, gardens, an auditorium, and a skating rink. Some of the stores open directly on the outside public sidewalks, but most open on the interior privately owned malls. Some stores open on both. There are no public streets or public sidewalks within the building complex, which is enclosed and entirely covered except for the landscaped portions of some of the interior malls.

They are a distinctive feature of the Center, serving both utilitarian and esthetic functions. Essentially, they are private, interior promenades with 10-foot sidewalks serving the stores, and with a center strip 30 feet wide in which flowers and shrubs are planted, and statuary, fountains, benches, and other amenities are located. There is no vehicular traffic on the malls. An architectural expert described the purpose of the malls as follows:

"In order to make shopping easy and pleasant, and to help realize the goal of maximum sales [for the Center], the shops are grouped about special pedestrian ways or malls. Here the shopper is isolated from the noise, fumes, confusion and

distraction which he normally finds along city streets, and a controlled, carefree environment is provided"

Although the stores close at customary hours, the malls are not physically closed, as pedestrian window shopping is encouraged within reasonable hours. Lloyd employs 12 security guards, who are commissioned as such by the city of Portland. The guards have police authority within the Center, wear uniforms similar to those worn by city police, and are licensed to carry handguns. They are employed by and subject to the control of Lloyd. Their duties are the customary ones, including shoplifting surveillance and general security

At a few places within the Center, small signs are embedded in the sidewalk which state:

"NOTICE -- Areas In Lloyd Center Used By The Public Are Not Public Ways But Are For The Use Of Lloyd Center Tenants And The Public Transacting Business With Them. Permission To Use Said Areas May Be Revoked At Any Time. Lloyd Corporation, Ltd."

The Center is open generally to the public, with a considerable effort being made to attract shoppers and prospective shoppers, and to create "customer motivation" as well as customer goodwill in the community. In this respect the Center pursues policies comparable to those of major stores and shopping centers across the country, although the Center affords superior facilities for these purposes. Groups and organizations are permitted, by invitation and advance arrangement, to use the auditorium and other facilities. Rent is charged for use of the auditorium except with respect to certain civic and charitable organizations, such as the Cancer Society and Boy and Girl Scouts. The Center also allows limited use of the malls by the American Legion to sell poppies for disabled veterans, and by the Salvation Army and Volunteers of America to solicit Christmas contributions. It has denied similar use to other civic and charitable organizations. Political use is also forbidden, except that presidential candidates of both parties have been allowed to speak in the auditorium.

The Center had been in operation for some eight years when this litigation commenced. Throughout this period it had a policy, strictly enforced, against the distribution of handbills within the building complex and its malls. No exceptions were made with respect to handbilling, which was considered likely to annoy customers, to create litter, potentially to create disorders, and generally to be incompatible with the purpose of the Center and the atmosphere sought to be preserved.

On November 14, 1968, the respondents in this case distributed within the Center handbill invitations to a meeting of the "Resistance Community" to protest the draft and the Vietnam war. The distribution, made in several different places on the mall walkways by five young people, was quiet and orderly, and there was no littering. There was a complaint from one customer. Security guards informed the respondents that they were trespassing and would be arrested unless they stopped distributing the handbills within the Center. The guards suggested

that respondents distribute their literature on the public streets and sidewalks adjacent to but outside of the Center complex. Respondents left the premises as requested "to avoid arrest" and continued the handbilling outside. Subsequently this suit was instituted in the District Court, seeking declaratory and injunctive relief.

The District Court, emphasizing that the Center "is open to the general public," found that it is "the functional equivalent of a public business district." 308 F.Supp., at 130. That court then held that Lloyd's "rule prohibiting the distribution of handbills within the Mall violates . . . First Amendment rights." 308 F.Supp., at 131. In a per curiam opinion, the Court of Appeals held that it was bound by the "factual determination" as to the character of the Center, and concluded that the decisions of this Court in *Marsh v. Alabama*, 326 U.S. 501 (1946), and *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968), compelled affirmance.

In *Logan Valley* the Court extended the rationale of *Marsh* to peaceful picketing of a store located in a large shopping center, known as *Logan Valley Mall*, near Altoona, Pennsylvania. The courts below considered the critical inquiry to be whether Lloyd Center was "the functional equivalent of a public business district." This phrase was first used in *Logan Valley*, but its genesis was in *Marsh*. It is well to consider what *Marsh* actually decided. As noted above, it involved an economic anomaly of the past, "the company town." One must have seen such towns to understand that functionally" they were no different from municipalities of comparable size. They developed primarily in the Deep South to meet economic conditions, especially those which existed following the Civil War. Impoverished States and especially backward areas thereof, needed an influx of industry and capital. Corporations attracted to the area by natural resources and abundant labor were willing to assume the role of local government. Quite literally, towns were built and operated by private capital with all of the customary services and utilities normally afforded by a municipal or state government: there were streets, sidewalks, sewers, public lighting, police and fire protection, business and residential areas, churches, postal facilities, and sometimes schools. In short, as Mr. Justice Black said, *Chickasaw, Alabama*, had "all the characteristics of any other American town." 326 U.S., at 502. The Court simply held that where private interests were substituting for and performing the customary functions of government, First Amendment freedoms could not be denied where exercised in the customary manner on the town's sidewalks and streets. Indeed, as title to the entire town was held privately, there were no publicly owned streets, sidewalks, or parks where such rights could be exercised.

Logan Valley extended *Marsh* to a shopping center situation in a different context from the company town setting, but it did so only in a context where the First Amendment activity was related to the shopping center's operations. There is some language in *Logan Valley*, unnecessary to the decision, suggesting that the key focus of *Marsh* was upon the "business district," and that whenever a privately owned business district serves the public generally its sidewalks and streets become the functional equivalents of similar public facilities.

The holding in Logan Valley was not dependent upon the suggestion that the privately owned streets and sidewalks of a business district or a shopping center are the equivalent, for First Amendment purposes, of municipally owned streets and sidewalks. No such expansive reading of the opinion of the Court is necessary or appropriate. The opinion was carefully phrased to limit its holding to the picketing involved, where the picketing was "directly related in its purpose to the use to which the shopping center property was being put," 391 U.S., at 320 n. 9, and where the store was located in the center of a large private enclave with the consequence that no other reasonable opportunities for the pickets to convey their message to their intended audience were available. Neither of these elements is present in the case now before the Court.

The basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against all handbilling. In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only. The Due Process Clauses of the Fifth and Fourteenth Amendments are also relevant to this case. They provide that "no person shall . . . be deprived of life, liberty, or property, without due process of law." There is the further proscription in the Fifth Amendment against the taking of "private property . . . for public use, without just compensation."

Although accommodations between the values protected by these three Amendments are sometimes necessary, and the courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only.

Respondents contend, however, that the property of a large shopping center is "open to the public," serves the same purposes as a "business district" of a municipality, and therefore has been dedicated to certain types of public use. The argument is that such a center has sidewalks, streets, and parking areas which are functionally similar to facilities customarily provided by municipalities. It is then asserted that all members of the public, whether invited as customers or not, have the same right of free speech as they would have on the similar public facilities in the streets of a city or town.

The argument reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use. The closest decision in theory, *Marsh v. Alabama*, supra, involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the State. In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State. In the instant case there is no comparable assumption or exercise of municipal functions or power.

Nor does property lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a free-standing store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there. Nor is size alone the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center. This is not to say that no differences may exist with respect to government regulation or rights of citizens arising by virtue of the size and diversity of activities carried on within a privately owned facility serving the public. There will be, for example, problems with respect to public health and safety which vary in degree and in the appropriate government response, depending upon the size and character of a shopping center, an office building, a sports arena, or other large facility serving the public for commercial purposes. We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other. There may be situations where accommodations between them, and the drawing of lines to assure due protection of both, are not easy. But on the facts presented in this case, the answer is clear.

We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights. Accordingly, we reverse the judgment and remand the case to the Court of Appeals with directions to vacate the injunction.

It is so ordered.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE STEWART join, dissenting.[omitted]

UNITED STATES v. GRACE
461 U.S. 171(1983)

JUDGES: WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined.

JUSTICE WHITE delivered the opinion of the Court.

In this case we must determine whether 40 U. S. C. §13k, which prohibits, among other things, the "display [of] any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement" in the United States Supreme Court building and on its grounds, violates the First Amendment.

In May 1978 appellee Thaddeus Zywicki, standing on the sidewalk in front of the Supreme Court building, distributed leaflets to passersby. The leaflets were reprints of a letter to the editor of the Washington Post from a United States Senator concerning the removal of unfit judges from the bench. A Supreme Court police officer approached Zywicki and told him, accurately, that Title 40 of the United States Code prohibited the distribution of leaflets on the Supreme Court grounds, which includes the sidewalk. Zywicki left.

In January 1980 Zywicki again visited the sidewalk in front of the Court to distribute pamphlets containing information about forthcoming meetings and events concerning "the oppressed peoples of Central America." Zywicki again was approached by a Court police officer and was informed that the distribution of leaflets on the Court grounds was prohibited by law. The officer indicated that Zywicki would be arrested if the leafletting continued. Zywicki left.

Zywicki reappeared in February 1980 on the sidewalk in front of the Court and distributed handbills concerning oppression in Guatemala. Zywicki had consulted with an attorney concerning the legality of his activities and had been informed that the Superior Court for the District of Columbia had construed the statute that prohibited leafletting, 40 U. S. C. §13k, to prohibit only conduct done with the specific intent to influence, impede, or obstruct the administration of justice. Zywicki again was told by a Court police officer that he would be subject to arrest if he persisted in his leafletting. Zywicki complained that he was being denied a right that others were granted, referring to the newspaper vending machines located on the sidewalk. Nonetheless, Zywicki left the grounds.

Around noon on March 17, 1980, appellee Mary Grace entered upon the sidewalk in front of the Court and began to display a four foot by two and a half foot sign on which was inscribed the verbatim text of the First Amendment. A Court police officer approached Grace and informed her that she would have to go across the street if she wished to display the sign. Grace was informed that Title 40 of the United States Code prohibited her conduct and that if she did not cease she would be arrested. Grace left the grounds.

On May 13, 1980, Zywicki and Grace filed the present suit in the United States District Court for the District of Columbia. They sought an injunction against continued enforcement of 40 U. S. C. §13k and a declaratory judgment that the statute was unconstitutional on its face. On August 7, 1980, the District Court dismissed the complaint.

The Court of Appeals determined that the District Court's dismissal was erroneous and went on to strike down §13k on its face as an unconstitutional restriction on First Amendment rights in a public place. The Government appealed from the Court of Appeals' judgment.

Section 13k prohibits two distinct activities: it is unlawful either "to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds," or "to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." Each appellee appeared individually on the public sidewalks to engage in expressive activity, and it goes without saying that the threat of arrest to which each appellee was subjected was for violating the prohibition against the display of a "banner or device." Accordingly, our review is limited to the latter portion of the statute. Likewise, the controversy presented by appellees concerned their right to use the public sidewalks surrounding the Court building for the communicative activities they sought to carry out, and we shall address only whether the proscriptions of §13k are constitutional as applied to the public sidewalks.

The statutory ban is on the display of a "flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." 40 U. S. C. §13k. It is undisputed that Grace's picket sign containing the text of the First Amendment falls within the description of a "flag, banner, or device." Although it is less obvious, it is equally uncontested that Zywicki's leaflets fall within the proscription as well.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech. . . ." There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving "speech" protected by the First Amendment. E. g., *Lovell v. Griffin*, 303 U.S. 444 (1938). It is also true that "public places" historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be "public forums." In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest.

Publicly owned or operated property does not become a "public forum" simply because members of the public are permitted to come and go at will. Although whether the property has been "generally opened to the public" is a factor to consider in determining whether the government has opened its property to the use of the people for communicative purposes, it is

not determinative of the question. We have regularly rejected the assertion that people who wish "to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." There is little doubt that in some circumstances the government may ban the entry on to public property that is not a "public forum" of all persons except those who have legitimate business on the premises. The government, "no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated."

It is argued that the Supreme Court building and grounds fit neatly within the description of nonpublic forum property. Although the property is publicly owned, it has not been traditionally held open for the use of the public for expressive activities. The property is not transformed into "public forum" property merely because the public is permitted to freely enter and leave the grounds at practically all times and the public is admitted to the building during specified hours. Under this view it would be necessary only to determine that the restrictions imposed by §13k are reasonable in light of the use to which the building and grounds are dedicated and that there is no discrimination on the basis of content. We need not make that judgment at this time, however, because §13k covers the public sidewalks as well as the building and grounds inside the sidewalks. As will become evident, we hold that §13k may not be applied to the public sidewalks.

The prohibitions imposed by §13k technically cover the entire grounds of the Supreme Court . That section describes the Court grounds as extending to the curb of each of the four streets enclosing the block on which the building is located. Included within this small geographical area, therefore, are not only the building, the plaza and surrounding promenade, lawn area, and steps, but also the sidewalks. The sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D. C., and we can discern no reason why they should be treated any differently. Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property. There is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave. The inclusion of the public sidewalks within the scope of §13k's prohibition, however, results in the destruction of public forum status that is at least presumptively impermissible. Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression. Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property. The public sidewalks forming the perimeter of the Supreme Court grounds, in our view, are public forums and should be treated as such for First Amendment purposes.

The Government submits that §13k qualifies as a reasonable time, place, and manner restriction which may be imposed to restrict communicative activities on public forum property such as sidewalks. The argument is that the inquiry should not be confined to the Supreme Court grounds but should focus on "the vicinity of the Supreme Court" or "the public places of Washington, D. C." Viewed in this light, the Government contends that there are sufficient alternative areas within the relevant forum, such as the streets around the Court or the sidewalks across those streets to permit §13k to be considered a reasonable "place" restriction having only a minimal impact on expressive activity. We are convinced, however, that the section, which totally bans the specified communicative activity on the public sidewalks around the Court grounds, cannot be justified as a reasonable place restriction primarily because it has an insufficient nexus with any of the public interests that may be thought to undergird §13k. Our reasons for this conclusion will become apparent below, where we decide that §13k, insofar as its prohibitions reach to the public sidewalks, is unconstitutional because it does not sufficiently serve those public interests that are urged as its justification.

Section 13k was part of an 11-section statute, enacted in 1949, "[relating] to the policing of the building and grounds of the Supreme Court of the United States." The occasion for its passage was the termination of the practice by District of Columbia authorities of appointing Supreme Court guards as special policemen for the District. This action left the Supreme Court police force without authority to make arrests and enforce the law in the building and on the grounds of the Court. The Act, which was soon forthcoming, was modeled on the legislation relating to the Capitol grounds. It authorizes the appointment by the Marshal of special officers "for duty in connection with the policing of the Supreme Court Building and grounds and adjacent streets." Sections 2-6 of the Act prohibit certain kinds of conduct in the building or grounds. Section 6, codified as 40 U. S. C. §13k, is at issue here. Other sections authorize the Marshal to issue regulations, provide penalties for violations of the Act or regulations, and authorize the Court's special police to make arrests for violation of the Act's prohibitions or of any law of the United States occurring within the building and grounds and on the adjacent streets. Section 11 of the Act, 13 U. S. C. §13p, defines the limits of the Court's grounds as including the sidewalks surrounding the building.

Based on its provisions and legislative history, it is fair to say that the purpose of the Act was to provide for the protection of the building and grounds and of the persons and property therein, as well as the maintenance of proper order and decorum. Section 6, 40 U. S. C. §13k, was one of the provisions apparently designed for these purposes. At least, no special reason was stated for its enactment.

We do not denigrate the necessity to protect persons and property or to maintain proper order and decorum within the Supreme Court grounds, but we do question whether a total ban on carrying a flag, banner, or device on the public sidewalks substantially serves these purposes. There is no suggestion, for example, that appellees' activities in any way obstructed the sidewalks or access to the building, threatened injury to any person or property, or in any way

interfered with the orderly administration of the building or other parts of the grounds. As we have said, the building's perimeter sidewalks are indistinguishable from other public sidewalks in the city that are normally open to the conduct that is at issue here and that §13k forbids. A total ban on that conduct is no more necessary for the maintenance of peace and tranquility on the public sidewalks surrounding the building than on any other sidewalks in the city. Accordingly, §13k cannot be justified on this basis.

We thus perceive insufficient justification for §13k's prohibition of carrying signs, banners, or devices on the public sidewalks surrounding the building. We hold that under the First Amendment the section is unconstitutional as applied to those sidewalks. Of course, this is not to say that those sidewalks, like other sidewalks, are not subject to reasonable time, place, and manner restrictions, either by statute or by regulations issued pursuant to 40 U. S. C. §13l.

The judgment below is accordingly affirmed to the extent indicated by this opinion and is otherwise vacated.

So ordered.

UNITED STATES v. KOKINDA
497 U.S. 720, 110 S.Ct. 3115 (1990)

Justice O'CONNOR announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, Justice WHITE, and Justice SCALIA join.

We are called upon in this case to determine whether a United States Postal Service regulation that prohibits "[s]oliciting alms and contributions" on postal premises violates the First Amendment. We hold the regulation valid as applied.

I

The respondents in this case, Marsha B. Kokinda and Kevin E. Pearl, were volunteers for the National Democratic Policy Committee, who set up a table on the sidewalk near the entrance of the Bowie, Maryland, post office to solicit contributions, sell books and subscriptions to the organization's newspaper, and distribute literature addressing a variety of political issues. The postal sidewalk provides the sole means by which customers of the post office may travel from the parking lot to the post office building and lies entirely on Postal Service property. The District Court for the District of Maryland described the layout of the post office as follows: "[T]he Bowie post office is a freestanding building, with its own sidewalk and parking lot. It is located on a major highway, Route 197. A sidewalk runs along the edge of the highway, separating the post office property from the street. To enter the post office, cars enter a driveway that traverses the public sidewalk and enter a parking lot that surrounds the post office building. Another sidewalk runs adjacent to the building itself, separating the parking lot from the building. Postal patrons must use the sidewalk to enter the post office. The sidewalk belongs to the post office and is used for no other purpose." App. to Pet. for Cert. 24a.

During the several hours that respondents were at the post office, postal employees received between 40 and 50 complaints regarding their presence. The record does not indicate the substance of the complaints with one exception. One individual complained "because she knew the Girl Scouts were not allowed to sell cookies on federal property." 866 F.2d 699, 705 (CA4 1989). The Bowie postmaster asked respondents to leave, which they refused to do. Postal inspectors arrested respondents, seizing their table as well as their literature and other belongings.

Respondents were tried before a United States Magistrate in the District of Maryland and convicted of violating 39 CFR §232.1(h)(1)(1989), which provides in relevant part:

"Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited."

Respondent Kokinda was fined \$50 and sentenced to 10 days' imprisonment; respondent Pearl was fined \$100 and received a 30-day suspended sentence under that provision.

Respondents appealed their convictions to the District Court, asserting that application of §232.1(h)(1) violated the First Amendment. The District Court affirmed their convictions, holding that the postal sidewalk was not a public forum and that the Postal Service's ban on solicitation is reasonable. A divided panel of the United States Court of Appeals for the Fourth Circuit reversed. 866 F.2d 699 (1989). The Court of Appeals held that the postal sidewalk is a traditional public forum and analyzed the regulation P as a time, place, and manner regulation. The Court determined that the Government has no significant interest in banning solicitation and that the regulation is not narrowly tailored to accomplish the asserted governmental interest. Respondents' petition for rehearing and a suggestion for rehearing en banc were denied. Because the decision below conflicts with other decisions by the Courts of Appeals, see *United States v. Belsky*, 799 F.2d 1485 (CA11 1986); *United States v. Bjerke*, 796 F.2d 643 (CA3 1986), we granted certiorari. 493 U.S. ----, 110 S.Ct. 47, 107 L.Ed.2d 16 (1989).

II

Solicitation is a recognized form of speech protected by the First Amendment. See *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 629, 100 S.Ct. 826, 832, 63 L.Ed.2d 73 (1980); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 788-789, 108 S.Ct. 2667, 2673-2674, 101 L.Ed.2d 669 (1988). Under our First Amendment jurisprudence, we must determine the level of scrutiny that applies to the regulation of protected speech at issue.

In *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983), the Court announced a tripartite framework for determining how First Amendment interests are to be analyzed with respect to Government property. Regulation of speech activity on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, is examined under strict scrutiny. *Id.*, at 45, 103 S.Ct., at 954-955. Regulation of speech on property that the Government has expressly dedicated to speech activity is also examined under strict scrutiny. *Ibid.* But regulation of speech activity where the Government has not dedicated its property to First Amendment activity is examined only for reasonableness. *Id.*, at 46, 103 S.Ct., at 955-956.

Respondents contend that although the sidewalk is on postal service property, because it is not distinguishable from the municipal sidewalk across the parking lot from the post office's entrance, it must be a traditional public forum and therefore subject to strict scrutiny. This argument is unpersuasive. The mere physical characteristics of the property cannot dictate forum analysis.

