Chapter 4

AN INTRACTABLE PROBLEM: 'TAKINGS'

When private property is "taken" for a public purpose compensation must be paid. This is required of the federal government by the fifth amendment and of the states by the fourteenth. Legitimate police power regulations impose uncompensated burdens, often of a substantial dollar amount, without offending this principle. But sometimes a property owner succeeds in having a particular regulation voided as it applies to certain land with the argument that it amounts to an attempt to "take" property without compensation. As we noted *supra*, p. S**Error! Bookmark not defined.**, state courts proceeded for a long period in this area without the benefit of much, if any, guidance from the Supreme Court. Doctrines varied from state to state, results perhaps even more so. The return of the Supreme Court to this area may serve at least to focus the debate, but before we get to that, it is well to consider a few situations that have given rise to a number of state cases. In all cases one should ask the question whether one can frame the issue in a coherent way. After you have had an opportunity to consider the recent Supreme Court cases, you might want to return to these fact situations and ask what light the recent cases cast on them:

(1) Following unsuccessful negotiations for the purchase of a seventy-five acre tract, the Borough of Middlesex created a new "park, playground, and school" district covering the tract. The ordinance was held unconstitutional by the Superior Court of New Jersey:

> While it is conceivable that [the owner] could find a private school willing to build on the property, as a practical matter the effect of the zoning ordinance is to limit the purchaser to defendant borough . . . . However desirable the property may be for defendant for parks and playgrounds, the defendant cannot use its power to zone as a method of depreciating the value of the property for purposes of purchase.

Joint Meeting of the City of Plainfield v. Borough of Middlesex, 69 N.J.Super. 136, 141, 173 A.2d 785, 787 (1961). The court relied on an earlier New Jersey Supreme Court decision striking down zoning height restrictions that protected the flight path into Newark Airport, quoting this portion of that opinion:

> . . . We conclude that this ordinance undertakes to zone without authority of any statute and is in fact the taking of private property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution, and also the taking for public use without just compensation, in violation of article 1, paragraph 16 of the state constitution.
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> The city is within its rights in acquiring property for airport purposes under the provisions of *R.S.* 40:8–1, and it may acquire private property for such purposes by condemnation if necessary under *R.S.* 40:8–5. To restrict the height or building of any structures or trees, or to interfere electrically with communication or impair visibility by lights, &c., or in any way to use property within two miles of the airport to endanger the landing or taking off, &c., of aircraft, as provided in the questioned ordinance, is an interference with the rights of property ownership, which is not within the contemplation or purpose of the Zoning Law. The city may not under the guise of an ordinance acquire rights in private property which it may only acquire by purchase or by the exercise of its power of eminent domain. [p*1083]

Yara Eng'g Corp. v. City of Newark, 132 N.J.L. 370, 373, 40 A.2d 559, 560–61 (1945).

Yara is representative of an interesting group of cases. While height and use restrictions have generally been upheld, there are a number of decisions holding them to be a taking where the restrictions are employed to protect a public airport from incompatible adjacent development. Why should that be? Should it be? *See*, *e.g.*, Indiana Toll Road Comm'n v. Jankovich, 244 Ind. 574, 193 N.E.2d 237 (1963); Roark v. Caldwell, 87 Idaho 557, 394 P.2d 641 (1964); Jackson Mun. Airport Auth. v. Evans, 191 So.2d 126 (Miss.1966); Annot., 77 A.L.R.2d 1355, 1362 (1961) ("Zoning ordinances purporting to limit the use of land and regulate the height of structures on land near or surrounding an airport . . . have frequently been held unconstitutional as a 'taking' of private property without just compensation, especially since the governing body could procure the land by eminent domain proceedings."); *cf.* Piper v. Ekern, 180 Wis. 586, 194 N.W. 159 (1923) (height limit imposed on buildings around state capitol invalid, being "designed solely for the protection of the Capitol building"). *See also* DKM3, p. 273.

There is also substantial authority supporting such a use of height regulation. *See*, *e.g.*, Smith v. County of Santa Barbara, 243 Cal.App.2d 126, 52 Cal. Rptr. 292 (1966); Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Auth., 111 So.2d 439 (Fla.1959); Village of Willoughby Hills v. Corrigan, 29 Ohio St.2d 39, 278 N.E.2d 658 (1972).