The postal sidewalk at issue does not have the characteristics of public sidewalks traditionally open to expressive activity. The municipal sidewalk that runs parallel to the road in this case is a public passageway. The Postal Service's sidewalk is not such a thoroughfare. Rather, it leads only from the parking area to the front door of the post office. Unlike the public street described in *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S.Ct.

2559, 69 L.Ed.2d 298 (1981), which was "continually open, often uncongested, and constitute[d] not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people [could] enjoy the open air or the company of friends and neighbors in a relaxed environment," *id.*, at 651, 101 S.Ct., at 2566, the postal sidewalk was constructed solely to provide for the passage of individuals engaged in postal business. The sidewalk leading to the entry of the post office is not the traditional public forum sidewalk referred to in *Perry*.

III

The Postal Service has been entrusted with this mission at a time when the mail service market is becoming much more competitive. It is with this mission in mind that we must examine the regulation at issue.

The Government asserts that it is reasonable to restrict access of postal premises to solicitation, because solicitation is inherently disruptive of the postal service's business. We agree. "Since the act of soliciting alms or contributions usually has as its objective an immediate act of charity, it has the potentiality for evoking highly personal and subjective reactions. Reflection usually is not encouraged, and the person solicited often must make a hasty decision whether to share his resources with an unfamiliar organization while under the eager gaze of the solicitor." 43 Fed.Reg. 38824 (1978). The dissent avoids determining whether the sidewalk is a public forum because it believes the regulation, 39 CFR §232.1(h) (1989), does not pass muster even under the reasonableness standard applicable to nonpublic fora. In concluding that §232.1(h) is unreasonable, the dissent relies heavily on the fact that the Service permits other types of potentially disruptive speech on a case-by-case basis. The dissent's criticism in this regard seems to be that solicitation is not receiving the same treatment by the Postal Service that other forms of speech receive. See *post*, at 3137 (criticizing "inconsistent treatment"). That claim, however, is more properly addressed under the equal protection component of the Fifth Amendment. In any event, it is anomalous that the Service's allowance of some avenues of speech would be relied upon as evidence that it is impermissibly suppressing other speech. If anything, the Service's generous accommodation of some types of speech testifies to its willingness to provide as broad a forum as possible, consistent with its postal mission.

The Postal Service's judgment is based on its long experience with solicitation. It has learned from this experience that because of a continual demand from a wide range of groups for permission to conduct fundraising or vending on postal premises, postal facility managers were distracted from their primary jobs by the need to expend considerable time and energy fielding competing demands for space and administering a program of permits and approvals. See *Tr. of Oral Arg.* 9 ("The Postal Service concluded after an experience with limited solicitation that there wasn't enough room for everybody who wanted to solicit on postal property and further concluded that allowing limited solicitation carried with it more problems than it was worth"). Thus, the Service found that "even the limited activities permitted by [its] program ... produced highly unsatisfactory results." 42 Fed.Reg. 63911 (1977). It is on the basis of this real-world

experience that the Postal Service enacted the regulation at issue in this case. In short, the Postal Service has prohibited the use of its property and resources where the intrusion creates significant interference with Congress' mandate to ensure the most effective and efficient distribution of the mails. This is hardly unreasonable.

It is clear that this regulation passes constitutional muster under the Court's usual test for reasonableness. See *Lehman*, 418 U.S., at 303, 94 S. Ct., at 2717; *Cornelius*, 473 U.S., at 808, 105 S.Ct., at 3452. Accordingly, we conclude, as have the Courts of Appeals for the Third and Eleventh Circuits, that the Postal Service's regulation of solicitation is reasonable as applied. See *United States v. Belsky*, 799 F.2d 1485 (CA11 1986); *United States v. Bjerke*, 796 F.2d 643 (CA3 1986).

The judgment of the court of appeals is, Reversed.

Justice BRENNAN, with whom Justice MARSHALL and Justice STEVENS join and with whom Justice BLACKMUN joins as to Part I, dissenting.

Today the Court holds that a United States Postal Service regulation prohibiting persons from "[s]oliciting alms and contributions" on postal premises does not violate the First Amendment as applied to members of a political advocacy group who solicited contributions from a sidewalk outside the entrance to a post office. A plurality finds that the sidewalk is not a public forum and that the Postal Service regulation is valid because it is "reasonable." Justice KENNEDY concludes that although the sidewalk might well be a public forum, the regulation is permissible as applied because it is a content-neutral time, place, or manner restriction on protected speech. Neither of these conclusions is justified. I think it clear that the sidewalk in question is a "public forum" and that the Postal Service regulation does not qualify as a content-neutral time, place, or manner restriction. Moreover, even if I did not regard the sidewalk in question as a public forum, I could not subscribe to the plurality's position that respondents can validly be excluded from the sidewalk, because I believe that the distinction drawn by the postal regulation between solicitation and virtually all other kinds of speech is not a reasonable one.

I

Some postal patrons may thank the Court for sparing them the inconvenience of having to encounter solicitors with whose views they do not agree. And postal officials can rest assured in the knowledge that they can silence an entire category of expression without having to apply the existing postal regulations governing disruptive conduct or having to craft more narrow time, place, or manner rules. Perhaps only three groups of people will be saddened by today's decision. The first includes solicitors, who, in a farce of the public forum doctrine, will henceforth be permitted at postal locations to solicit the public only from such inhospitable locations as the busy four-lane highway that runs in front of the Bowie Post Office. The next to be disappointed will be those members of the public who would prefer not to be deprived of the

views of solicitors at postal locations. The last group, unfortunately, includes all of us who are conscious of the importance of the First Amendment. I respectfully dissent.

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS v. LEE
505 U.S. 672 (1992)

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

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In this case we consider whether an airport terminal operated by a public authority is a public forum and whether a regulation prohibiting solicitation in the interior of an airport terminal violates the First Amendment.

The relevant facts in this case are not in dispute. Petitioner International Society for Krishna Consciousness, Inc. (ISKCON) is a not-for-profit religious corporation whose members perform a ritual known as sankirtan. The ritual consists of "going into public places, disseminating religious literature and soliciting funds to support the religion." 925 F. 2d 576, 577 (CA2 1991). The primary purpose of this ritual is raising funds for the movement.

Respondent Walter Lee, now deceased, was the police superintendent of the Port Authority of New York and New Jersey and was charged with enforcing the regulation at issue. The Port Authority owns and operates three major airports in the greater New York City area: John F. Kennedy International Airport (Kennedy), La Guardia Airport (La Guardia), and Newark International Airport (Newark). The three airports collectively form one of the world's busiest metropolitan airport complexes. They serve approximately 8% of this country's domestic airline market and more than 50% of the trans-Atlantic market. By decade's end they are expected to serve at least 110 million passengers annually. *Id.*, at 578.

The airports are funded by user fees and operated to make a regulated profit. Most space at the three airports is leased to commercial airlines, which bear primary responsibility for the leasehold. The Port Authority retains control over unleased portions, including La Guardia's Central Terminal Building, portions of Kennedy's International Arrivals Building, and Newark's North Terminal Building (we refer to these areas collectively as the "terminals"). The terminals are generally accessible to the general public and contain various commercial establishments such as restaurants, snack stands, bars, newsstands, and stores of various types. *Id.*, at 578. Virtually all who visit the terminals do so for purposes related to air travel. These visitors principally include passengers, those meeting or seeing off passengers, flight crews, and terminal employees. *Ibid.*

The Port Authority has adopted a regulation forbidding within the terminals the repetitive solicitation of money or distribution of literature. The regulation states:

"1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:

"(a) The sale or distribution of any merchandise, including but not limited to jewelry, food stuffs, candles, flowers, badges and clothing.

"(b) The sale or distribution of flyers, brochures, pamphlets, books or any

"(c) Solicitation and receipt of funds." *Id.*, at 578-579.

The regulation governs only the terminals; the Port Authority permits solicitation and distribution on the sidewalks outside the terminal buildings. The regulation effectively prohibits petitioner from performing sankirtan in the terminals. As a result, petitioner brought suit seeking declaratory and injunctive relief under 42 U.S.C. §1983, alleging that the regulation worked to deprive them of rights guaranteed under the First Amendment. The District Court analyzed the claim under the "traditional public forum" doctrine. It concluded that the terminals were akin to public streets, 721 F. Supp. 572, 577 (SDNY 1989), the quintessential traditional public fora. This conclusion in turn meant that the Port Authority's terminal regulation could be sustained only if it was narrowly tailored to support a compelling state interest. *Id.*, at 579. In the absence of any argument that the blanket prohibition constituted such narrow tailoring, the District Court granted petitioner summary judgment. *Ibid.*

The Court of Appeals affirmed in part and reversed in part. 925 F. 2d 576 (1991). Relying on our recent decision in *United States v. Kokinda*, 497 U.S. (1990), a divided panel concluded that the terminals are not public fora. As a result, the restrictions were required only to satisfy a standard of reasonableness. The Court of Appeals then concluded that, presented with the issue, this Court would find that the ban on solicitation was reasonable, but the ban on distribution was not. Petitioner sought certiorari respecting the Court of Appeals' decision that the terminals are not public fora and upholding the solicitation ban. Respondent cross-petitioned respecting the court's holding striking down the distribution ban. We granted both petitions, 502 U.S. (1992), to resolve whether airport terminals are public fora, a question on which the Circuits have split and on which we once before granted certiorari but ultimately failed to reach. *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987).

It is uncontested that the solicitation at issue in this case is a form of speech protected under the First Amendment. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Kokinda*, *supra*, at (citing *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 629 (1980)); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 788-789 (1988). But it is also well settled that the government need not permit all forms of speech on property that it owns and controls. *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 129 (1981); *Greer v. Spock*, 424 U.S. 828 (1976). Where the government is acting as a proprietor, managing its internal operations, rather than

acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject. Thus, we have upheld a ban on political advertisements in city-operated transit vehicles, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), even though the city permitted other types of advertising on those vehicles. Similarly, we have permitted a school district to limit access to an internal mail system used to communicate with teachers employed by the district. *Perry Education Assn. v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

The parties do not disagree that this is the proper framework. Rather, they disagree whether the airport terminals are public fora or nonpublic fora. They also disagree whether the regulation survives the "reasonableness" review governing nonpublic fora, should that prove the appropriate category. Like the Court of Appeals, we conclude that the terminals are nonpublic fora and that the regulation reasonably limits solicitation.

The terminals here are far from atypical. Airport builders and managers focus their efforts on providing terminals that will contribute to efficient air travel. See, e.g., R. Horonjeff & F. McKelvey, *Planning and Design of Airports* 326 (3d. ed.1983) ("the terminal is used to process passengers and baggage for the interface with aircraft and the ground transportation modes"). Although many airports have expanded their function beyond merely contributing to efficient air travel, few have included among their purposes the designation of a forum for solicitation and distribution activities. Thus, we think that neither by tradition nor purpose can the terminals be described as satisfying the standards we have previously set out for identifying a public forum.

The restrictions here challenged, therefore, need only satisfy a requirement of reasonableness. We reiterate what we stated in *Kokinda*, the restriction "needed only be reasonable; it need not be the most reasonable or the only reasonable limitation." 496 U.S., (plurality opinion) (quoting *Cornelius*, *supra*, at 808). We have no doubt that under this standard the prohibition on solicitation passes muster.

We have on many prior occasions noted the disruptive effect that solicitation may have on business. "Solicitation requires action by those who would respond: The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card." *Kokinda*, *supra*, at ; see *Heffron*, 452 U.S., at 663 (BLACKMUN, J., concurring in part and dissenting in part). Passengers who wish to avoid the solicitor may have to alter their path, slowing both themselves and those around them. The result is that the normal flow of traffic is impeded. *Id.*, at 653. This is especially so in an airport, where "air travelers, who are often weighted down by cumbersome baggage . . . may be hurrying to catch a plane or to arrange ground transportation." 925 F. 2d, at 582. Delays may be particularly costly in this setting, as a flight missed by only a few minutes can result in hours worth of subsequent inconvenience.

The Port Authority has concluded that its interest in monitoring the activities can best be accomplished by limiting solicitation and distribution to the sidewalk areas outside the terminals. Sloane Supp. This sidewalk area is frequented by an overwhelming percentage of airport users, see *id.*, at para. 14, 2 App. 515-516 (noting that no more than 3% of air travelers passing through the terminals are doing so on intraterminal flights, i.e. transferring planes). Thus the resulting access of those who would solicit the general public is quite complete. In turn we think it would be odd to conclude that the Port Authority's terminal regulation is unreasonable despite the Port Authority having otherwise assured access to an area universally traveled.

Affirmed.

UNITED STATES v. AMERICAN LIBRARY ASSOCIATION
539 U.S. 194 (2003)

Chief Justice Rehnquist announced the judgment of the Court and delivered an opinion, in which Justice O'Connor, Justice Scalia, and Justice Thomas joined.

To address the problems associated with the availability of Internet pornography in public libraries, Congress enacted the Children's Internet Protection Act (CIPA), 114 Stat. 2763A-335. Under CIPA, a public library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them. The District Court held these provisions facially invalid on the ground that they induce public libraries to violate patrons' First Amendment rights. We now reverse.

To help public libraries provide their patrons with Internet access, Congress offers two forms of federal assistance. First, the E-rate program established by the Telecommunications Act of 1996 entitles qualifying libraries to buy Internet access at a discount. Second, pursuant to the Library Services and Technology Act (LSTA), 110 the Institute of Museum and Library Services makes grants to state library administrative agencies to "electronically link libraries with educational, social, or information services," "assist libraries in accessing information through electronic networks.

By connecting to the Internet, public libraries provide patrons with a vast amount of valuable information. But there is also an enormous amount of pornography on the Internet, much of which is easily obtained. The accessibility of this material has created serious problems for libraries, which have found that patrons of all ages, including minors, regularly search for online pornography. Some patrons also expose others to pornographic images by leaving them on Internet terminals or printed at library printers. *Id.*, at 423.

Upon discovering these problems, Congress became concerned that the E-rate and LSTA programs were facilitating access to illegal and harmful pornography. But Congress also learned that filtering software that blocks access to pornographic Web sites could provide a reasonably effective way to prevent such uses of library resources. By 2000, before Congress enacted CIPA, almost 17% of public libraries used such software on at least some of their Internet terminals, and 7% had filters on all of them. A library can set such software to block categories of material, such as "Pornography" or "Violence." When a patron tries to view a site that falls within such a category, a screen appears indicating that the site is blocked. But a filter set to block pornography may sometimes block other sites that present neither obscene nor pornographic material, but that nevertheless trigger the filter. To minimize this problem, a library can set its software to prevent the blocking of material that falls into categories like "Education," "History," and "Medical."

Responding to this information, Congress enacted CIPA. It provides that a library may not receive E-rate or LSTA assistance unless it has "a policy of Internet safety for minors that includes the operation of a technology protection measure . . . that protects against access" by all persons to "visual depictions" that constitute "obscenity" or "child pornography," and that protects against access by minors to "visual depictions" that are "harmful to minors."

Appellees are a group of libraries, library associations, library patrons, and Web site publishers, including the American Library Association (ALA) and the Multnomah County Public Library in Portland, Oregon (Multnomah). They sued the United States and the Government agencies and officials responsible for administering the E-rate and LSTA programs in District Court, challenging the constitutionality of CIPA's filtering provisions. A three-judge District Court convened.

After a trial, the District Court ruled that CIPA was facially unconstitutional and enjoined the relevant agencies and officials from withholding federal assistance for failure to comply with CIPA. The District Court held that Congress had exceeded its authority under the Spending Clause, U.S. Const., Art. I, §8, cl. 1, because, in the court's view, "any public library that complies with CIPA's conditions will necessarily violate the First Amendment." The court acknowledged that "generally the First Amendment subjects libraries' content-based decisions about which print materials to acquire for their collections to only rational [basis] review." But it distinguished libraries' decisions to make certain Internet material inaccessible. "The central difference," the court stated, "is that by providing patrons with even filtered Internet access, the library permits patrons to receive speech on a virtually unlimited number of topics, from a virtually unlimited number of speakers, without attempting to restrict patrons' access to speech that the library, in the exercise of its professional judgment, determines to be particularly valuable." Reasoning that "the provision of Internet access within a public library . . . is for use by the public . . . for expressive activity," the court analyzed such access as a "designated public forum." The District Court also likened Internet access in libraries to "traditional public fora . . . such as sidewalks and parks" because it "promotes First Amendment values in an analogous manner."

Based on both of these grounds, the court held that the filtering software contemplated by CIPA was a content-based restriction on access to a public forum, and was therefore subject to strict scrutiny. *Ibid.* Applying this standard, the District Court held that, although the Government has a compelling interest "in preventing the dissemination of obscenity, child pornography, or, in the case of minors, material harmful to minors," the use of software filters is not narrowly tailored to further those interests. We noted probable jurisdiction, and now reverse.

Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives. But Congress may not "induce" the recipient "to engage in activities that would themselves be unconstitutional." To determine whether libraries would

violate the First Amendment by employing the filtering software that CIPA requires, we must first examine the role of libraries in our society.

Public libraries pursue the worthy missions of facilitating learning and cultural enrichment. Appellee ALA's Library Bill of Rights states that libraries should provide "books and other . . . resources . . . for the interest, information, and enlightenment of all people of the community the library serves." To fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide to their patrons. Although they seek to provide a wide array of information, their goal has never been to provide "universal coverage." Instead, public libraries seek to provide materials "that would be of the greatest direct benefit or interest to the community." To this end, libraries collect only those materials deemed to have "requisite and appropriate quality." See W. Katz, *Collection Development: The Selection of Materials for Libraries* 6 (1980)

We have held in two analogous contexts that the government has broad discretion to make content-based judgments in deciding what private speech to make available to the public. In *Arkansas Ed. Television Comm'n v. Forbes*, we held that public forum principles do not generally apply to a public television station's editorial judgments regarding the private speech it presents to its viewers. "Broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations." Recognizing a broad right of public access "would [also] risk implicating the courts in judgments that should be left to the exercise of journalistic discretion."

Similarly, in *National Endowment for Arts v. Finley*, 524 U.S. 569, 141 L. Ed. 2d 500, 118 S. Ct. 2168 (1998), we upheld an art funding program that required the National Endowment for the Arts (NEA) to use content-based criteria in making funding decisions. We explained that "any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding."

The principles underlying *Forbes* and *Finley* also apply to a public library's exercise of judgment in selecting the material it provides to its patrons. Just as forum analysis and heightened judicial scrutiny are incompatible with the role of public television stations and the role of the NEA, they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions. Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them.

The public forum principles on which the District Court relied are out of place in the context of this case. Internet access in public libraries is neither a "traditional" nor a "designated" public forum. First, this resource--which did not exist until quite recently-- has not "immemorially been held in trust for the use of the public and, time out of mind, . . . been used for purposes of assembly, communication of thoughts between citizens, and discussing public questions." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679, 679,

120 L. Ed. 2d 541, 112 S. Ct. 2701 (1992) (internal quotation marks omitted). We have "rejected the view that traditional public forum status extends beyond its historic confines." *Forbes*, *supra*. The doctrines surrounding traditional public forums may not be extended to situations where such history is lacking.

Nor does Internet access in a public library satisfy our definition of a "designated public forum." To create such a forum, the government must make an affirmative choice to open up its property for use as a public forum.

The situation here is very different. A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak. It provides Internet access to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality. As Congress recognized, "the Internet is simply another method for making information available in a school or library." It is "no more than a technological extension of the book stack."

The District Court disagreed because, whereas a library reviews and affirmatively chooses to acquire every book in its collection, it does not review every Web site that it makes available. Based on this distinction, the court reasoned that a public library enjoys less discretion in deciding which Internet materials to make available than in making book selections. We do not find this distinction constitutionally relevant. A library's failure to make quality-based judgments about all the material it furnishes from the Web does not somehow taint the judgments it does make. A library's need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material; it is no less entitled to play that role when it collects material from the Internet than when it collects material from any other source. Most libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion. We do not subject these decisions to heightened scrutiny; it would make little sense to treat libraries' judgments to block online pornography any differently, when these judgments are made for just the same reason.

Moreover, because of the vast quantity of material on the Internet and the rapid pace at which it changes, libraries cannot possibly segregate, item by item, all the Internet material that is appropriate for inclusion from all that is not. While a library could limit its Internet collection to just those sites it found worthwhile, it could do so only at the cost of excluding an enormous amount of valuable information that it lacks the capacity to review. Given that tradeoff, it is entirely reasonable for public libraries to reject that approach and instead exclude certain categories of content, without making individualized judgments that everything they do make available has requisite and appropriate quality.

Because public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights, CIPA does not induce libraries to violate the Constitution, and is a valid exercise of Congress' spending power. Nor does CIPA impose an unconstitutional condition on

public libraries. Therefore, the judgment of the District Court for the Eastern District of Pennsylvania is reversed.

[Concurrences and dissents omitted]

Session 35. Commercial Speech

LINMARK ASSOCIATES v. TOWNSHIP OF WILLINGBORO 431 U.S. 85 (1977)

MARSHALL, J., delivered the opinion of the Court, in which all other Members joined except REHNQUIST, J., who took no part in the consideration or decision of the case.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether the First Amendment permits a municipality to prohibit the posting of “For Sale” or “Sold” signs when the municipality acts to stem what it perceives as the flight of white homeowners from a racially integrated community.

Petitioner Linmark Associates, a New Jersey corporation, owned a piece of realty in the township of Willingboro, N.J. Petitioner decided to sell its property, and on March 26, 1974, listed it with petitioner Mellman, a real estate agent. To attract interest in the property, petitioners desired to place a “For Sale” sign on the lawn. Willingboro, however, narrowly limits the types of signs that can be erected on land in the township. Although prior to March 1974 “For Sale” and “Sold” signs were permitted subject to certain restrictions not at issue here, on March 18, 1974, the Township Council enacted Ordinance 5-1974, repealing the statutory authorization for such signs on all but model homes. Petitioners brought this action against both the township and the building inspector charged with enforcing the ban on “For Sale” signs, seeking declaratory and injunctive relief. The District Court granted a declaration of unconstitutionality, but a divided Court of Appeals reversed, 535 F. 2d 786 (CA3 1976). We granted certiorari, 429 U.S. 938 (1976) and reverse the judgment of the Court of Appeals.

The township of Willingboro is a residential community located in southern New Jersey near Fort Dix, McGuire Air Force Base, and offices of several national corporations. The township was developed as a middle-income community by Levitt & Sons, beginning in the late 1950’s. It is served by over 80 real estate agents.

During the 1960’s Willingboro underwent rapid growth. The white population increased by almost 350%, and the nonwhite population rose from 60 to over 5,000, or from .005% of the population to 11.7%. As of the 1970 census, almost 44,000 people resided in Willingboro. In the 1970’s, however, the population growth slowed; from 1970 to 1973, the latest year for which figures were available at the time of trial, Willingboro’s population rose by only 3%. More significantly, the white population actually declined by almost 2,000 in this interval, a drop of over 5%, while the nonwhite population grew by more than 3,000, an increase of approximately 60%. By 1973, nonwhites constituted 18.2% of the township’s population.

At the trial in this case respondents presented testimony from two real estate agents, two members of the Township Council, and three members of the Human Relations Commission, all

of whom agreed that a major cause in the decline in the white population was “panic selling” - that is, selling by whites who feared that the township was becoming all black, and that property values would decline. One real estate agent estimated that the reason 80% of the sellers gave for their decision to sell was that “the whole town was for sale, and they didn’t want to be caught in any bind.” App. in No. 75-1448 (CA3), pp. 219a-220a. Respondents’ witnesses also testified that in their view “For Sale” and “Sold” signs were a major catalyst of these fears.

William Kearns, the Mayor of Willingboro during the year preceding enactment of the ordinance and a member of the Council when the ordinance was enacted, testified concerning the events leading up to its passage. *Id.*, at 183a-186a. According to Kearns, beginning at least in 1973 the community became concerned about the changing population. At a town meeting in February 1973, called to discuss “Willingboro, to sell or not to sell,” a member of the community suggested that real estate signs be banned. The suggestion received the overwhelming support of those attending the meeting. Kearns brought the proposal to the Township Council, which requested the Township Solicitor to study it. The Council also contacted National Neighbors, a nationwide organization promoting integrated housing, and obtained the names of other communities that had prohibited “For Sale” signs. After obtaining a favorable report from Shaker Heights, Ohio, on its ordinance, and after receiving an endorsement of the proposed ban from the Willingboro Human Relations Commission, the Council began drafting legislation.

Rather than following its usual procedure of conducting a public hearing only after the proposed law had received preliminary Council approval, the Council scheduled two public meetings on Ordinance 5-1974. The first took place in February 1974, before the initial Council vote, and the second in March 1974, after the vote. At the conclusion of the second hearing, the ordinance was approved unanimously.

The transcripts of the Council hearings were introduced into evidence at trial. They reveal that at the hearings the Council received important information bearing on the need for and likely impact of the ordinance. With respect to the justification for the ordinance, the Council was told (a) that a study of Willingboro home sales in 1973 revealed that the turnover rate was roughly 11%, App. in No. 75-1448 (CA3), p. 89a; (b) that in February 1974—a typical month—230 “For Sale” signs were posted among the 11,000 houses in the community, *id.*, at 94a, 37a; and (c) that the Willingboro Tax Assessor had reported that “by and large the increased value of Willingboro properties was way ahead of ... comparable communities.” *Id.*, at 106a. With respect to the projected effect of the ordinance, several real estate agents reported that 30%-35% of their purchaser—clients came to them because they had seen one of the agent’s “For Sale” or “Sold” signs, *id.*, at 33a, 47a, 49a, 57a, n4 and one agent estimated, based on his experience in a neighboring community that had already banned signs, that selling realty without signs takes twice as long as selling with signs, *id.*, at 42a.

The transcripts of the Council hearings also reveal that the hearings provided useful barometers of public sentiment toward the proposed ordinance. The Council was told, for

example, that surveys in two areas of the township found overwhelming support for the law, *id.*, at 29a, 84a. In addition, at least at the second meeting, the citizens, who were not real estate agents and who spoke, favored the proposed ordinance by a sizable margin. Interestingly, however, at both meetings those defending the ordinance focused primarily on aesthetic considerations and on the effect of signs— and transiency generally —on property values. Few speakers directly referred to the changing racial composition of Willingboro in supporting the proposed law.

Although the ordinance had been in effect for nine months prior to trial, no statistical data were presented concerning its impact. Respondents’ witnesses all agreed, however, that the number of persons selling or considering selling their houses because of racial fears had declined sharply. But several of these witnesses also testified that the number of sales in Willingboro had not declined since the ordinance was enacted. Moreover, respondents’ real-estate-agent witnesses both stated that their business had increased by 25% since the ordinance was enacted, *id.*, at 164a, 226a, and one of these agents reported that the racial composition of his clientele remained unchanged, *id.*, at 160a.

The District Court did not make specific findings of fact. In the course of its opinion, however, the court stated that Willingboro “is to a large extent a transient community, partly due to its proximity to the military facility at Fort Dix and in part due to the numerous transfers of real estate.” The court also stated that there was “no evidence” that whites were leaving Willingboro en masse as “For Sale” signs appeared, but “merely an indication that its residents are concerned that there may be a large influx of minority groups moving in to the town with the resultant effect being a reduction in property values.” The Court of Appeals essentially accepted these “findings,” although it found that Willingboro was experiencing “incipient” panic selling, 535 F. 2d, at 799, and that a “fear psychology [had] developed,” *id.*, at 790.

The starting point for analysis of petitioners’ First Amendment claim must be the two recent decisions in which this Court has eroded the “commercial speech” exception to the First Amendment. In *Bigelow v. Virginia*, 421 U.S. 809 (1975), decided less than two years ago, this Court for the first time expressed its dissatisfaction with the then-prevalent approach of resolving a class of First Amendment claims simply by categorizing the speech as “commercial.” *Id.*, at 826. “Regardless of the particular label,” we stated, “a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.” *Ibid.* After conducting such an analysis in *Bigelow* we concluded that Virginia could not constitutionally punish the publisher of a newspaper for printing an abortion referral agency’s paid advertisement which not only promoted the agency’s services but also contained information about the availability of abortions.

One year later, in *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), we went further. Conceding that “[some] fragment of hope for the continuing validity of a ‘commercial speech’ exception arguably might have persisted because of the subject

matter of the advertisement in *Bigelow*,” *id.*, at 760, we held quite simply, that commercial speech is not “wholly outside the protection of the First Amendment,” *id.*, at 761. Although recognizing that “[some] forms of commercial speech regulations”—such as regulation of false or misleading speech—are surely permissible,” *id.*, at 770, we had little difficulty in finding that Virginia’s ban on the advertising of prescription drug prices by pharmacists was unconstitutional.

Respondents contend, as they must, that the “For Sale” signs banned in Willingboro are constitutionally distinguishable from the abortion and drug advertisements we have previously considered. It is to the distinctions respondents advance that we now turn.

Respondents do seek to distinguish *Bigelow* and *Virginia Pharmacy Bd.* by relying on the vital goal this ordinance serves: namely, promoting stable, racially integrated housing. There can be no question about the importance of achieving this goal. This Court has expressly recognized that substantial benefits flow to both whites and blacks from interracial association and that Congress has made a strong national commitment to promote integrated housing. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

That this ordinance was enacted to achieve an important governmental objective, however, does not distinguish the case from *Virginia Pharmacy Bd.* In that case the State argued that its prohibition on prescription drug price advertising furthered the health and safety of state residents by preventing low cost, low quality pharmacists from driving reputable pharmacists out of business. We expressly recognized the “strong interest” of a State in maintaining “professionalism on the part of licensed pharmacists.” 25 U.S., at 766. But we nevertheless found the Virginia law unconstitutional because we were unpersuaded that the law was necessary to achieve this objective, and were convinced that in any event, the First Amendment disabled the State from achieving its goal by restricting the free flow of truthful information. For the same reasons we conclude that the Willingboro ordinance at issue here is also constitutionally infirm.

The record here demonstrates that respondents failed to establish that this ordinance is needed to assure that Willingboro remains an integrated community. As the District Court concluded, the evidence does not support the Council’s apparent fears that Willingboro was experiencing a substantial incidence of panic selling by white homeowners. A fortiori, the evidence does not establish that “For Sale” signs in front of 2% of Willingboro homes were a major cause of panic selling. And the record does not confirm the township’s assumption that proscribing such signs will reduce public awareness of realty sales and thereby decrease public concern over selling.

The constitutional defect in this ordinance, however, is far more basic. The Township Council here, like the Virginia Assembly in *Virginia Pharmacy Bd.*, acted to prevent its residents from obtaining certain information. That information, which pertains to sales activity in

Willingboro, is of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families. The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township: they will choose to leave town. The Council's concern, then, was not with any commercial aspect of "For Sale" signs—with offerors communicating offers to offerees—but with the substance of the information communicated to Willingboro citizens. If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act "irrationally." Virginia Pharmacy Bd. denies government such sweeping powers. As we said there in rejecting Virginia's claim that the only way it could enable its citizens to find their self-interest was to deny them information that is neither false nor misleading:

"There is... an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.... But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." 425 U.S., at 770.I

Since we can find no meaningful distinction between Ordinance 5-1974 and the statute overturned in Virginia Pharmacy Bd., we must conclude that this ordinance violates the First Amendment.

III

In invalidating this law, we by no means leave Willingboro defenseless in its effort to promote integrated housing. The township obviously remains free to continue "the process of education" it has already begun. It can give widespread publicity—through "Not for Sale" signs or other methods—to the number of whites remaining in Willingboro. And it surely can endeavor to create inducements to retain individuals who are considering selling their homes.

Reversed.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

**CENTRAL HUDSON GAS & ELECTRIC CORP. v. PUBLIC SERVICE COMMISSION
OF NEW YORK
447 U.S. 557 (1980)**

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a regulation of the Public Service Commission of the State of New York violates the First and Fourteenth Amendments because it completely bans promotional advertising by an electrical utility.

I

In December 1973, the Commission, appellee here, ordered electric utilities in New York State to cease all advertising that “[promotes] the use of electricity.”. The order was based on the Commission’s finding that “the interconnected utility system in New York State does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973-1974 winter.” *Id.*, at 26a.

Three years later, when the fuel shortage had eased, the Commission requested comments from the public on its proposal to continue the ban on promotional advertising. Central Hudson Gas & Electric Corp., the appellant in this case, opposed the ban on First Amendment grounds. App. A10. After reviewing the public comments, the Commission extended the prohibition in a Policy Statement issued on February 25, 1977.

The Commission declared all promotional advertising contrary to the national policy of conserving energy. It acknowledged that the ban is not a perfect vehicle for conserving energy. For example, the Commission’s order prohibits promotional advertising to develop consumption during periods when demand for electricity is low. By limiting growth in “off-peak” consumption, the ban limits the “beneficial side effects” of such growth in terms of more efficient use of existing powerplants. And since oil dealers are not under the Commission’s jurisdiction and thus remain free to advertise, it was recognized that the ban can achieve only “piecemeal conservationism.” Still, the Commission adopted the restriction because it was deemed likely to “result in some dampening of unnecessary growth” in energy consumption.

The Commission’s order explicitly permitted “informational” advertising designed to encourage “shifts of consumption” from peak demand times to periods of low electricity demand. . Informational advertising would not seek to increase aggregate consumption, but would invite a leveling of demand throughout any given 24-hour period. The agency offered to review “specific proposals by the companies for specifically described [advertising] programs that meet these criteria.”

Appellant challenged the order in state court, arguing that the Commission had restrained commercial speech in violation of the First and Fourteenth Amendments. The Commission’s order was upheld by the trial court and at the intermediate appellate level. The New York Court

of Appeals affirmed. It found little value to advertising in “the noncompetitive market in which electric corporations operate.” *Consolidated Edison Co. v. Public Service Comm’n*, 47 N. Y. 2d 94, 110, 390 N. E. 2d 749, 757 (1979). Since consumers “have no choice regarding the source of their electric power,” the court denied that “promotional advertising of electricity might contribute to society’s interest in ‘informed and reliable’ economic decisionmaking.” *Ibid.* The court also observed that by encouraging consumption, promotional advertising would only exacerbate the current energy situation. *Id.*, at 110, 390 N. E. 2d, at 758. The court concluded that the governmental interest in the prohibition outweighed the limited constitutional value of the commercial speech at issue. We noted probable jurisdiction, 444 U.S. 962 (1979), and now reverse.

II

The Commission’s order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience. *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976) The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the “highly paternalistic” view that government has complete power to suppress or regulate commercial speech. “[People] will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them. . . .” *id.*, at 770; see *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 92 (1977). Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.

Nevertheless, our decisions have recognized “the ‘commonsense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. “ *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-456 (1978); see *Bates v. State Bar of Arizona*, *supra*, at 381; see also Jackson & Jeffries, “Commercial Speech: Economic Due Process and the First Amendment,” 65 Va. L. Rev. 1, 38-39 (1979). The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. 436 U.S., at 456, 457. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.

The First Amendment’s concern for commercial speech is based on the informational function of advertising. See *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may

ban forms of communication more likely to deceive the public than to inform it, *Friedman v. Rogers*, supra, at 13, 15-16; *Ohralik v. Ohio State Bar Assn.*, supra, at 464-465, or commercial speech related to illegal activity, *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 388 (1973).

If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

In commercial speech cases a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

III

We now apply this four-step analysis for commercial speech to the Commission's arguments in support of its ban on promotional advertising.

A

The Commission does not claim that the expression at issue either is inaccurate or relates to unlawful activity. Yet the New York Court of Appeals questioned whether Central Hudson's advertising is protected commercial speech. Because appellant holds a monopoly over the sale of electricity in its service area, the state court suggested that the Commission's order restricts no commercial speech of any worth. The court stated that advertising in a "noncompetitive market" could not improve the decisionmaking of consumers. 47 N. Y. 2d, at 110, 390 N. E. 2d, at 757. The court saw no constitutional problem with barring commercial speech that it viewed as conveying little useful information.

This reasoning falls short of establishing that appellant's advertising is not commercial speech protected by the First Amendment. Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric utilities compete with suppliers of fuel oil and natural gas in several markets, such as those for home heating and industrial power. This Court noted the existence of interfuel competition 45 years ago, see *West*

Ohio Gas Co. v. Public Utilities Comm'n, 294 U.S. 63, 72 (1935). Each energy source continues to offer peculiar advantages and disadvantages that may influence consumer choice. For consumers in those competitive markets, advertising by utilities is just as valuable as advertising by unregulated firms.

Even in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment. The New York court's argument appears to assume that the providers of a monopoly service or product are willing to pay for wholly ineffective advertising. Most businesses—even regulated monopolies—are unlikely to underwrite promotional advertising that is of no interest or use to consumers. Indeed, a monopoly enterprise legitimately may wish to inform the public that it has developed new services or terms of doing business. A consumer may need information to aid his decision whether or not to use the monopoly service at all, or how much of the service he should purchase. In the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising. Since no such extraordinary conditions have been identified in this case, appellant's monopoly position does not alter the First Amendment's protection for its commercial speech.

B

The Commission offers two state interests as justifications for the ban on promotional advertising. The first concerns energy conservation. Any increase in demand for electricity—during peak or off-peak periods—means greater consumption of energy. The Commission argues, and the New York court agreed, that the State's interest in conserving energy is sufficient to support suppression of advertising designed to increase consumption of electricity. In view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. Plainly, therefore, the state interest asserted is substantial.

The Commission also argues that promotional advertising will aggravate inequities caused by the failure to base the utilities' rates on marginal cost. The utilities argued to the Commission that if they could promote the use of electricity in periods of low demand, they would improve their utilization of generating capacity. The Commission responded that promotion of off-peak consumption also would increase consumption during peak periods. If peak demand were to rise, the absence of marginal cost rates would mean that the rates charged for the additional power would not reflect the true costs of expanding production. Instead, the extra costs would be borne by all consumers through higher overall rates. Without promotional advertising, the Commission stated, this inequitable turn of events would be less likely to occur. The choice among rate structures involves difficult and important questions of economic supply and distributional fairness. The State's concern that rates be fair and efficient represents a clear and substantial governmental interest.

C

Next, we focus on the relationship between the State's interests and the advertising ban. The State's interest in energy conservation is directly advanced by the Commission order at issue here. There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.

D

We come finally to the critical inquiry in this case: whether the Commission's complete suppression of speech ordinarily protected by the First Amendment is no more extensive than necessary to further the State's interest in energy conservation. The Commission's order reaches all promotional advertising, regardless of the impact of the touted service on overall energy use. But the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use. In addition, no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests.

Appellant insists that but for the ban, it would advertise products and services that use energy efficiently. These include the "heat pump," which both parties acknowledge to be a major improvement in electric heating, and the use of electric heat as a "backup" to solar and other heat sources. Although the Commission has questioned the efficiency of electric heating before this Court, neither the Commission's Policy Statement nor its order denying rehearing made findings on this issue. In the absence of authoritative findings to the contrary, we must credit as within the realm of possibility the claim that electric heat can be an efficient alternative in some circumstances.

The Commission's order prevents appellant from promoting electric services that would reduce energy use by diverting demand from less efficient sources, or that would consume roughly the same amount of energy as do alternative sources. In neither situation would the utility's advertising endanger conservation or mislead the public. To the extent that the Commission's order suppresses speech that in no way impairs the State's interest in energy conservation, the Commission's order violates the First and Fourteenth Amendments and must be invalidated.

The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression. To further its policy of conservation, the Commission could attempt to restrict the format and content of Central Hudson's advertising. It might, for example, require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future. In the absence of a showing that more limited

speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising.

In view of our conclusion that the Commission's advertising policy violates the First and Fourteenth Amendments, we do not reach appellant's claims that the agency's order also violated the Equal Protection Clause of the Fourteenth Amendment, and that it is both overbroad and vague.

IV

Our decision today in no way disparages the national interest in energy conservation. We accept without reservation the argument that conservation, as well as the development of alternative energy sources, is an imperative national goal. Administrative bodies empowered to regulate electric utilities have the authority—and indeed the duty—to take appropriate action to further this goal. When, however, such action involves the suppression of speech, the First and Fourteenth Amendments require that the restriction be no more extensive than is necessary to serve the state interest. In this case, the record before us fails to show that the total ban on promotional advertising meets this requirement.

Accordingly, the judgment of the New York Court of Appeals is Reversed.

METROMEDIA, v. CITY OF SAN DIEGO
453 U.S. 490 (1981)

JUSTICE WHITE announced the judgment of the Court and delivered an opinion, in which JUSTICE STEWART, JUSTICE MARSHALL, and JUSTICE POWELL joined.

This case involves the validity of an ordinance of the city of San Diego, Cal., imposing substantial prohibitions on the erection of outdoor advertising displays within the city.

I

Stating that its purpose was "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays" and "to preserve and improve the appearance of the City," San Diego enacted an ordinance to prohibit "outdoor advertising display signs." The California Supreme Court subsequently defined the term "advertising display sign" as "a rigidly assembled sign, display, or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public." 26 Cal. 3d 848, 856, n. 2 (1980).

The ordinance provides two kinds of exceptions to the general prohibition: onsite signs and signs falling within 12 specified categories. Onsite signs are defined as those "designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed."

The specific categories exempted from the prohibition include: government signs; signs located at public bus stops; signs manufactured, transported, or stored within the city, if not used for advertising purposes; commemorative historical plaques; religious symbols; signs within shopping malls; for sale and for lease signs; signs on public and commercial vehicles; signs depicting time, temperature, and news; approved temporary, off-premises, subdivision directional signs; and "[temporary] political campaign signs." Under this scheme, onsite commercial advertising is permitted, but other commercial advertising and noncommercial communications using fixed-structure signs are everywhere forbidden unless permitted by one of the specified exceptions.

Appellants are companies that were engaged in the outdoor advertising business in San Diego at the time the ordinance was passed. Each owns a substantial number of outdoor advertising displays (approximately 500 to 800) within the city. These signs are all located in areas zoned for commercial and industrial purposes, most of them on property leased by the owners to appellants for the purpose of maintaining billboards. Each sign has a remaining useful income-producing life of over 25 years, and each sign has a fair market value of between \$2,500 and \$25,000. Space on the signs was made available to "all comers" and the copy on each sign changed regularly, usually monthly. Although the purchasers of advertising space on appellants'

signs usually seek to convey a commercial message, their billboards have also been used to convey a broad range of noncommercial political and social messages.

Appellants brought suit in state court to enjoin enforcement of the ordinance ... [T]he California Supreme Court ... held that the two purposes of the ordinance were within the city's legitimate interests and that the ordinance was "a proper application of municipal authority over zoning and land use for the purpose of promoting the public safety and welfare." 26 Cal. 3d, at 858. The court rejected appellants' argument that the ordinance was facially invalid under the First Amendment. Appellants sought review in this Court, arguing that the ordinance was facially invalid on First Amendment grounds and that the city's threatened destruction of the outdoor advertising business was prohibited by the Due Process Clause of the Fourteenth Amendment. We noted probable jurisdiction. 449 U.S. 897.

III

This Court has often faced the problem of applying the broad principles of the First Amendment to unique forums of expression. Even a cursory reading of these opinions reveals that at times First Amendment values must yield to other societal interests. These cases support the cogency of Justice Jackson's remark in *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949): Each method of communicating ideas is "a law unto itself" and that law must reflect the "differing natures, values, abuses and dangers" of each method. We deal here with the law of billboards.

Billboards are a well-established medium of communication, used to convey a broad range of different kinds of messages. As Justice Clark noted in his dissent below:

"The outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas. From the poster or 'broadside' to the billboard, outdoor signs have played a prominent role throughout American history, rallying support for political and social causes." 26 Cal. 3d, at 888, 610 P. 2d, at 430-431.

The record in this case indicates that besides the typical commercial uses, San Diego billboards have been used "to publicize the 'City in motion' campaign of the City of San Diego, to communicate messages from candidates for municipal, state and national offices, including candidates for judicial office, to propose marriage, to seek employment, to encourage the use of seat belts, to denounce the United Nations, to seek support for Prisoners of War and Missing in Action, to promote the United Crusade and a variety of other charitable and socially-related endeavors and to provide directions to the traveling public."

But whatever its communicative function, the billboard remains a "large, immobile, and permanent structure which like other structures is subject to . . . regulation." *Id.*, at 870, 610 P. 2d, at 419. Moreover, because it is designed to stand out and apart from its surroundings, the billboard creates a unique set of problems for land-use planning and development.

As construed by the California Supreme Court, the ordinance restricts the use of certain kinds of outdoor signs. That restriction is defined in two ways: first, by reference to the structural characteristics of the sign; second, by reference to the content, or message, of the sign. Thus, the regulation only applies to a "permanent structure constituting, or used for the display of, a commercial or other advertisement to the public." Within that class, the only permitted signs are those (1) identifying the premises on which the sign is located, or its owner or occupant, or advertising the goods produced or services rendered on such property and (2) those within one of the specified exemptions to the general prohibition, such as temporary political campaign signs. To determine if any billboard is prohibited by the ordinance, one must determine how it is constructed, where it is located, and what message it carries.

Thus, under the ordinance (1) a sign advertising goods or services available on the property where the sign is located is allowed; (2) a sign on a building or other property advertising goods or services produced or offered elsewhere is barred; (3) noncommercial advertising, unless within one of the specific exceptions, is everywhere prohibited. The occupant of property may advertise his own goods or services; he may not advertise the goods or services of others, nor may he display most noncommercial messages.

IV

Appellants' principal submission is that enforcement of the ordinance will eliminate the outdoor advertising business in San Diego and that the First and Fourteenth Amendments prohibit the elimination of this medium of communication. Appellants contend that the city may bar neither all offsite commercial signs nor all noncommercial advertisements and that even if it may bar the former, it may not bar the latter. Appellants may raise both arguments in their own right because, although the bulk of their business consists of offsite signs carrying commercial advertisements, their billboards also convey a substantial amount of noncommercial advertising. Because our cases have consistently distinguished between the constitutional protection afforded commercial as opposed to noncommercial speech, in evaluating appellants' contention we consider separately the effect of the ordinance on commercial and noncommercial speech.

However, we have never held that one with a "commercial interest" in speech also cannot challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment interests of others. Were it otherwise, newspapers, radio stations, movie theaters and producers - often those with the highest interest and the largest stake in a First Amendment controversy - would not be able to challenge government limitations on speech as substantially overbroad.

The extension of First Amendment protections to purely commercial speech is a relatively recent development in First Amendment jurisprudence. In *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), we plainly held that speech proposing no more than a commercial transaction enjoys a substantial degree of First Amendment

protection: A State may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon its disseminators and its recipients. That decision, however, did not equate commercial and noncommercial speech for First Amendment purposes; indeed, it expressly indicated the contrary. See *id.*, at 770-773, and n. 24. See also *id.*, at 779-781 (STEWART, J., concurring).

Although the protection extended to commercial speech has continued to develop, commercial and noncommercial communications, in the context of the First Amendment, have been treated differently.... [I]n *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), we held: "The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for a particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Id.*, at 562-563 (citation omitted). We then adopted a four-part test for determining the validity of government restrictions on commercial speech as distinguished from more fully protected speech. (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

Appellants agree that the proper approach to be taken in determining the validity of the restrictions on commercial speech is that which was articulated in *Central Hudson*, but assert that the San Diego ordinance fails that test. We do not agree.

There can be little controversy over the application of the first, second, and fourth criteria. There is no suggestion that the commercial advertising at issue here involves unlawful activity or is misleading. Nor can there be substantial doubt that the twin goals that the ordinance seeks to further - traffic safety and the appearance of the city - are substantial governmental goals. Similarly, we reject appellants' claim that the ordinance is broader than necessary and, therefore, fails the fourth part of the *Central Hudson* test. If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The city has gone no further than necessary in seeking to meet its ends. Indeed, it has stopped short of fully accomplishing its ends: It has not prohibited all billboards, but allows onsite advertising and some other specifically exempted signs.

The more serious question, then, concerns the third of the *Central Hudson* criteria: Does the ordinance "directly advance" governmental interests in traffic safety and in the appearance of the city? It is asserted that the record is inadequate to show any connection between billboards and traffic safety. The California Supreme Court noted the meager record on this point but held "as a matter of law that an ordinance which eliminates billboards designed to be viewed from streets and highways reasonably relates to traffic safety." 26 Cal. 3d, at 859, 610 P. 2d, at 412.

Noting that "[billboards] are intended to, and undoubtedly do, divert a driver's attention from the roadway," *ibid.*, and that whether the "distracting effect contributes to traffic accidents invokes an issue of continuing controversy," *ibid.*, the California Supreme Court agreed with many other courts that a legislative judgment that billboards are traffic hazards is not manifestly unreasonable and should not be set aside. We likewise hesitate to disagree with the accumulated, commonsense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety.

We reach a similar result with respect to the second asserted justification for the ordinance - advancement of the city's esthetic interests. It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an "esthetic harm." San Diego, like many States and other municipalities, has chosen to minimize the presence of such structures. Such esthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose. But there is no claim in this case that San Diego has as an ulterior motive the suppression of speech, and the judgment involved here is not so unusual as to raise suspicions in itself.

It is nevertheless argued that the city denigrates its interest in traffic safety and beauty and defeats its own case by permitting onsite advertising and other specified signs. Appellants question whether the distinction between onsite and offsite advertising on the same property is justifiable in terms of either esthetics or traffic safety. The ordinance permits the occupant of property to use billboards located on that property to advertise goods and services offered at that location; identical billboards, equally distracting and unattractive, that advertise goods or services available elsewhere are prohibited even if permitting the latter would not multiply the number of billboards. Despite the apparent incongruity, this argument has been rejected, at least implicitly, in all of the cases sustaining the distinction between offsite and onsite commercial advertising. We agree with those cases and with our own decisions in *Suffolk Outdoor Advertising Co. v. Hulse*, 439 U.S. 808 (1978); *Markham Advertising Co. v. Washington*, 393 U.S. 316 (1969); and *Newman Signs, Inc. v. Hjelle*, 440 U.S. 901 (1979).

In the first place, whether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising. Second, the city may believe that offsite advertising, with its periodically changing content, presents a more acute problem than does onsite advertising. Third, San Diego has obviously chosen to value one kind of commercial speech - onsite advertising - more than another kind of commercial speech - offsite advertising. The ordinance reflects a decision by the city that the former interest, but not the latter, is stronger than the city's interests in traffic safety and esthetics. The city has decided that in a limited instance - onsite commercial advertising - its interests should yield. We do not reject that judgment. As we see it, the city could reasonably conclude that a commercial enterprise -- as well as the interested public -- has a stronger interest

in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere. It does not follow from the fact that the city has concluded that some commercial interests outweigh its municipal interests in this context that it must give similar weight to all other commercial advertising. Thus, offsite commercial billboards may be prohibited while onsite commercial billboards are permitted.

The constitutional problem in this area requires resolution of the conflict between the city's land-use interests and the commercial interests of those seeking to purvey goods and services within the city. In light of the above analysis, we cannot conclude that the city has drawn an ordinance broader than is necessary to meet its interests, or that it fails directly to advance substantial government interests. In sum, insofar as it regulates commercial speech the San Diego ordinance meets the constitutional requirements of *Central Hudson*, supra.

V

It does not follow, however, that San Diego's general ban on signs carrying noncommercial advertising is also valid under the First and Fourteenth Amendments. The fact that the city may value commercial messages relating to onsite goods and services more than it values commercial communications relating to offsite goods and services does not justify prohibiting an occupant from displaying its own ideas or those of others.

As indicated above, our recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech. San Diego effectively inverts this judgment, by affording a greater degree of protection to commercial than to noncommercial speech. There is a broad exception for onsite commercial advertisements, but there is no similar exception for noncommercial speech. The use of onsite billboards to carry commercial messages related to the commercial use of the premises is freely permitted, but the use of otherwise identical billboards to carry noncommercial messages is generally prohibited. The city does not explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city. Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.

Furthermore, the ordinance contains exceptions that permit various kinds of noncommercial signs, whether on property where goods and services are offered or not, that would otherwise be within the general ban. A fixed sign may be used to identify any piece of property and its owner. Any piece of property may carry or display religious symbols, commemorative plaques of recognized historical societies and organizations, signs carrying news items or telling the time or temperature, signs erected in discharge of any governmental function,

or temporary political campaign signs. No other noncommercial or ideological signs meeting the structural definition are permitted, regardless of their effect on traffic safety or esthetics.

Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests. With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse: "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Consolidated Edison Co.*, 447 U.S., at 538. Because some noncommercial messages may be conveyed on billboards throughout the commercial and industrial zones, San Diego must similarly allow billboards conveying other noncommercial messages throughout those zones.

There can be no question that a prohibition on the erection of billboards infringes freedom of speech: The exceptions do not create the infringement, rather the general prohibition does. But the exceptions to the general prohibition are of great significance in assessing the strength of the city's interest in prohibiting billboards. We conclude that by allowing commercial establishments to use billboards to advertise the products and services they offer, the city necessarily has conceded that some communicative interests, e. g., onsite commercial advertising, are stronger than its competing interests in esthetics and traffic safety. It has nevertheless banned all noncommercial signs except those specifically excepted.

Because the San Diego ordinance reaches too far into the realm of protected speech, we conclude that it is unconstitutional on its face. The judgment of the California Supreme Court is reversed, and the case is remanded to that court.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE BLACKMUN joins, concurring in the judgment. [omitted]

JUSTICE STEVENS, dissenting in part.

If enforced as written, the ordinance at issue in this case will eliminate the outdoor advertising business in the city of San Diego. The principal question presented is, therefore, whether a city may prohibit this medium of communication. Instead of answering that question, the plurality focuses its attention on the exceptions from the total ban and, somewhat ironically, concludes that the ordinance is an unconstitutional abridgment of speech because it does not abridge enough speech.

CHIEF JUSTICE BURGER, dissenting.

Today the Court takes an extraordinary -- even a bizarre -- step by severely limiting the power of a city to act on risks it perceives to traffic safety and the environment posed by large,

permanent billboards. Those joining the plurality opinion invalidate a city's effort to minimize these traffic hazards and eyesores simply because, in exercising rational legislative judgment, it has chosen to permit a narrow class of signs that serve special needs.

JUSTICE REHNQUIST, dissenting [omitted]

LORILLARD TOBACCO COMPANY v. REILLY
533 U.S. 525 (2001)

JUSTICE O'CONNOR delivered the opinion of the Court.

In January 1999, the Attorney General of Massachusetts promulgated comprehensive regulations governing the advertising and sale of cigarettes, smokeless tobacco, and cigars. Petitioners, a group of cigarette, smokeless tobacco, and cigar manufacturers and retailers, filed suit in Federal District Court claiming that the regulations violate federal law and the United States Constitution. In large measure, the District Court determined that the regulations are valid and enforceable. The United States Court of Appeals for the First Circuit affirmed in part and reversed in part, concluding that the regulations are not pre-empted by federal law and do not violate the First Amendment. The first question presented for our review is whether certain cigarette advertising regulations are pre-empted by the Federal Cigarette Labeling and Advertising Act (FCLAA), 79 Stat. 282, as amended, 15 U.S.C. §1331 et seq. The second question presented is whether certain regulations governing the advertising and sale of tobacco products violate the First Amendment.

In November 1998, Massachusetts, along with over 40 other States, reached a landmark agreement with major manufacturers in the cigarette industry. The signatory States settled their claims against these companies in exchange for monetary payments and permanent injunctive relief. At the press conference covering Massachusetts' decision to sign the agreement, then-Attorney General Scott Harshbarger announced that as one of his last acts in office, he would create consumer protection regulations to restrict advertising and sales practices for tobacco products. He explained that the regulations were necessary in order to "close holes" in the settlement agreement and "to stop Big Tobacco from recruiting new customers among the children of Massachusetts."

In January 1999, pursuant to his authority to prevent unfair or deceptive practices in trade the Massachusetts Attorney General (Attorney General) promulgated regulations governing the sale and advertisement of cigarettes, smokeless tobacco, and cigars. The purpose of the cigarette and smokeless tobacco regulations is "to eliminate deception and unfairness in the way cigarettes and smokeless tobacco products are marketed, sold and distributed in Massachusetts in order to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age . . . [and] in order to prevent access to such products by underage consumers." The similar purpose of the cigar regulations is "to eliminate deception and unfairness in the way cigars and little cigars are packaged, marketed, sold and distributed in Massachusetts [so that] . . . consumers may be adequately informed about the health risks associated with cigar smoking, its addictive properties, and the false perception that cigars are a safe alternative to cigarettes . . . [and so that] the incidence of cigar use by children under legal age is addressed . . . in order to prevent access to such products by underage consumers." The regulations have a broader scope than the master settlement agreement, reaching advertising, sales practices, and members of the

tobacco industry not covered by the agreement. The regulations place a variety of restrictions on outdoor advertising, point-of-sale advertising, retail sales transactions, transactions by mail, promotions, sampling of products, and labels for cigars.

The cigarette and smokeless tobacco regulations being challenged before this Court provide:

"(2) Retail Outlet Sales Practices. Except as otherwise provided in [§21.04(4)], it shall be an unfair or deceptive act or practice for any person who sells or distributes cigarettes or smokeless tobacco products through a retail outlet located within Massachusetts to engage in any of the following retail outlet sales practices:

.....

"(c) Using self-service displays of cigarettes or smokeless tobacco products;

"(d) Failing to place cigarettes and smokeless tobacco products out of the reach of all consumers, and in a location accessible only to outlet personnel." §§21.04(2)(c)-(d).

"(5) Advertising Restrictions. Except as provided in [§21.04(6)], it shall be an unfair or deceptive act or practice for any manufacturer, distributor or retailer to engage in any of the following practices:

"(a) Outdoor advertising, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the [*535] outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school;

"(b) Point-of-sale advertising of cigarettes or smokeless tobacco products any portion of which is placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school, and which is not an adult-only retail establishment." §§21.04(5)(a)-(b).

The cigar regulations that are still at issue provide:

"(1) Retail Sales Practices. Except as otherwise provided in [§22.06(4)], it shall be an unfair or deceptive act or practice for any person who sells or distributes cigars or little cigars directly to consumers within Massachusetts to engage in any of the following practices:

"(a) sampling of cigars or little cigars or promotional give-aways of cigars or little cigars." §21.06(1)(a).

"(2) Retail Outlet Sales Practices. Except as otherwise provided in [§22.06(4)], it shall be an unfair or deceptive act or practice for any person who sells or distributes cigars or little cigars through a retail outlet located within Massachusetts to engage in any of the following retail outlet sales practices:

.....

"(c) Using self-service displays of cigars or little cigars;

"(d) Failing to place cigars and little cigars out of the reach of all consumers, and in a location accessible only to outlet personnel." §§22.06(2)(c)-(d).

"(5) Advertising Restrictions. Except as provided in [§22.06(6)], it shall be an unfair or deceptive act or practice for any manufacturer, distributor or retailer to engage in any of the following practices:

"(a) Outdoor advertising of cigars or little cigars, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school;

"(b) Point-of-sale advertising of cigars or little cigars any portion of which is placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school, and which is not an adult-only retail establishment." §§22.06(5)(a)- (b).

The term "advertisement" is defined as:

"any oral, written, graphic, or pictorial statement or representation, made by, or on behalf of, any person who manufactures, packages, imports for sale, distributes or sells within Massachusetts [tobacco products], the purpose or effect of which is to promote the use or sale of the product. Advertisement includes, without limitation, any picture, logo, symbol, motto, selling message, graphic display, visual image, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of [tobacco product]. This includes, without limitation, utilitarian items and permanent or semi-permanent fixtures with such indicia of product identification such as lighting fixtures, awnings, display cases, clocks and door

mats, but does not include utilitarian items with a volume of 200 cubic inches or less." §§21.03, 22.03.

Before the effective date of the regulations, February 1, 2000, members of the tobacco industry sued the Attorney General in the United States District Court for the District of Massachusetts. Four cigarette manufacturers (Lorillard Tobacco Company, Brown & Williamson Tobacco Corporation, R. J. Reynolds Tobacco Company, and Philip Morris Incorporated), a maker of smokeless tobacco products (U.S. Smokeless Tobacco Company), and several cigar manufacturers and retailers claimed that many of the regulations violate the Commerce Clause, the Supremacy Clause, the First and Fourteenth Amendments, and Rev. Stat. §1979, 42 U.S.C. §1983. The parties sought summary judgment.

II

Before reaching the First Amendment issues, we must decide to what extent federal law pre-empts the Attorney General's regulations. The cigarette petitioners contend that the FCLAA, 15 U.S.C. §1331 et seq., pre-empts the Attorney General's cigarette advertising regulations.....[analysis omitted] We hold ... that the FCLAA pre-empts state regulations targeting cigarette advertising. States remain free to enact generally applicable zoning regulations, and to regulate conduct with respect to cigarette use and sales.

Although the FCLAA prevents States and localities from imposing special requirements or prohibitions "based on smoking and health" "with respect to the advertising or promotion" of cigarettes, that language still leaves significant power in the hands of States to impose generally applicable zoning regulations and to regulate conduct.

For instance, the FCLAA does not restrict a State or locality's ability to enact generally applicable zoning restrictions. We have recognized that state interests in traffic safety and esthetics may justify zoning regulations for advertising. See *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 507-508, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981). See also *St. Louis Poster Advertising Co. v. St. Louis*, 249 U.S. 269, 274, 63 L. Ed. 599, 39 S. Ct. 274, 17 Ohio L. Rep. 62 (1919); *Thomas Cusack Co. v. Chicago*, 242 U.S. 526, 529-531, 61 L. Ed. 472, 37 S. Ct. 190 (1917). Although Congress has taken into account the unique concerns about cigarette smoking and health in advertising, there is no indication that Congress intended to displace local community interests in general regulations of the location of billboards or large marquee advertising, or that Congress intended cigarette advertisers to be afforded special treatment in that regard. Restrictions on the location and size of advertisements that apply to cigarettes on equal terms with other products appear to be outside the ambit of the pre-emption provision. Such restrictions are not "based on smoking and health."

The FCLAA also does not foreclose all state regulation of conduct as it relates to the sale or use of cigarettes. The FCLAA's pre-emption provision explicitly governs state regulations of "advertising or promotion." * Accordingly, the FCLAA does not pre-empt state laws prohibiting

cigarette sales to minors. To the contrary, there is an established congressional policy that supports such laws; Congress has required States to prohibit tobacco sales to minors as a condition of receiving federal block grant funding for substance abuse treatment activities. 106 Stat. 394, 388, 42 U.S.C. §§300x-26(a)(1), 300x-21.

III

By its terms, the FCLAA's pre-emption provision only applies to cigarettes. Accordingly, we must evaluate the smokeless tobacco and cigar petitioners' First Amendment challenges to the State's outdoor and point-of-sale advertising regulations. The cigarette petitioners did not raise a pre-emption challenge to the sales practices regulations. Thus, we must analyze the cigarette as well as the smokeless tobacco and cigar petitioners' claim that certain sales practices regulations for tobacco products violate the First Amendment.

For over 25 years, the Court has recognized that commercial speech does not fall outside the purview of the First Amendment. *Central Hudson Gas and Electric v. Public* 447 U.S. 557 (1980). Instead, the Court has afforded commercial speech a measure of First Amendment protection "commensurate" with its position in relation to other constitutionally guaranteed expression. In recognition of the "distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech," we developed a framework for analyzing regulations of commercial speech that is "substantially similar" to the test for time, place, and manner restrictions. The analysis contains four elements:

"At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Central Hudson*, *supra*, at 566.

Petitioners urge us to reject the *Central Hudson* analysis and apply strict scrutiny. They are not the first litigants to do so. Admittedly, several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases. See, e.g., *Greater New Orleans*, *supra*, at 197 (THOMAS, J., concurring in judgment. But here, as in *Greater New Orleans*, we see "no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision." 527 U.S. at 184.

Only the last two steps of *Central Hudson*'s four-part analysis are at issue here. The Attorney General has assumed for purposes of summary judgment that petitioners' speech is entitled to First Amendment protection. 218 F.3d at 43; 84 F. Supp. 2d at 185-186. With respect

to the second step, none of the petitioners contests the importance of the State's interest in preventing the use of tobacco products by minors.

The third step of *Central Hudson* concerns the relationship between the harm that underlies the State's interest and the means identified by the State to advance that interest. It requires that:

"the speech restriction directly and materially advance the asserted governmental interest. This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Greater New Orleans*, supra, at 188

We do not, however, require that "empirical data come . . . accompanied by a surfeit of background information . . . We have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'" *Florida Bar v. Went For It, Inc.*, 515 U.S. at 628 (citations and internal quotation marks omitted).

The last step of the *Central Hudson* analysis "complements" the third step, "asking whether the speech restriction is not more extensive than necessary to serve the interests that support it." *Greater New Orleans*, supra, at 188. We have made it clear that "the least restrictive means" is not the standard; instead, the case law requires a reasonable "fit between the legislature's ends and the means chosen to accomplish those ends, . . . a means narrowly tailored to achieve the desired objective." Focusing on the third and fourth steps of the *Central Hudson* analysis, we first address the outdoor advertising and point-of-sale advertising regulations for smokeless tobacco and cigars. We then address the sales practices regulations for all tobacco products.

The outdoor advertising regulations prohibit smokeless tobacco or cigar advertising within a 1,000-foot radius of a school or playground. The District Court and Court of Appeals concluded that the Attorney General had identified a real problem with underage use of tobacco products, that limiting youth exposure to advertising would combat that problem, and that the regulations burdened no more speech than necessary to accomplish the State's goal. The smokeless tobacco and cigar petitioners take issue with all of these conclusions.

The smokeless tobacco and cigar petitioners contend that the Attorney General's regulations do not satisfy *Central Hudson*'s third step. They maintain that although the Attorney General may have identified a problem with underage cigarette smoking, he has not identified an equally severe problem with respect to underage use of smokeless tobacco or cigars. The smokeless tobacco petitioner emphasizes the "lack of parity" between cigarettes and smokeless tobacco. The petitioners finally contend that the Attorney General cannot prove that advertising

has a causal link to tobacco use such that limiting advertising will materially alleviate any problem of underage use of their products.

In previous cases, we have acknowledged the theory that product advertising stimulates demand for products, while suppressed advertising may have the opposite effect. The Attorney General cites numerous studies to support this theory in the case of tobacco products.

Our review of the record reveals that the Attorney General has provided ample documentation of the problem with underage use of smokeless tobacco and cigars. In addition, we disagree with petitioners' claim that there is no evidence that preventing targeted campaigns and limiting youth exposure to advertising will decrease underage use of smokeless tobacco and cigars. On this record and in the posture of summary judgment, we are unable to conclude that the Attorney General's decision to regulate advertising of smokeless tobacco and cigars in an effort to combat the use of tobacco products by minors was based on mere "speculation [and] conjecture." *Edenfield v. Fane*, 507 U.S. at 770.

Whatever the strength of the Attorney General's evidence to justify the outdoor advertising regulations, however, we conclude that the regulations do not satisfy the fourth step of the Central Hudson analysis. The final step of the Central Hudson analysis, the "critical inquiry in this case," requires a reasonable fit between the means and ends of the regulatory scheme. The Attorney General's regulations do not meet this standard. The broad sweep of the regulations indicates that the Attorney General did not "carefully calculate the costs and benefits associated with the burden on speech imposed" by the regulations.

The outdoor advertising regulations prohibit any smokeless tobacco or cigar advertising within 1,000 feet of schools or playgrounds. The substantial geographical reach of the Attorney General's outdoor advertising regulations is compounded by other factors. "Outdoor" advertising includes not only advertising located outside an establishment, but also advertising inside a store if that advertising is visible from outside the store. The regulations restrict advertisements of any size and the term advertisement also includes oral statements.

In some geographical areas, these regulations would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers. The breadth and scope of the regulations, and the process by which the Attorney General adopted the regulations, do not demonstrate a careful calculation of the speech interests involved.

In addition, the range of communications restricted seems unduly broad. For instance, it is not clear from the regulatory scheme why a ban on oral communications is necessary to further the State's interest. Apparently that restriction means that a retailer is unable to answer inquiries about its tobacco products if that communication occurs outdoors. Similarly, a ban on all signs of any size seems ill suited to target the problem of highly visible billboards, as opposed to smaller signs. To the extent that studies have identified particular advertising and promotion practices

that appeal to youth, tailoring would involve targeting those practices while permitting others. As crafted, the regulations make no distinction among practices on this basis.

The State's interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity. We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products. As the State protects children from tobacco advertisements, tobacco manufacturers and retailers and their adult consumers still have a protected interest in communication.

In some instances, Massachusetts' outdoor advertising regulations would impose particularly onerous burdens on speech. For example, we disagree with the Court of Appeals' conclusion that because cigar manufacturers and retailers conduct a limited amount of advertising in comparison to other tobacco products, "the relative lack of cigar advertising also means that the burden imposed on cigar advertisers is correspondingly small." If some retailers have relatively small advertising budgets, and use few avenues of communication, then the Attorney General's outdoor advertising regulations potentially place a greater, not lesser, burden on those retailers' speech. Furthermore, to the extent that cigar products and cigar advertising differ from that of other tobacco products, that difference should inform the inquiry into what speech restrictions are necessary.

In addition, a retailer in Massachusetts may have no means of communicating to passersby on the street that it sells tobacco products because alternative forms of advertisement, like newspapers, do not allow that retailer to propose an instant transaction in the way that onsite advertising does. The ban on any indoor advertising that is visible from the outside also presents problems in establishments like convenience stores, which have unique security concerns that counsel in favor of full visibility of the store from the outside. It is these sorts of considerations that the Attorney General failed to incorporate into the regulatory scheme.

We conclude that the Attorney General has failed to show that the outdoor advertising regulations for smokeless tobacco and cigars are not more extensive than necessary to advance the State's substantial interest in preventing underage tobacco use. We believe that a remand is inappropriate in this case because the State had ample opportunity to develop a record with respect to tailoring (as it had to justify its decision to regulate advertising), and additional evidence would not alter the nature of the scheme before the Court.

A careful calculation of the costs of a speech regulation does not mean that a State must demonstrate that there is no incursion on legitimate speech interests, but a speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products. After reviewing the outdoor

advertising regulations, we find the calculation in this case insufficient for purposes of the First Amendment.

Massachusetts has also restricted indoor, point-of-sale advertising for smokeless tobacco and cigars. Advertising cannot be "placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of" any school or playground. We conclude that the point-of-sale advertising regulations fail both the third and fourth steps of the Central Hudson analysis. A regulation cannot be sustained if it "provides only ineffective or remote support for the government's purpose," Central Hudson, 447 U.S. at 564 or if there is "little chance" that the restriction will advance the State's goal, Greater New Orleans, supra, at 193 (internal quotation marks omitted). As outlined above, the State's goal is to prevent minors from using tobacco products and to curb demand for that activity by limiting youth exposure to advertising. The 5 foot rule does not seem to advance that goal. Not all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings.

Massachusetts may wish to target tobacco advertisements and displays that entice children, much like floor-level candy displays in a convenience store, but the blanket height restriction does not constitute a reasonable fit with that goal. We conclude that the restriction on the height of indoor advertising is invalid under Central Hudson's third and fourth prongs.

We have observed that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. at 161. From a policy perspective, it is understandable for the States to attempt to prevent minors from using tobacco products before they reach an age where they are capable of weighing for themselves the risks and potential benefits of tobacco use, and other adult activities. Federal law, however, places limits on policy choices available to the States.

In this case, Congress enacted a comprehensive scheme to address cigarette smoking and health in advertising and pre-empted state regulation of cigarette advertising that attempts to address that same concern, even with respect to youth. The First Amendment also constrains state efforts to limit advertising of tobacco products, because so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information.

To the extent that federal law and the First Amendment do not prohibit state action, States and localities remain free to combat the problem of underage tobacco use by appropriate means.

CONCUR BY: KENNEDY; THOMAS; SOUTER (In Part); STEVENS (In Part)

DISSENT BY: SOUTER (In Part); STEVENS (In Part)

Session 36. Content-Based Restrictions

YOUNG v. AMERICAN MINI THEATRES 427 U.S. 50 (1976)

MR. JUSTICE STEVENS delivered the opinion of the Court.

Zoning ordinances adopted by the city of Detroit differentiate between motion picture theaters which exhibit sexually explicit "adult" movies and those which do not. The principal question presented by this case is whether that statutory classification is unconstitutional because it is based on the content of communication protected by the First Amendment.¹⁸⁷

Effective November 2, 1972, Detroit adopted the ordinances challenged in this litigation. Instead of concentrating "adult" theaters in limited zones, these ordinances require that such theaters be dispersed. Specifically, an adult theater may not be located within 1,000 feet of any two other "regulated uses" or within 500 feet of a residential area. The term "regulated uses" includes 10 different kinds of establishments in addition to adult theaters.¹⁸⁸

The classification of a theater as "adult" is expressly predicated on the character of the motion pictures which it exhibits. If the theater is used to present "material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,'" ¹⁸⁹ it is an adult establishment.¹⁹⁰

¹⁸⁷ "Congress shall make no law ... abridging the freedom of speech, or of the press...."

¹⁸⁸ In addition to adult motion picture theaters and "mini" theaters, which contain less than 50 seats, the regulated uses include adult bookstores; cabarets (group "D"); establishments for the sale of beer or intoxicating liquor for consumption on the premises; hotels or motels; pawnshops; pool or billiard halls; public lodging houses; secondhand stores; shoeshine parlors; and taxi dance halls.

¹⁸⁹ These terms are defined as follows:

"For the purpose of this Section, 'Specified Sexual Activities' is defined as:

- "1. Human Genitals in a state of sexual stimulation or arousal;
- "2. Acts of human masturbation, sexual intercourse or sodomy;
- "3. Fondling or other erotic touching of human genitals, public region, buttock or female breast.

"And 'Specified Anatomical Areas' is defined as:

- "1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and
- "2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered."

¹⁹⁰ There are three types of adult establishments - bookstores, motion picture theaters, and mini motion picture theaters - defined respectively as follows:

"Adult Book Store

The 1972 ordinances were amendments to an "Anti-Skid Row Ordinance" which had been adopted 10 years earlier. At that time the Detroit Common Council made a finding that some uses of property are especially injurious to a neighborhood when they are concentrated in limited areas. The decision to add adult motion picture theaters and adult book stores to the list of businesses which, apart from a special waiver, could not be located within 1,000 feet of two other "regulated uses," was, in part, a response to the significant growth in the number of such establishments. In the opinion of urban planners and real estate experts who supported the ordinances, the location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere.

Respondents are the operators of two adult motion picture theaters. One, the Nortown, was an established theater which began to exhibit adult films in March 1973. The other, the Pussy Cat, was a corner gas station which was converted into a "mini theater," but denied a certificate of occupancy because of its plan to exhibit adult films. Both theaters were located within 1,000 feet of two other regulated uses and the Pussy Cat was less than 500 feet from a residential area. The respondents brought two separate actions against appropriate city officials, seeking a declaratory judgment that the ordinances were unconstitutional and an injunction against their enforcement. Federal jurisdiction was properly invoked and the two cases were consolidated for decision.

The District Court granted defendants' motion for summary judgment. On the basis of the reasons stated by the city for adopting the ordinances, the court concluded that they

"An establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' (as defined below), or an establishment with a segment or section devoted to the sale or display of such material.

"Adult Motion Picture Theater

"An enclosed building with a capacity of 50 or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' (as defined below) for observation by patrons therein.

"Adult Mini Motion Picture Theater

"An enclosed building with a capacity for less than 50 persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' (as defined below), for observation by patrons therein."

represented a rational attempt to preserve the city's neighborhoods. The court analyzed and rejected respondents' argument that the definition and waiver provisions in the ordinances were impermissibly vague; it held that the disparate treatment of adult theaters and other theaters was justified by a compelling state interest and therefore did not violate the Equal Protection Clause; and finally it concluded that the regulation of the places where adult films could be shown did not violate the First Amendment.

The Court of Appeals reversed. *American Mini Theatres, Inc. v. Gribbs*, 518 F. 2d 1014 (CA6 1975). The majority opinion concluded that the ordinances imposed a prior restraint on constitutionally protected communication and therefore "merely establishing that they were designed to serve a compelling public interest" provided an insufficient justification for a classification of motion picture theaters on the basis of the content of the materials they purvey to the public. Relying primarily on *Police Department of Chicago v. Mosley*, 408 U.S. 92, the court held the ordinance invalid under the Equal Protection Clause. Judge Celebrezze, in dissent, expressed the opinion that the ordinance was a valid "'time, place and manner' regulation," rather than a regulation of speech on the basis of its content.

Because of the importance of the decision, we granted certiorari, 423 U.S. 911.

As they did in the District Court, respondents contend (1) that the ordinances are so vague that they violate the Due Process Clause of the Fourteenth Amendment; (2) that they are invalid under the First Amendment as prior restraints on protected communication; and (3) that the classification of theaters on the basis of the content of their exhibitions violates the Equal Protection Clause of the Fourteenth Amendment. We consider their arguments in that order.

I

We are not persuaded that the Detroit zoning ordinances will have a significant deterrent effect on the exhibition of films protected by the First Amendment. ...[T]he only vagueness in the ordinances relates to the amount of sexually explicit activity that may be portrayed before the material can be said to be "characterized by an emphasis" on such matter. For most films the question will be readily answerable; to the extent that an area of doubt exists, we see no reason why the ordinances are not "readily subject to a narrowing construction by the state courts." Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance, and since the limited amount of uncertainty in the ordinances is easily susceptible of a narrowing construction, we think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court.

The only area of protected communication that may be deterred by these ordinances comprises films containing material falling within the specific definitions of "Specified Sexual Activities" or "Specified Anatomical Areas." The fact that the First Amendment protects some, though not necessarily all, of that material from total suppression does not warrant the further

conclusion that an exhibitor's doubts as to whether a borderline film may be shown in his theater, as well as in theaters licensed for adult presentations, involves the kind of threat to the free market in ideas and expression that justifies the exceptional approach to constitutional adjudication recognized in cases like *Dombrowski v. Pfister*, 380 U.S. 479.

The application of the ordinances to respondents is plain; even if there is some area of uncertainty about their application in other situations, we agree with the District Court that respondents' due process argument must be rejected.

II

Petitioners acknowledge that the ordinances prohibit theaters which are not licensed as "adult motion picture theaters" from exhibiting films which are protected by the First Amendment. Respondents argue that the ordinances are therefore invalid as prior restraints on free speech.

The ordinances are not challenged on the ground that they impose a limit on the total number of adult theaters which may operate in the city of Detroit. There is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained.

It is true, however, that adult films may only be exhibited commercially in licensed theaters. But that is also true of all motion pictures. The city's general zoning laws require all motion picture theaters to satisfy certain locational as well as other requirements; we have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city. The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances.

Putting to one side for the moment the fact that adult motion picture theaters must satisfy a locational restriction not applicable to other theaters, we are also persuaded that the 1,000-foot restriction does not, in itself, create an impermissible restraint on protected communication. The city's interest in planning and regulating the use of property for commercial purposes is clearly adequate to support that kind of restriction applicable to all theaters within the city limits. In short, apart from the fact that the ordinances treat adult theaters differently from other theaters and the fact that the classification is predicated on the content of material shown in the respective theaters, the regulation of the place where such films may be exhibited does not offend the First

Amendment.¹⁹¹ We turn, therefore, to the question whether the classification is consistent with the Equal Protection Clause.

III

A remark attributed to Voltaire characterizes our zealous adherence to the principle that the government may not tell the citizen what he may or may not say. Referring to a suggestion that the violent overthrow of tyranny might be legitimate, he said: "I disapprove of what you say, but I will defend to the death your right to say it."¹⁹² The essence of that comment has been repeated time after time in our decisions invalidating attempts by the government to impose selective controls upon the dissemination of ideas.

Thus, the use of streets and parks for the free expression of views on national affairs may not be conditioned upon the sovereign's agreement with what a speaker may intend to say. Nor may speech be curtailed because it invites dispute, creates dissatisfaction with conditions the way they are, or even stirs people to anger. The sovereign's agreement or disagreement with the content of what a speaker has to say may not affect the regulation of the time, place, or manner of presenting the speech.

The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech. Thus, the line between permissible advocacy and impermissible incitation to crime or violence depends, not merely on the setting in which the speech occurs, but also on exactly what the speaker had to say. Similarly, it is the content of the utterance that determines whether it is a protected epithet or an unprotected "fighting comment." And in time of war "the publication of the sailing dates of transports or the number and location of troops" may unquestionably be restrained, see *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716, although publication of news stories with a different content would be protected.

Even within the area of protected speech, a difference in content may require a different governmental response. In *New York Times Co. v. Sullivan*, 376 U.S. 254, we recognized that the First Amendment places limitations on the States' power to enforce their libel laws. We held that a public official may not recover damages from a critic of his official conduct without proof of "malice" as specially defined in that opinion. Implicit in the opinion is the assumption that if the content of the newspaper article had been different - that is, if its subject matter had not been a public official - a lesser standard of proof would have been adequate.

¹⁹¹Reasonable regulations of the time, place, and manner of protected speech, where those regulations are necessary to further significant governmental interests, are permitted by the First Amendment. See, e.g., *Kovacs v. Cooper*, 336 U.S. 77 (limitation on use of sound trucks); *Cox v. Louisiana*, 379 U.S. 559 (ban on demonstrations in or near a courthouse with the intent to obstruct justice); *Grayned v. City of Rockford*, 408 U.S. 104 (ban on willful making, on grounds adjacent to a school, of any noise which disturbs the good order of the school session).

¹⁹²*S. Tallentyre, The Friends of Voltaire* 199 (1907).

The essence of that rule is the need for absolute neutrality by the government; its regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator. Thus, although the content of a story must be examined to decide whether it involves a public figure or a public issue, the Court's application of the relevant rule may not depend on its favorable or unfavorable appraisal of that figure or that issue.

We have recently held that the First Amendment affords some protection to commercial speech.¹⁹³ We have also made it clear, however, that the content of a particular advertisement may determine the extent of its protection. A public rapid transit system may accept some advertisements and reject others. A state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere, and regulatory commissions may prohibit businessmen from making statements which, though literally true, are potentially deceptive. The measure of constitutional protection to be afforded commercial speech will surely be governed largely by the content of the communication.

More directly in point are opinions dealing with the question whether the First Amendment prohibits the State and Federal Governments from wholly suppressing sexually oriented materials on the basis of their "obscene character." In *Ginsberg v. New York*, 390 U.S. 629, the Court upheld a conviction for selling to a minor magazines which were concededly not "obscene" if shown to adults. Indeed, the Members of the Court who would accord the greatest protection to such materials have repeatedly indicated that the State could prohibit the distribution or exhibition of such materials to juveniles and unconsenting adults. Surely the First Amendment does not foreclose such a prohibition; yet it is equally clear that any such prohibition must rest squarely on an appraisal of the content of material otherwise within a constitutionally protected area.

Such a line may be drawn on the basis of content without violating the government's paramount obligation of neutrality in its regulation of protected communication. For the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate; whether a motion picture ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same.

Moreover, even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see

¹⁹³*Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748.

"Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.

The remaining question is whether the line drawn by these ordinances is justified by the city's interest in preserving the character of its neighborhoods. On this question the record discloses a factual basis for the Common Council's conclusion that this kind of restriction will have the desired effect.¹⁹⁴ It is not our function to appraise the wisdom of its decision to require adult theaters to be separated rather than concentrated in the same areas. In either event, the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.

Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, even though the determination of whether a particular film fits that characterization turns on the nature of its content, we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures. We hold that the zoning ordinances requiring that adult motion picture theaters not be located within 1,000 feet of two other regulated uses does not violate the Equal Protection Clause of the Fourteenth Amendment.

The judgment of the Court of Appeals is Reversed.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join, dissenting.

The Court today holds that the First and Fourteenth Amendments do not prevent the city of Detroit from using a system of prior restraints and criminal sanctions to enforce content-based restrictions on the geographic location of motion picture theaters that exhibit non-obscene but sexually oriented films. I dissent from this drastic departure from established principles of First Amendment law.

This case does not involve a simple zoning ordinance,¹⁹⁵ or a content-neutral time, place, and manner restriction, or a regulation of obscene expression or other speech that is entitled to less than the full protection of the First Amendment. The kind of expression at issue here is no doubt objectionable to some, but that fact does not diminish its protected status any more than

¹⁹⁴The Common Council's determination was that a concentration of "adult" movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of "offensive" speech.

¹⁹⁵Contrast *Village of Belle Terre v. Boraas*, 416 U.S. 1, which upheld a zoning ordinance that restricted no substantive right guaranteed by the Constitution.

did the particular content of the "offensive" expression in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (display of nudity on a drive-in movie screen); *Lewis v. City of New Orleans*, 415 U.S. 130 (utterance of vulgar epithet); *Hess v. Indiana*, 414 U.S. 105 (utterance of vulgar remark); *Papish v. University of Missouri Curators*, 410 U.S. 667 (indecent remarks in campus newspaper); *Cohen v. California*, 403 U.S. 15 (wearing of clothing inscribed with a vulgar remark); *Brandenburg v. Ohio*, 395 U.S. 444 (utterance of racial slurs); or *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684 (alluring portrayal of adultery as proper behavior).

What this case does involve is the constitutional permissibility of selective interference with protected speech whose content is thought to produce distasteful effects. It is elementary that a prime function of the First Amendment is to guard against just such interference. By refusing to invalidate Detroit's ordinance the Court rides roughshod over cardinal principles of First Amendment law, which require that time, place, and manner regulations that affect protected expression be content neutral except in the limited context of a captive or juvenile audience. In place of these principles the Court invokes a concept wholly alien to the First Amendment. Since "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice," ante, at 70, the Court implies that these films are not entitled to the full protection of the Constitution. This stands "Voltaire's immortal comment," *ibid.*, on its head. For if the guarantees of the First Amendment were reserved for expression that more than a "few of us" would take up arms to defend, then the right of free expression would be defined and circumscribed by current popular opinion. The guarantees of the Bill of Rights were designed to protect against precisely such majoritarian limitations on individual liberty.

The fact that the "offensive" speech here may not address "important" topics - "ideas of social and political significance," in the Court's terminology, ante, at 61 - does not mean that it is less worthy of constitutional protection. "Wholly neutral futilities ... come under the protection of free speech as fully as do Keats' poems or Donne's sermons." *Winters v. New York*, 333 U.S. 507, 528 (Frankfurter, J., dissenting); accord, *Cohen v. California*, supra, at 25. Moreover, in the absence of a judicial determination of obscenity, it is by no means clear that the speech is not "important" even on the Court's terms. "[S]ex and obscenity are not synonymous.... The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." *Roth v. United States*, 354 U.S. 476, 487 (footnotes omitted). See also *Kingsley Pictures Corp. v. Regents*, supra, at 688-689.

I can only interpret today's decision as an aberration. The Court is undoubtedly sympathetic, as am I, to the well-intentioned efforts of Detroit to "clean up" its streets and prevent the proliferation of "skid rows." But it is in those instances where protected speech grates most unpleasantly against the sensibilities that judicial vigilance must be at its height.

Heretofore, the Court has not shied from its responsibility to protect "offensive" speech from governmental interference. The Court must never forget that the consequences of rigorously enforcing the guarantees of the First Amendment are frequently unpleasant. Much speech that seems to be of little or no value will enter the marketplace of ideas, threatening the quality of our social discourse and, more generally, the serenity of our lives. But that is the price to be paid for constitutional freedom.

CITY OF RENTON v. PLAYTIME THEATRES, INC.
475 U.S. 41(1985)

JUSTICE REHNQUIST delivered the opinion of the Court.

This case involves a constitutional challenge to a zoning ordinance, enacted by appellant city of Renton, Washington, that prohibits adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Appellees, Playtime Theatres, Inc., and Sea-First Properties, Inc., filed an action in the United States District Court for the Western District of Washington seeking a declaratory judgment that the Renton ordinance violated the First and Fourteenth Amendments and a permanent injunction against its enforcement. The District Court ruled in favor of Renton and denied the permanent injunction, but the Court of Appeals for the Ninth Circuit reversed and remanded for reconsideration. 748 F.2d 527 (1984). We noted probable jurisdiction, 471 U.S. 1013 and now reverse the judgment of the Ninth Circuit.

In May 1980, the Mayor of Renton, a city of approximately 32,000 people located just south of Seattle, suggested to the Renton City Council that it consider the advisability of enacting zoning legislation dealing with adult entertainment uses. No such uses existed in the city at that time. Upon the Mayor's suggestion, the City Council referred the matter to the city's Planning and Development Committee. The Committee held public hearings, reviewed the experiences of Seattle and other cities, and received a report from the City Attorney's Office advising as to developments in other cities. The City Council, meanwhile, adopted Resolution No. 2368, which imposed a moratorium on the licensing of "any business . . . which . . . has as its primary purpose the selling, renting or showing of sexually explicit materials." The resolution contained a clause explaining that such businesses "would have a severe impact upon surrounding businesses and residences."

In April 1981, acting on the basis of the Planning and Development Committee's recommendation, the City Council enacted Ordinance No. 3526. The ordinance prohibited any "adult motion picture theater" from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park, and within one mile of any school. The term "adult motion picture theater" was defined as "[an] enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or [characterized] by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' . . . for observation by patrons therein."

In early 1982, respondents acquired two existing theaters in downtown Renton, with the intention of using them to exhibit feature-length adult films. The theaters were located within the area proscribed by Ordinance No. 3526. At about the same time, respondents filed the previously mentioned lawsuit challenging the ordinance on First and Fourteenth Amendment grounds, and seeking declaratory and injunctive relief. While the federal action was pending, the

City Council amended the ordinance in several respects, adding a statement of reasons for its enactment and reducing the minimum distance from any school to 1,000 feet.

In November 1982, the Federal Magistrate to whom respondents' action had been referred recommended the entry of a preliminary injunction against enforcement of the Renton ordinance and the denial of Renton's motions to dismiss and for summary judgment. The District Court adopted the Magistrate's recommendations and entered the preliminary injunction, and respondents began showing adult films at their two theaters in Renton. Shortly thereafter, the parties agreed to submit the case for a final decision on whether a permanent injunction should issue on the basis of the record as already developed.

The District Court then vacated the preliminary injunction, denied respondents' requested permanent injunction, and entered summary judgment in favor of Renton. The court found that the Renton ordinance did not substantially restrict First Amendment interests, that Renton was not required to show specific adverse impact on Renton from the operation of adult theaters but could rely on the experiences of other cities, that the purposes of the ordinance were unrelated to the suppression of speech, and that the restrictions on speech imposed by the ordinance were no greater than necessary to further the governmental interests involved. Relying on *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), and *United States v. O'Brien*, 391 U.S. 367 (1968), the court held that the Renton ordinance did not violate the First Amendment.

The Court of Appeals for the Ninth Circuit reversed. The Court of Appeals first concluded, contrary to the finding of the District Court, that the Renton ordinance constituted a substantial restriction on First Amendment interests. Then, using the standards set forth in *United States v. O'Brien*, *supra*, the Court of Appeals held that Renton had improperly relied on the experiences of other cities in lieu of evidence about the effects of adult theaters on Renton, that Renton had thus failed to establish adequately the existence of a substantial governmental interest in support of its ordinance, and that in any event Renton's asserted interests had not been shown to be unrelated to the suppression of expression. The Court of Appeals remanded the case to the District Court for reconsideration of Renton's asserted interests.

In our view, the resolution of this case is largely dictated by our decision in *Young v. American Mini Theatres, Inc.*, *supra*. There, although five Members of the Court did not agree on a single rationale for the decision, we held that the city of Detroit's zoning ordinance, which prohibited locating an adult theater within 1,000 feet of any two other "regulated uses" or within 500 feet of any residential zone, did not violate the First and Fourteenth Amendments. The Renton ordinance, like the one in *American Mini Theatres*, does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The ordinance is therefore properly analyzed as a form of time, place, and manner regulation. *Id.*, at 63, and n. 18; *id.*, at 78-79 (POWELL, J., concurring).

Describing the ordinance as a time, place, and manner regulation is, of course, only the first step in our inquiry. This Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment. On the other hand, so-called "content-neutral" time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.

At first glance, the Renton ordinance, like the ordinance in *American Mini Theatres*, does not appear to fit neatly into either the "content-based" or the "content-neutral" category. To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, as the District Court concluded, the Renton ordinance is aimed not at the content of the films shown at "adult motion picture theatres," but rather at the secondary effects of such theaters on the surrounding community. The District Court found that the City Council's "predominate concerns" were with the secondary effects of adult theaters, and not with the content of adult films themselves. App. to Juris. Statement 31a (emphasis added). But the Court of Appeals, relying on its decision in *Tovar v. Billmeyer*, 721 F.2d 1260, 1266 (CA9 1983), held that this was not enough to sustain the ordinance. According to the Court of Appeals, if "a motivating factor" in enacting the ordinance was to restrict respondents' exercise of First Amendment rights the ordinance would be invalid, apparently no matter how small a part this motivating factor may have played in the City Council's decision. 748 F.2d, at 537 (emphasis in original). This view of the law was rejected in *United States v. O'Brien*, 391 U.S., at 382-386, the very case that the Court of Appeals said it was applying:

"It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."

The District Court's finding as to "predominate" intent, left undisturbed by the Court of Appeals, is more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free expression. The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally "[protect] and [preserve] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life," not to suppress the expression of unpopular views. As JUSTICE POWELL observed in *American Mini Theatres*, "[if] [the city] had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location."

In short, the Renton ordinance is completely consistent with our definition of "content-neutral" speech regulations as those that "are justified without reference to the content of the regulated speech." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425

U.S. 748, 771 (1976) (emphasis added); *Community for Creative Non-Violence*, supra, at 293; *International Society for Krishna Consciousness*, supra, at 648. The ordinance does not contravene the fundamental principle that underlies our concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Mosley*, supra, at 95-96.

It was with this understanding in mind that, in *American Mini Theatres*, a majority of this Court decided that, at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to "content-neutral" time, place, and manner regulations. JUSTICE STEVENS, writing for the plurality, concluded that the city of Detroit was entitled to draw a distinction between adult theaters and other kinds of theaters "without violating the government's paramount obligation of neutrality in its regulation of protected communication," 427 U.S., at 70, noting that "[it] is [the] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech," JUSTICE POWELL, in concurrence, elaborated:

"[The] dissent misconceives the issue in this case by insisting that it involves an impermissible time, place, and manner restriction based on the content of expression. It involves nothing of the kind. We have here merely a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings. . . . Moreover, even if this were a case involving a special governmental response to the content of one type of movie, it is possible that the result would be supported by a line of cases recognizing that the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated.

The appropriate inquiry in this case, then, is whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication. It is clear that the ordinance meets such a standard. As a majority of this Court recognized in *American Mini Theatres*, a city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." Exactly the same vital governmental interests are at stake here.

The Court of Appeals ruled, however, that because the Renton ordinance was enacted without the benefit of studies specifically relating to "the particular problems or needs of Renton," the city's justifications for the ordinance were "conclusory and speculative." We think the Court of Appeals imposed on the city an unnecessarily rigid burden of proof.

We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the "detailed findings" summarized in the Washington Supreme Court's Northend Cinema opinion, in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. That was the case here. Nor is our holding affected by the fact that Seattle ultimately chose a different method of adult theater zoning than that chosen by Renton, since Seattle's choice of a different remedy to combat the secondary effects of adult theaters does not call into question either Seattle's identification of those secondary effects or the relevance of Seattle's experience to Renton.

We also find no constitutional defect in the method chosen by Renton to further its substantial interests. Cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton. "It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas. . . . [The] city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *American Mini Theatres*, 427 U.S., at 71 . Moreover, the Renton ordinance is "narrowly tailored" to affect only that category of theaters shown to produce the unwanted secondary effects.

Finally, turning to the question whether the Renton ordinance allows for reasonable alternative avenues of communication, we note that the ordinance leaves some 520 acres, or more than five percent of the entire land area of Renton, open to use as adult theater sites. The District Court found, and the Court of Appeals did not dispute the finding, that the 520 acres of land consists of "[ample], accessible real estate," including "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads."

Respondents argue, however, that some of the land in question is already occupied by existing businesses, that "practically none" of the undeveloped land is currently for sale or lease, and that in general there are no "commercially viable" adult theater sites within the 520 acres left open by the Renton ordinance. The Court of Appeals accepted these arguments, concluded that the 520 acres was not truly "available" land, and therefore held that the Renton ordinance "would result in a substantial restriction" on speech.

We disagree with both the reasoning and the conclusion of the Court of Appeals. That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. In our

view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

In sum, we find that the Renton ordinance represents a valid governmental response to the "admittedly serious problems" created by adult theaters. Renton has not used "the power to zone as a pretext for suppressing expression," *id.*, at 84 (POWELL, J., concurring), but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning. Here, as in *American Mini Theatres*, the city has enacted a zoning ordinance that meets these goals while also satisfying the dictates of the First Amendment. The judgment of the Court of Appeals is therefore

Reversed.

JUSTICE BLACKMUN concurs in the result.

DISSENT: JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Despite the evidence in the record, the Court reasons that the fact "[that] respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." . However, respondents are not on equal footing with other prospective purchasers and lessees, but must conduct business under severe restrictions not imposed upon other establishments. The Court also argues that the First Amendment does not compel "the government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices." However, respondents do not ask Renton to guarantee low-price sites for their businesses, but seek only a reasonable opportunity to operate adult theaters in the city. By denying them this opportunity, Renton can effectively ban a form of protected speech from its borders. The ordinance "greatly [restricts] access to . . . lawful speech," *American Mini Theatres*, *supra*, (plurality opinion), and is plainly unconstitutional.

CITY OF LADUE v. GILLEO
512 U.S. 43 (1994)

JUDGES: STEVENS, J., delivered the opinion for a unanimous Court. O'CONNOR, J., filed a concurring opinion.

An ordinance of the City of Ladue prohibits homeowners from displaying any signs on their property except "residence identification" signs, "for sale" signs, and signs warning of safety hazards. The ordinance permits commercial establishments, churches, and nonprofit organizations to erect certain signs that are not allowed at residences. The question presented is whether the ordinance violates a Ladue resident's right to free speech.¹⁹⁶

I

Respondent Margaret P. Gilleo owns one of the 57 single-family homes in the Willow Hill subdivision of Ladue.¹⁹⁷ On December 8, 1990, she placed on her front lawn a 24- by 36-inch sign printed with the words "Say No to War in the Persian Gulf, Call Congress Now." After that sign disappeared, Gilleo put up another but it was knocked to the ground. When Gilleo reported these incidents to the police, they advised her that such signs were prohibited in Ladue. The City Council denied her petition for a variance.¹⁹⁸ Gilleo then filed this action under 42 U.S.C. ' 1983 against the City, the Mayor, and members of the City Council, alleging that Ladue's sign ordinance violated her First Amendment right of free speech.

The District Court issued a preliminary injunction against enforcement of the ordinance. Gilleo then placed an 8.5- by 11-inch sign in the second story window of her home stating, "For Peace in the Gulf." The Ladue City Council responded to the injunction by repealing its ordinance and enacting a replacement.¹⁹⁹ Like its predecessor, the new ordinance contains a general prohibition of "signs" and defines that term broadly.²⁰⁰ The ordinance prohibits all signs

¹⁹⁶The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." The Fourteenth Amendment makes this limitation applicable to the States, see *Gitlow v. New York*, 268 U.S. 652, 69 L. Ed. 1138, 45 S. Ct. 625 (1925), and to their political subdivisions, see *Lovell v. Griffin*, 303 U.S. 444, 82 L. Ed. 949, 58 S. Ct. 666 (1938).

¹⁹⁷ Ladue is a suburb of St. Louis, Missouri. It has a population of almost 9,000, and an area of about 8.5 square miles, of which only 3% is zoned for commercial or industrial use.

¹⁹⁸ The ordinance then in effect gave the Council the authority to "permit a variation in the strict application of the provisions and requirements of this chapter . . . where the public interest will be best served by permitting such variation." App. 72.

¹⁹⁹ The new ordinance eliminates the provision allowing for variances and contains a grandfather clause exempting signs already lawfully in place.

²⁰⁰ Section 35-2 of the ordinance declares that "No sign shall be erected [or] maintained" in the City except in conformity with the ordinance; ' 35-3 authorizes the City to remove nonconforming signs. App. to Pet. for Cert. 40a. Section 35-1 defines "sign" as:

"A name, word, letter, writing, identification, description, or illustration which is erected, placed upon, affixed to, painted or represented upon a building or structure, or any part thereof, or any manner upon a parcel of land or lot, and which publicizes an object, product, place, activity,

except those that fall within one of ten exemptions. Thus, "residential identification signs" no larger than one square foot are allowed, as are signs advertising "that the property is for sale, lease or exchange" and identifying the owner or agent. ¹. Also exempted are signs "for churches, religious institutions, and schools," "commercial signs in commercially or industrial zoned districts," and on-site signs advertising "gasoline filling stations." Unlike its predecessor, the new ordinance contains a lengthy "Declaration of Findings, Policies, Interests, and Purposes," part of which recites that the "proliferation of an unlimited number of signs in private, residential, commercial, industrial, and public areas of the City of Ladue would create ugliness, visual blight and clutter, tarnish the natural beauty of the landscape as well as the residential and commercial architecture, impair property values, substantially impinge upon the privacy and special ambience of the community, and may cause safety and traffic hazards to motorists, pedestrians, and children[.]"

Gileo amended her complaint to challenge the new ordinance, which explicitly prohibits window signs like hers. The District Court held the ordinance unconstitutional, and the Court of Appeals affirmed. 986 F.2d 1180 (CA8 1993). Relying on the plurality opinion in *MetroMedia, Inc. v. San Diego*, 453 U.S. 490, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981), the Court of Appeals held the ordinance invalid as a "content based" regulation because the City treated commercial speech more favorably than noncommercial speech and favored some kinds of noncommercial speech over others. Acknowledging that "Ladue's interests in enacting its ordinance are substantial," the Court of Appeals nevertheless concluded that those interests were "not sufficiently 'compelling' to support a content-based restriction."

We granted the City of Ladue's petition for certiorari, and now affirm.

II

While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs— just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989); *Kovacs v. Cooper*, 336 U.S. 77, 93 L. Ed. 513, 69 S. Ct. 448 (1949). However, because regulation of a

opinion, person, institution, organization or place of business, or which is used to advertise or promote the interests of any person. The word 'sign' shall also include 'banners', 'pennants', 'insignia', 'bulletins boards', 'ground signs', 'billboard', 'poster billboards', 'illuminated signs', 'projecting signs', 'temporary signs', 'marquees', 'roof signs', 'yard signs', 'electric signs', 'wall signs', and 'window signs', wherever placed out of doors in view of the general public or wherever placed indoors as a window sign." *Id.*, at 39a.

medium inevitably affects communication itself, it is not surprising that we have had occasion to review the constitutionality of municipal ordinances prohibiting the display of certain outdoor signs.

In *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 52 L. Ed. 2d 155, 97 S. Ct. 1614 (1977), we addressed an ordinance that sought to maintain stable, integrated neighborhoods by prohibiting homeowners from placing "For Sale" or "Sold" signs on their property. Although we recognized the importance of Willingboro's objective, we held that the First Amendment prevented the township from "achieving its goal by restricting the free flow of truthful information." *Id.*, at 95. In some respects *Linmark* is the mirror image of this case. For instead of prohibiting "For Sale" signs without banning any other signs, *Ladue* has exempted such signs from an otherwise virtually complete ban. Moreover, whereas in *Linmark* we noted that the ordinance was not concerned with the promotion of aesthetic values unrelated to the content of the prohibited speech, here *Ladue* relies squarely on that content-neutral justification for its ordinance.

In *Metromedia*, we reviewed an ordinance imposing substantial prohibitions on outdoor advertising displays within the City of San Diego in the interest of traffic safety and aesthetics. The ordinance generally banned all except those advertising "on-site" activities. The Court concluded that the City's interest in traffic safety and its aesthetic interest in preventing "visual clutter" could justify a prohibition of off-site commercial billboards even though similar on-site signs were allowed. Nevertheless, the Court's judgment in *Metromedia*, supported by two different lines of reasoning, invalidated the San Diego ordinance in its entirety. According to Justice White's plurality opinion, the ordinance impermissibly discriminated on the basis of content by permitting on-site commercial speech while broadly prohibiting noncommercial messages. On the other hand, Justice Brennan, joined by JUSTICE BLACKMUN, concluded "that the practical effect of the San Diego ordinance [was] to eliminate the billboard as an effective medium of communication" for noncommercial messages, and that the city had failed to make the strong showing needed to justify such "content-neutral prohibitions of particular media of communication." The three dissenters also viewed San Diego's ordinance as tantamount to a blanket prohibition of billboards, but would have upheld it because they did not perceive "even a hint of bias or censorship in the city's actions" nor "any reason to believe that the overall communications market in San Diego is inadequate."

In *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984), we upheld a Los Angeles ordinance that prohibited the posting of signs on public property. Noting the conclusion shared by seven Justices in *Metromedia* that San Diego's "interest in avoiding visual clutter" was sufficient to justify a prohibition of commercial billboards, *id.*, at 806-807, in *Vincent* we upheld the Los Angeles ordinance, which was justified on the same grounds. We rejected the argument that the validity of the City's aesthetic interest had been compromised by failing to extend the ban to private property, reasoning that the "private citizen's interest in controlling the use of his own property justifies the disparate

treatment." *Id.*, at 811. We also rejected as "misplaced" respondents' reliance on public forum principles, for they had "failed to demonstrate the existence of a traditional right of access respecting such items as utility poles . . . comparable to that recognized for public streets and parks." *Id.*, at 814.

These decisions identify two analytically distinct grounds for challenging the constitutionality of a municipal ordinance regulating the display of signs. One is that the measure in effect restricts too little speech because its exemptions discriminate on the basis of the signs' messages. See *Metromedia*, 453 U.S., at 512-517 (opinion of White, J.). Alternatively, such provisions are subject to attack on the ground that they simply prohibit too much protected speech. The City of Ladue contends, first, that the Court of Appeals' reliance on the former rationale was misplaced because the City's regulatory purposes are content-neutral, and, second, that those purposes justify the comprehensiveness of the sign prohibition. A comment on the former contention will help explain why we ultimately base our decision on a rejection of the latter.

III

While surprising at first glance, the notion that a regulation of speech may be impermissibly underinclusive is firmly grounded in basic First Amendment principles. Thus, an exemption from an otherwise permissible regulation of speech may represent a governmental "attempt to give one side of a debatable public question an advantage in expressing its views to the people." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). Alternatively, through the combined operation of a general speech restriction and its exemptions, the government might seek to select the "permissible subjects for public debate" and thereby to "control . . . the search for political truth." *Consolidated Edison Co. of N.Y. v. Public Service Comm'n of N.Y.* 447 U.S. 530, 538, 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980).

The City argues that its sign ordinance implicates neither of these concerns, and that the Court of Appeals therefore erred in demanding a "compelling" justification for the exemptions. The mix of prohibitions and exemptions in the ordinance, Ladue maintains, reflects legitimate differences among the side effects of various kinds of signs. These differences are only adventitiously connected with content, and supply a sufficient justification, unrelated to the City's approval or disapproval of specific messages, for carving out the specified categories from the general ban. Thus, according to the Declaration of Findings, Policies, Interests, and Purposes supporting the ordinance, the permitted signs, unlike the prohibited signs, are unlikely to contribute to the dangers of "unlimited proliferation" associated with categories of signs that are not inherently limited in number. Because only a few residents will need to display "for sale" or "for rent" signs at any given time, permitting one such sign per marketed house does not threaten visual clutter. Because the City has only a few businesses, churches, and schools, the same rationale explains the exemption for on-site commercial and organizational signs. Moreover, some of the exempted categories (e.g., danger signs) respond to unique public needs to permit

certain kinds of speech. Even if we assume the validity of these arguments, the exemptions in Ladue's ordinance nevertheless shed light on the separate question of whether the ordinance prohibits too much speech. Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: they may diminish the credibility of the government's rationale for restricting speech in the first place. In this case, at the very least, the exemptions from Ladue's ordinance demonstrate that Ladue has concluded that the interest in allowing certain messages to be conveyed by means of residential signs outweighs the City's aesthetic interest in eliminating outdoor signs. Ladue has not imposed a flat ban on signs because it has determined that at least some of them are too vital to be banned.

Under the Court of Appeals' content discrimination rationale, the City might theoretically remove the defects in its ordinance by simply repealing all of the exemptions. If, however, the ordinance is also vulnerable because it prohibits too much speech, that solution would not save it. Moreover, if the prohibitions in Ladue's ordinance are impermissible, resting our decision on its exemptions would afford scant relief for respondent Gilleo. She is primarily concerned not with the scope of the exemptions available in other locations, such as commercial areas and on church property. She asserts a constitutional right to display an antiwar sign at her own home. Therefore, we first ask whether Ladue may properly prohibit Gilleo from displaying her sign, and then, only if necessary, consider the separate question whether it was improper for the City simultaneously to permit certain other signs. In examining the propriety of Ladue's near-total prohibition of residential signs, we will assume, *arguendo*, the validity of the City's submission that the various exemptions are free of impermissible content or viewpoint discrimination.²⁰¹

IV

In *Linmark* we held that the City's interest in maintaining a stable, racially integrated neighborhood was not sufficient to support a prohibition of residential "For Sale" signs. We recognized that even such a narrow sign prohibition would have a deleterious effect on residents' ability to convey important information because alternatives were "far from satisfactory." 431 U.S., at 93. Ladue's sign ordinance is supported principally by the City's interest in minimizing the visual clutter associated with signs, an interest that is concededly valid but certainly no more compelling than the interests at stake in *Linmark*. Moreover, whereas the ordinance in *Linmark* applied only to a form of commercial speech, Ladue's ordinance covers even such absolutely pivotal speech as a sign protesting an imminent governmental decision to go to war.

²⁰¹ Because we set to one side the content discrimination question, we need not address the City's argument that the ordinance, although speaking in subject-matter terms, merely targets the "undesirable secondary effects" associated with certain kinds of signs. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986). The inquiry we undertake below into the adequacy of alternative channels of communication would also apply to a provision justified on those grounds. See *id.*, at 50.

The impact on free communication of Ladue's broad sign prohibition, moreover, is manifestly greater than in Linmark. Gilleo and other residents of Ladue are forbidden to display virtually any "sign" on their property. The ordinance defines that term sweepingly. A prohibition is not always invalid merely because it applies to a sizeable category of speech; the sign ban we upheld in *Vincent*, for example, was quite broad. But in *Vincent* we specifically noted that the category of speech in question- signs placed on public property -was not a "uniquely valuable or important mode of communication," and that there was no evidence that "appellees' ability to communicate effectively is threatened by ever-increasing restrictions on expression." 466 U.S., at 812.

Here, in contrast, Ladue has almost completely foreclosed a venerable means of communication that is both unique and important. It has totally foreclosed that medium to political, religious, or personal messages. Signs that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community. Often placed on lawns or in windows, residential signs play an important part in political campaigns, during which they are displayed to signal the resident's support for particular candidates, parties, or causes.²⁰² They may not afford the same opportunities for conveying complex ideas as do other media, but residential signs have long been an important and distinct medium of expression.

Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression. Thus, we have held invalid ordinances that completely banned the distribution of pamphlets within the municipality. Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent- by eliminating a common means of speaking, such measures can suppress too much speech.

Ladue contends, however, that its ordinance is a mere regulation of the "time, place, or manner" of speech because residents remain free to convey their desired messages by other means, such as hand-held signs, "letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings." However, even regulations that do not foreclose an entire medium of expression, but merely shift the time, place, or manner of its use, must "leave open ample alternative channels for communication." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984). In this case, we are not persuaded that adequate substitutes exist for the important medium of speech that Ladue has closed off.

Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means.

²⁰² "Small [political campaign] posters have maximum effect when they go up in the windows of homes, for this demonstrates that citizens of the district are supporting your candidate--an impact that money can't buy." D. Simpson, *Winning Elections: A Handbook in Participatory Politics* 87 (rev. ed. 1981).

Precisely because of their location, such signs provide information about the identity of the "speaker." As an early and eminent student of rhetoric observed, the identity of the speaker is an important component of many attempts to persuade.

A sign advocating "Peace in the Gulf" in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile. An espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.

Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a hand-held sign may make the difference between participating and not participating in some public debate. Furthermore, a person who puts up a sign at her residence often intends to reach neighbors, an audience that could not be reached nearly as well by other means.

A special respect for individual liberty in the home has long been part of our culture and our law. Most Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8- by 11-inch sign expressing their political views. Whereas the government's need to mediate among various competing uses, including expressive ones, for public streets and facilities is constant and unavoidable its need to regulate temperate speech from the home is surely much less pressing, see *Spence*, 418 U.S., at 409.

Our decision that Ladue's ban on almost all residential signs violates the First Amendment by no means leaves the City powerless to address the ills that may be associated with residential signs. It bears mentioning that individual residents themselves have strong incentives to keep their own property values up and to prevent "visual clutter" in their own yards and neighborhoods- incentives markedly different from those of persons who erect signs on others' land, in others' neighborhoods, or on public property. Residents' self-interest diminishes the danger of the "unlimited" proliferation of residential signs that concerns the City of Ladue. We are confident that more temperate measures could in large part satisfy Ladue's stated regulatory needs without harm to the First Amendment rights of its citizens. As currently framed, however, the ordinance abridges those rights.

Accordingly, the judgment of the Court of Appeals is Affirmed.

VAN ORDEN v. PERRY
545 U.S. 677 (2005)

JUDGES: REHNQUIST, C. J., announced the judgment of the Court and delivered an opinion, in which SCALIA, KENNEDY, and THOMAS, JJ., joined. SCALIA, J., and THOMAS, J., filed concurring opinions. BREYER, J., filed an opinion concurring in the judgment. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined. O'CONNOR, J., filed a dissenting opinion. SOUTER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined.

CHIEF JUSTICE REHNQUIST announced the judgment of the Court and delivered an opinion, in which JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE THOMAS join.

The question here is whether the Establishment Clause of the First Amendment allows the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds. We hold that it does.

The 22 acres surrounding the Texas State Capitol contain 17 monuments and 21 historical markers commemorating the "people, ideals, and events that compose Texan identity." Tex. H. Con. Res. 38, 77th Leg. (2001). The monolith challenged here stands 6-feet high and 3-feet wide. It is located to the north of the Capitol building, between the Capitol and the Supreme Court building. Its primary content is the text of the Ten Commandments. An eagle grasping the American flag, an eye inside of a pyramid, and two small tablets with what appears to be an ancient script are carved above the text of the Ten Commandments. Below the text are two Stars of David and the superimposed Greek letters Chi and Rho, which represent Christ. The bottom of the monument bears the inscription "PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961."

The legislative record surrounding the State's acceptance of the monument from the Eagles -- a national social, civic, and patriotic organization -- is limited to legislative journal entries. After the monument was accepted, the State selected a site for the monument based on the recommendation of the state organization responsible for maintaining the Capitol grounds. The Eagles paid the cost of erecting the monument, the dedication of which was presided over by two state legislators.

Petitioner Thomas Van Orden is a native Texan and a resident of Austin. At one time he was a licensed lawyer, having graduated from Southern Methodist Law School. Van Orden testified that, since 1995, he has encountered the Ten Commandments monument during his frequent visits to the Capitol grounds. His visits are typically for the purpose of using the law library in the Supreme Court building, which is located just northwest of the Capitol building.

Forty years after the monument's erection and six years after Van Orden began to encounter the monument frequently, he sued numerous state officials in their official capacities

under Rev. Stat. §1979, 42 U.S.C. §1983, seeking both a declaration that the monument's placement violates the Establishment Clause and an injunction requiring its removal. After a bench trial, the District Court held that the monument did not contravene the Establishment Clause. It found that the State had a valid secular purpose in recognizing and commending the Eagles for their efforts to reduce juvenile delinquency. The District Court also determined that a reasonable observer, mindful of the history, purpose, and context, would not conclude that this passive monument conveyed the message that the State was seeking to endorse religion. The Court of Appeals affirmed the District Court's holdings with respect to the monument's purpose and effect. 351 F.3d 173 (CA5 2003). We granted certiorari, 543 U.S. ___, 160 L. Ed. 2d 220, 125 S. Ct. 346 (2004), and now affirm.

Our cases, *Januslike*, point in two directions in applying the Establishment Clause. One face looks toward the strong role played by religion and religious traditions throughout our Nation's history. As we observed in *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 10 L. Ed. 2d 844, 83 S. Ct. 1560 (1963):

"It is true that religion has been closely identified with our history and government . . . The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are 'earnestly praying, as . . . in duty bound, that the Supreme Lawgiver of the Universe . . . guide them into every measure which may be worthy of his [blessing]'" *Id.*, at 212-213, 10 L. Ed. 2d 844, 83 S. Ct. 1560.

The other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom.

This case, like all Establishment Clause challenges, presents us with the difficulty of respecting both faces. Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens. One face looks to the past in acknowledgment of our Nation's heritage, while the other looks to the present in demanding a separation between church and state. Reconciling these two faces requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage:

"When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a

callous indifference to religious groups We find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach v. Clauson*, 343 U.S. 306, 313-314, 96 L. Ed. 954, 72 S. Ct. 679 (1952).

These two faces are evident in representative cases both upholding and invalidating laws under the Establishment Clause. Over the last 25 years, we have sometimes pointed to *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971), as providing the governing test in Establishment Clause challenges. Yet, just two years after *Lemon* was decided, we noted that the factors identified in *Lemon* serve as "no more than helpful signposts." *Hunt v. McNair*, 413 U.S. 734, 741, 37 L. Ed. 2d 923, 93 S. Ct. 2868 (1973). Many of our recent cases simply have not applied the *Lemon* test. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 153 L. Ed. 2d 604, 122 S. Ct. 2460 (2002); *Good News Club v. Milford Central School*, 533 U.S. 98, 150 L. Ed. 2d 151, 121 S. Ct. 2093 (2001). Others have applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test.

Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history.

Recognition of the role of God in our Nation's heritage has also been reflected in our decisions. We have acknowledged, for example, that "religion has been closely identified with our history and government," *School Dist. of Abington Township v. Schempp*, 374 U.S., at 212, 10 L. Ed. 2d 844, 83 S. Ct. 1560, and that "the history of man is inseparable from the history of religion," *Engel v. Vitale*, 370 U.S. 421, 434, 8 L. Ed. 2d 601, 82 S. Ct. 1261 (1962). This recognition has led us to hold that the Establishment Clause permits a state legislature to open its daily sessions with a prayer by a chaplain paid by the State. *Marsh v. Chambers*, 463 U.S., at 792, 77 L. Ed. 2d 1019, 103 S. Ct. 3330. Such a practice, we thought, was "deeply embedded in the history and tradition of this country." *Id.*, at 786, 77 L. Ed. 2d 1019, 103 S. Ct. 3330. As we observed there, "it would be incongruous to interpret [the Establishment Clause] as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government." *Id.*, at 790-791, 77 L. Ed. 2d 1019, 103 S. Ct. 3330. With similar reasoning, we have upheld laws, which originated from one of the Ten Commandments, that prohibited the sale of merchandise on Sunday. *McGowan v. Maryland*, 366 U.S. 420, 431-440, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961); see *id.*, at 470-488, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (separate opinion of Frankfurter, J.).

In this case we are faced with a display of the Ten Commandments on government property outside the Texas State Capitol. Such acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America. We need only look

within our own Courtroom. Since 1935, Moses has stood, holding two tablets that reveal portions of the Ten Commandments written in Hebrew, among other lawgivers in the south frieze. Representations of the Ten Commandments adorn the metal gates lining the north and south sides of the Courtroom as well as the doors leading into the Courtroom. Moses also sits on the exterior east facade of the building holding the Ten Commandments tablets.

Similar acknowledgments can be seen throughout a visitor's tour of our Nation's Capital. For example, a large statue of Moses holding the Ten Commandments, alongside a statue of the Apostle Paul, has overlooked the rotunda of the Library of Congress' Jefferson Building since 1897. And the Jefferson Building's Great Reading Room contains a sculpture of a woman beside the Ten Commandments with a quote above her from the Old Testament (Micah 6:8). A medallion with two tablets depicting the Ten Commandments decorates the floor of the National Archives. Inside the Department of Justice, a statue entitled "The Spirit of Law" has two tablets representing the Ten Commandments lying at its feet. In front of the Ronald Reagan Building is another sculpture that includes a depiction of the Ten Commandments. So too a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments and a cross, stands outside the federal courthouse that houses both the Court of Appeals and the District Court for the District of Columbia. Moses is also prominently featured in the Chamber of the United States House of Representatives.

Of course, the Ten Commandments are religious -- they were so viewed at their inception and so remain. The monument, therefore, has religious significance. According to Judeo-Christian belief, the Ten Commandments were given to Moses by God on Mt. Sinai. But Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning, as the foregoing examples demonstrate. Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.

There are, of course, limits to the display of religious messages or symbols. For example, we held unconstitutional a Kentucky statute requiring the posting of the Ten Commandments in every public schoolroom. *Stone v. Graham*, 449 U.S. 39, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980) (per curiam). In the classroom context, we found that the Kentucky statute had an improper and As evidenced by Stone's almost exclusive reliance upon two of our school prayer cases, it stands as an example of the fact that we have "been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," Neither Stone itself nor subsequent opinions have indicated that Stone's holding would extend to a legislative chamber.

The placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more passive use of those texts than was the case in Stone, where the text confronted elementary school students every day. Indeed, Van Orden, the petitioner here, apparently walked by the monument for a number of years before bringing this lawsuit. The monument is therefore also quite different from the prayers involved in *Schempp and Lee v. Weisman*. Texas has

treated her Capitol grounds monuments as representing the several strands in the State's political and legal history. The inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government. We cannot say that Texas' display of this monument violates the Establishment Clause of the First Amendment.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, concurring.

I join the opinion of THE CHIEF JUSTICE because I think it accurately reflects our current Establishment Clause jurisprudence -- or at least the Establishment Clause jurisprudence we currently apply some of the time. I would prefer to reach the same result by adopting an Establishment Clause jurisprudence that is in accord with our Nation's past and present practices, and that can be consistently applied -- the central relevant feature of which is that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments. See *McCreary County v. Am. Civil Liberties Union*, 162 L. Ed. 2d 729, 125 S. Ct. 2722, 2005 U.S. LEXIS 5211 (June 27, 2005) post, at 1-11 (SCALIA, J., dissenting).

JUSTICE THOMAS, concurring. [omitted]

JUSTICE BREYER, concurring in the judgment. [omitted]

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

The sole function of the monument on the grounds of Texas' State Capitol is to display the full text of one version of the Ten Commandments. The monument is not a work of art and does not refer to any event in the history of the State. It is significant because, and only because, it communicates the following message:

"I AM the LORD thy God.

"Thou shalt have no other gods before me.

"Thou shalt not make to thyself any graven images.

"Thou shalt not take the Name of the Lord thy God in vain.

"Remember the Sabbath day, to keep it holy.

"Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.

"Thou shalt not [***50] kill.

"Thou shalt not commit adultery.

"Thou shalt not steal.

"Thou shalt not bear false witness against thy neighbor.

"Thou shalt not covet thy neighbor's house.

"Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's."

Viewed on its face, Texas' display has no purported connection to God's role in the formation of Texas or the founding of our Nation; nor does it provide the reasonable observer with any basis to guess that it was erected to honor any individual or organization. The message transmitted by Texas' chosen display is quite plain: This State endorses the divine code of the "Judeo-Christian" God.

For those of us who learned to recite the King James version of the text long before we understood the meaning of some of its words, God's Commandments may seem like wise counsel. The question before this Court, however, is whether it is counsel that the State of Texas may proclaim without violating the Establishment Clause of the Constitution. If any fragment of Jefferson's metaphorical "wall of separation between church and State" is to be preserved -- if there remains any meaning to the "wholesome 'neutrality' of which this Court's [Establishment Clause] cases speak," *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222, 10 L. Ed. 2d 844, 83 S. Ct. 1560 (1963) -- a negative answer to that question is mandatory.

McCREARY COUNTY v. AMERICAN CIVIL LIBERTIES UNION
545 U.S. 844 (2005)

JUSTICE SOUTER delivered the opinion of the Court.

Executives of two counties posted a version of the Ten Commandments on the walls of their courthouses. After suits were filed charging violations of the Establishment Clause, the legislative body of each county adopted a resolution calling for a more extensive exhibit meant to show that the Commandments are Kentucky's "precedent legal code." The result in each instance was a modified display of the Commandments surrounded by texts containing religious references as their sole common element. After changing counsel, the counties revised the exhibits again by eliminating some documents, expanding the text set out in another, and adding some new ones.

The issues are whether a determination of the counties' purpose is a sound basis for ruling on the Establishment Clause complaints, and whether evaluation of the counties' claim of secular purpose for the ultimate displays may take their evolution into account. We hold that the counties' manifest objective may be dispositive of the constitutional enquiry, and that the development of the presentation should be considered when determining its purpose.

I

In the summer of 1999, petitioners McCreary County and Pulaski County, Kentucky (hereinafter Counties), put up in their respective courthouses large, gold-framed copies of an abridged text of the King James version of the Ten Commandments, including a citation to the Book of Exodus. In McCreary County, the placement of the Commandments responded to an order of the county legislative body requiring "the display [to] be posted in 'a very high traffic area' of the courthouse." 96 F. Supp. 2d 679, 684 (ED Ky. 2000). In Pulaski County, amidst reported controversy over the propriety of the display, the Commandments were hung in a ceremony presided over by the county Judge-Executive, who called them "good rules to live by" and who recounted the story of an astronaut who became convinced "there must be a divine God" after viewing the Earth from the moon. The Judge-Executive was accompanied by the pastor of his church, who called the Commandments "a creed of ethics" and told the press after the ceremony that displaying the Commandments was "one of the greatest things the judge could have done to close out the millennium." In both counties, this was the version of the Commandments posted:

"Thou shalt have no other gods before me.

"Thou shalt not make unto thee any graven images.

"Thou shalt not take the name of the Lord thy God in vain.

"Remember the sabbath day, to keep it holy.

"Honor thy father and thy mother.

"Thou shalt not kill.

"Thou shalt not commit adultery.

"Thou shalt not steal.

"Thou shalt not bear false witness.

"Thou shalt not covet.

"Exodus 20:3-17."

In each county, the hallway display was "readily visible to . . . county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote." 96 F. Supp. 2d., at 684; *American Civil Liberties Union of Kentucky v. Pulaski County, Kentucky*, 96 F. Supp. 2d 691, 695 (ED Ky. 2000).

In November 1999, respondents *American Civil Liberties Union of Kentucky et al.* sued the Counties in Federal District Court under Rev. Stat. §1979, 42 U.S.C. §1983, and sought a preliminary injunction against maintaining the displays, which the ACLU charged were violations of the prohibition of religious establishment included in the First Amendment of the Constitution. Within a month, and before the District Court had responded to the request for injunction, the legislative body of each County authorized a second, expanded display, by nearly identical resolutions reciting that the Ten Commandments are "the precedent legal code upon which the civil and criminal codes of . . . Kentucky are founded," and stating several grounds for taking that position: that "the Ten Commandments are codified in Kentucky's civil and criminal laws"; that the Kentucky House of Representatives had in 1993 "voted unanimously . . . to adjourn . . . 'in remembrance and honor of Jesus Christ, the Prince of Ethics'"; that the "County Judge and . . . magistrates agree with the arguments set out by Judge [Roy] Moore" in defense of his "display [of] the Ten Commandments in his courtroom"; and that the "Founding Fathers [had an] explicit understanding of the duty of elected officials to publicly acknowledge God as the source of America's strength and direction."

As directed by the resolutions, the Counties expanded the displays of the Ten Commandments in their locations, presumably along with copies of the resolution, which instructed that it, too, be posted, in addition to the first display's large framed copy of the edited King James version of the Commandments, the second included eight other documents in smaller frames, each either having a religious theme or excerpted to highlight a religious element. The documents were the "endowed by their Creator" passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, "In God We Trust"; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the

Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible," reading that "the Bible is the best gift God has ever given to man"; a proclamation by President Reagan marking 1983 the Year of the Bible; and the Mayflower Compact. 96 F. Supp. 2d, at 684; 96 F. Supp. 2d, at 695-696.

After argument, the District Court entered a preliminary injunction on May 5, 2000, ordering that the "display . . . be removed from [each] County Courthouse IMMEDIATELY" and that no county official "erect or cause to be erected similar displays." 96 F. Supp. 2d, at 691; 96 F. Supp. 2d, at 702-703. The court's analysis of the situation followed the three-part formulation first stated in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971). As to governmental purpose, it concluded that the original display "lacked any secular purpose" because the Commandments "are a distinctly religious document, believed by many Christians and Jews to be the direct and revealed word of God." 96 F. Supp. 2d, at 686; 96 F. Supp. 2d, at 698. Although the Counties had maintained that the original display was meant to be educational, "the narrow scope of the display -- a single religious text unaccompanied by any interpretation explaining its role as a foundational document -- can hardly be said to present meaningfully the story of this country's religious traditions." 96 F. Supp. 2d, at 686-687; 96 F. Supp. 2d, at 698. The court found that the second version also "clearly lacked a secular purpose" because the "Counties narrowly tailored [their] selection of foundational documents to incorporate only those with specific references to Christianity." 96 F. Supp. 2d, at 687; 96 F. Supp. 2d, at 699.

The Counties filed a notice of appeal from the preliminary injunction but voluntarily dismissed it after hiring new lawyers. They then installed another display in each courthouse, the third within a year. No new resolution authorized this one, nor did the Counties repeal the resolutions that preceded the second. The posting consists of nine framed documents of equal size, one of them setting out the Ten Commandments explicitly identified as the "King James Version" at Exodus 20:3-17, 145 F. Supp. 2d 845, 847 (ED Ky. 2001) and quoted at greater length than before:

"Thou shalt have no other gods before me.

"Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water underneath the earth: Thou shalt not bow down thyself to them, nor serve them: for I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me.

"Thou shalt not take the name of the LORD thy God in vain: for the LORD will not hold him guiltless that taketh his name in vain.

"Remember the sabbath day, to keep it holy.

"Honour thy father and thy mother: that thy days may be long upon the land which the LORD thy God giveth thee.

"Thou shalt not kill.

"Thou shalt not commit adultery.

"Thou shalt not steal.

"Thou shalt not bear false witness against thy neighbour.

"Thou shalt not covet thy neighbour's house, thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor anything that is thy neighbour's."

Assembled with the Commandments are framed copies of the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice. The collection is entitled "The Foundations of American Law and Government Display" and each document comes with a statement about its historical and legal significance. The comment on the Ten Commandments reads:

"The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.' The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition."

The ACLU moved to supplement the preliminary injunction to enjoin the Counties' third display, and the Counties responded with several explanations for the new version, including desires "to demonstrate that the Ten Commandments were part of the foundation of American Law and Government" and "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government." 145 F. Supp. 2d, at 848 (internal quotation marks omitted). The court, however, took the objective of proclaiming the Commandments' foundational value as "a religious, rather than secular, purpose" under *Stone v. Graham*, 449 U.S. 39, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980) (per curiam), 145 F. Supp. 2d, at 849, and found that the assertion that the Counties' broader educational goals are secular "crumbles . . . upon an examination of the history of this litigation," In light of the Counties' decision to post the Commandments by themselves in the first instance, contrary to *Stone*, and later to "accentuate" the religious objective by surrounding the

Commandments with "specific references to Christianity, "the District Court understood the Counties" 'clear' purpose as being to post the Commandments, not to educate.

As requested, the trial court supplemented the injunction, and a divided panel of the Court of Appeals for the Sixth Circuit affirmed. The Circuit majority stressed that under *Stone*, displaying the Commandments bespeaks a religious object unless they are integrated with other material so as to carry "a secular message," 354 F.3d 438, 449 (2003). The majority judges saw no integration here because of a "lack of a demonstrated analytical or historical connection [between the Commandments and] the other documents.". They noted in particular that the Counties offered no support for their claim that the Ten Commandments "provided the moral backdrop" to the Declaration of Independence or otherwise "profoundly influenced" it. *Ibid.* (Internal quotation marks omitted). The majority found that the Counties' purpose was religious, not educational, given the nature of the Commandments as "an active symbol of religion [stating] 'the religious duties of believers,'" The judges in the majority understood the identical displays to emphasize "a single religious influence, with no mention of any other religious or secular influences," and they took the very history of the litigation as evidence of the Counties' religious objective.

Judge Ryan dissented on the basis of wide recognition that religion, and the Ten Commandments in particular, have played a foundational part in the evolution of American law and government; he saw no reason to gainsay the Counties' claim of secular purposes.. The dissent denied that the prior displays should have any bearing on the constitutionality of the current one: a "history of unconstitutional displays cannot be used as a sword to strike down an otherwise constitutional display."

We granted certiorari, and now affirm.

II

Twenty-five years ago in a case prompted by posting the Ten Commandments in Kentucky's public schools, this Court recognized that the Commandments "are undeniably a sacred text in the Jewish and Christian faiths" and held that their display in public classrooms violated the First Amendment's bar against establishment of religion. *Stone*, 449 U.S., at 41, 66 L. Ed. 2d 199, 101 S. Ct. 192. *Stone* found a predominantly religious purpose in the government's posting of the Commandments, given their prominence as "'an instrument of religion,'" The Counties ask for a different approach here by arguing that official purpose is unknowable and the search for it inherently vain. In the alternative, the Counties would avoid the District Court's conclusion by having us limit the scope of the purpose enquiry so severely that any trivial rationalization would suffice, under a standard oblivious to the history of religious government action like the progression of exhibits in this case.

A

Ever since *Lemon v. Kurtzman* summarized the three familiar considerations for evaluating Establishment Clause claims, looking to whether government action has "a secular legislative purpose" has been a common, albeit seldom dispositive, element of our cases. Though we have found government action motivated by an illegitimate purpose only four times since *Lemon*, and "the secular purpose requirement alone may rarely be determinative . . . , it nevertheless serves an important function." *Wallace v. Jaffree*, 472 U.S. 38, 75, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985) (O'CONNOR, J., concurring in judgment).

The touchstone for our analysis is the principle that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." By showing a purpose to favor religion, the government "sends the . . . message to . . . nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members'" *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 309-310, 147 L. Ed. 2d 295, 120 S. Ct. 2266 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984) (O'CONNOR, J., concurring)).

Indeed, the purpose apparent from government action can have an impact more significant than the result expressly decreed: when the government maintains Sunday closing laws, it advances religion only minimally because many working people would take the day as one of rest regardless, but if the government justified its decision with a stated desire for all Americans to honor Christ, the divisive thrust of the official action would be inescapable. This is the teaching of *McGowan v. Maryland*, 366 U.S. 420, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961), which upheld Sunday closing statutes on practical, secular grounds after finding that the government had forsaken the religious purposes behind centuries-old predecessor laws. *Id.*, at 449-451, 6 L. Ed. 2d 393, 81 S. Ct. 1101.

B

Despite the intuitive importance of official purpose to the realization of Establishment Clause values, the Counties ask us to abandon *Lemon's* purpose test, or at least to truncate any enquiry into purpose here. Their first argument is that the very consideration of purpose is deceptive: according to them, true "purpose" is unknowable, and its search merely an excuse for courts to act selectively and unpredictably in picking out evidence of subjective intent. The assertions are as seismic as they are unconvincing.

Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country. With enquiries into purpose this common, if they were nothing but hunts for mares' nests deflecting attention from bare judicial will, the whole notion of purpose in law would have dropped into disrepute long ago.

But scrutinizing purpose does make practical sense, as in Establishment Clause analysis, where an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts. The eyes that look to purpose belong to an "objective observer," one who takes account of the traditional external signs that show up in the "text, legislative history, and implementation of the statute," or comparable official act. *Santa Fe Independent School Dist. v. Doe*, supra, at 308 (quoting *Wallace v. Jaffree*, 472 U.S., at 73, 86 L. Ed. 2d 29, 105 S. Ct. 2479) (O'CONNOR, J., concurring in judgment)) There is, then, nothing hinting at an unpredictable or disingenuous exercise when a court enquires into purpose after a claim is raised under the Establishment Clause.

The cases with findings of a predominantly religious purpose point to the straightforward nature of the test. In *Stone*, the Court held that the "posting of religious texts on the wall served no . . . educational function," and found that if "the posted copies of the Ten Commandments [were] to have any effect at all, it [would] be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments." 449 U.S., at 42, 66 L. Ed. 2d 199, 101 S. Ct. 192. In each case, the government's action was held unconstitutional only because openly available data supported a commonsense conclusion that a religious objective permeated the government's action.

C

Lemon said that government action must have "a secular . . . purpose," 403 U.S., at 612, 29 L. Ed. 2d 745, 91 S. Ct. 2105, and after a host of cases it is fair to add that although a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective. Even the Counties' own cited authority confirms that we have not made the purpose test a pushover for any secular claim. As we said, the Court often does accept governmental statements of purpose, in keeping with the respect owed in the first instance to such official claims. But in those unusual cases where the claim was an apparent sham, or the secular purpose secondary, the unsurprising results have been findings of no adequate secular object, as against a predominantly religious one.

III

This case comes to us on appeal from a preliminary injunction. We accordingly review the District Court's legal rulings de novo, and its ultimate conclusion for abuse of discretion. [There is no denying] that the Commandments have had influence on civil or secular law; a major text of a majority religion is bound to be felt. The point is simply that the original text viewed in its entirety is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction. When the government initiates an effort to place this statement alone in public view, a religious object is unmistakable.

Once the Counties were sued, they modified the exhibits and invited additional insight into their purpose in a display that hung for about six months. This new one was the product of

forthright and nearly identical Pulaski and McCreary County resolutions listing a series of American historical documents with theistic and Christian references, which were to be posted in order to furnish a setting for displaying the Ten Commandments and any "other Kentucky and American historical document" without raising concern about "any Christian or religious references" in them. As mentioned, the resolutions expressed support for an Alabama judge who posted the Commandments in his courtroom, and cited the fact the Kentucky Legislature once adjourned a session in honor of "Jesus Christ, Prince of Ethics." Together, the display and resolution presented an indisputable, and undisputed, showing of an impermissible purpose.

Today, the Counties make no attempt to defend their undeniable objective, but instead hopefully describe version two as "dead and buried." After the Counties changed lawyers, they mounted a third display, without a new resolution or repeal of the old one. The result was the "Foundations of American Law and Government" exhibit, which placed the Commandments in the company of other documents the Counties thought especially significant in the historical foundation of American government. These new statements of purpose were presented only as a litigating position, there being no further authorizing action by the Counties' governing boards. No reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays.

IV

The prohibition on establishment covers a variety of issues from prayer in widely varying government settings, to financial aid for religious individuals and institutions, to comment on religious questions. In these varied settings, issues of about interpreting inexact Establishment Clause language, like difficult interpretative issues generally, arise from the tension of competing values, each constitutionally respectable, but none open to realization to the logical limit.

The First Amendment has not one but two clauses tied to "religion," the second forbidding any prohibition on the "the free exercise thereof," and sometimes, the two clauses compete: spending government money on the clergy looks like establishing religion, but if the government cannot pay for military chaplains a good many soldiers and sailors would be kept from the opportunity to exercise their chosen religions. At other times, limits on governmental action that might make sense as a way to avoid establishment could arguably limit freedom of speech when the speaking is done under government auspices.

Given the variety of interpretative problems, the principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause. The principle has been helpful simply because it responds to one of the major concerns that prompted adoption of the Religion Clauses. The Framers and the citizens of their time intended not only to protect the integrity of individual conscience in religious matters, *Wallace v. Jaffree*, 472 U.S., at 52-54, 86 L. Ed. 2d 29, 105 S. Ct. 2479, and n. 38, but to guard against the civic

divisiveness that follows when the Government weighs in on one side of religious debate; nothing does a better job of roiling society, a point that needed no explanation to the descendants of English Puritans and Cavaliers (or Massachusetts Puritans and Baptists). E.g., *Everson*, supra, at 8, 91 L. Ed. 711, 67 S. Ct. 504 ("A large proportion of the early settlers of this country came here from Europe to escape [religious persecution]"). A sense of the past thus points to governmental neutrality as an objective of the Establishment Clause, and a sensible standard for applying it. To be sure, given its generality as a principle, an appeal to neutrality alone cannot possibly lay every issue to rest, or tell us what issues on the margins are substantial enough for constitutional significance, a point that has been clear from the Founding era to modern times.

Historical evidence thus supports no solid argument for changing course (whatever force the argument might have when directed at the existing precedent), whereas public discourse at the present time certainly raises no doubt about the value of the interpretative approach invoked for 60 years now. We are centuries away from the St. Bartholomew's Day massacre and the treatment of heretics in early Massachusetts, but the divisiveness of religion in current public life is inescapable. This is no time to deny the prudence of understanding the Establishment Clause to require the Government to stay neutral on religious belief, which is reserved for the conscience of the individual.

V

Given the ample support for the District Court's finding of a predominantly religious purpose behind the Counties' third display, we affirm the Sixth Circuit in upholding the preliminary injunction.

It is so ordered.

JUSTICE O'CONNOR, concurring. [omitted]

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, and with whom JUSTICE KENNEDY joins [in part]dissenting .

I would uphold McCreary County and Pulaski County, Kentucky's (hereinafter Counties) displays of the Ten Commandments. I shall discuss ... why the judgment here is wrong.

What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle. That is what prevents judges from ruling now this way, now that - - thumbs up or thumbs down -- as their personal preferences dictate. Today's opinion forthrightly (or actually, somewhat less than forthrightly) admits that it does not rest upon consistently applied principle. In a revealing the Court acknowledges that the "Establishment Clause doctrine" it purports to be applying "lacks the comfort of categorical absolutes." What the Court means by this lovely euphemism is that sometimes the Court chooses to decide cases on the

principle that government cannot favor religion, and sometimes it does not. The footnote goes on to say that "in special instances we have found good reason" to dispense with the principle, but "no such reasons present themselves here." It does not identify all of those "special instances," much less identify the "good reason" for their existence.

The only "good reason" for ignoring the neutrality principle set forth in any of these cases was the antiquity of the practice at issue. That would be a good reason for finding the neutrality principle a mistaken interpretation of the Constitution, but it is hardly a good reason for letting an unconstitutional practice continue. Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion.

JUSTICE STEVENS argues that original meaning should not be the touchstone anyway, but that we should rather "expound the meaning of constitutional provisions with one eye towards our Nation's history and the other fixed on its democratic aspirations." *Van Orden*, ante, at 27-28, 2005 U.S. LEXIS 5215 (dissenting opinion). This is not the place to debate the merits of the "living Constitution."²⁰³ Even assuming, however, that the meaning of the Constitution ought to change according to "democratic aspirations," why are those aspirations to be found in Justices' notions of what the Establishment Clause ought to mean, rather than in the democratically adopted dispositions of our current society? As I have observed above, numerous provisions of our laws and numerous continuing practices of our people demonstrate that the government's invocation of God (and hence the government's invocation of the Ten Commandments) is unobjectionable -- including a statute enacted by Congress almost unanimously less than three years ago, stating that "under God" in the Pledge of Allegiance is constitutional, see 116 Stat., at 2058. To ignore all this is not to give effect to "democratic aspirations" but to frustrate them.

As bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve. Today's opinion is no different. I have remarked before that it is an odd jurisprudence that bases the unconstitutionality of a government practice that does not actually advance religion on the hopes of the government that it would do so. See *Edwards*, 482 U.S., at 639, 96 L. Ed. 2d 510, 107 S. Ct. 2573. But that oddity pales in comparison to the one invited by today's analysis: the legitimacy of a government action with a wholly secular effect would turn on the misperception of an imaginary observer that the government officials behind the action had the intent to advance religion.

In sum: The first displays did not necessarily evidence an intent to further religious practice; nor did the second displays, or the resolutions authorizing them; and there is in any event no basis for attributing whatever intent motivated the first and second displays to the third. Given the presumption of regularity that always accompanies our review of official action, the

²⁰³ See Scalia, *Originalism: The Lesser Evil*, 57 *Cincinnati L. Rev.* 852-853 (1989).

Court has identified no evidence of a purpose to advance religion in a way that is inconsistent with our cases. The Court may well be correct in identifying the third displays as the fruit of a desire to display the Ten Commandments, but neither our cases nor our history support its assertion that such a desire renders the fruit poisonous.