(2) In 1952, Mount Vernon, New York amended its zoning ordinance to create a new "Designed Parking District" which was applied to 86,000 square feet adjacent to the railroad station which had since 1922 been operated as a parking lot under private ownership. Before 1952, the lot had been zoned for residential use, but the parking continued as a prior non-conforming use. The surrounding land was zoned and used for business buildings. The New York Court of Appeals held, over a vigorous dissent, that the ordinance was unconstitutional:

> True it is that for a long time the land has been devoted to parking, a nonconforming use, but it does not follow that an ordinance prohibiting any other use is a reasonable exercise of the police power. . . . On this record, the plaintiff, having asserted an invasion of his property rights [citation omitted] has met the burden of proof by establishing that the property is so situated that it has no possibilities for residential use and that the use added by the 1952 amendment does not improve the situation but, in fact, will operate to destroy the greater part of the value of the property since, in authorizing its use for parking and incidental services, it necessarily permanently precludes the use for which it is most readily adapted, i.e., a business use such as permitted and actually carried on by the owners of all the surrounding property. Under such circumstances, the 1927 zoning ordinance and zoning map and the 1952 amendment, as they pertain to the plaintiff's property, are so unreasonable and arbitrary as to constitute an invasion of property rights, contrary to constitutional due process and, as such, are invalid, illegal and void enactments [citation omitted].

Vernon Park Realty, Inc. v. City of Mount Vernon, 307 N.Y. 493, 499, 121 N.E.2d 517, 520 (1954). Is this decision based upon purpose, effect, or some combination of the two?

(3) In many states there is enabling authority for a form of regulation specifically aimed at preventing development of land slated for eventual condemnation. Typically, such regulation provides for an "official map" on which planned highways, parks, and perhaps other public projects are entered. Building permits are denied for private development on affected [p*1084] land. Under the classic model, an owner can seek a variance if the denial would prevent a reasonable return on his property. In a few states, variances have not been provided for, but the effect of a map entry has been limited in time—three years, one year. Is such designation constitutional? Does it make any difference which form of designation is used? *Cf.* Lomarch Corp. v. Mayor of Englewood, 51 N.J. 108, 237 A.2d 881 (1968); Miller v. Beaver Falls, 368 Pa.

189, 82 A.2d 34 (1951). *See generally* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 270–76 (1971).[1]

(4) Beginning with the heightened environmental concern of the 1960's, a number of states passed statutes designed to preserve "wetlands," marshy areas, the ecological benefits of which seem to be substantial. The statutes typically impose very heavy burdens on owners seeking to fill those lands and to develop them for any purpose other than keeping them in their natural condition. Faced with a case in which it found that the denial of such a permit effectively prevented any development of the defendant's land, the Supreme Judicial Court of Maine held:

> Between the public interest in braking and eventually stopping the insidious despoliation of our natural resources which have for so long been taken for granted, on the one hand, and the protection of appellants' property rights on the other, the issue is cast. . . .
>
> As distinguished from conventional zoning for town protection, the area of Wetlands representing a "valuable natural resource of the State," of which appellants' holdings are but a minute part, is of state-wide concern. The benefits from its preservation extend beyond town limits and are state-wide. The cost of its preservation should be publicly borne. To leave appellants with commercially valueless land in upholding the restriction presently imposed, is to charge them with more than their just share of the cost of this state-wide conservation program, granting fully its commendable purpose. . . . [T]heir compensation by sharing in the benefits with this restriction is intended to secure is so disproportionate to their deprivation of reasonable use that such exercise of the State's police power is unreasonable.

State v. Johnson, 265 A.2d 711, 716 (Me.1971).

After surveying the literature and case law, an article dealing with the issue of *State v. Johnson* reports: "Most cases to date dealing with highly restrictive open space zoning have invalidated the regulations." Kusler, *Open Space Zoning: Valid Regulation or Invalid Taking*, 57 MINN.L.REV. 1, 8 (1972). The cases are not, however, all adverse:

> An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. . . . [W]e think it is not an unreasonable exercise of [the police] power to prevent harm to public rights by limiting the use of private property to its natural uses.

Just v. Marinette County, 56 Wis.2d 7, 17, 201 N.W.2d 761, 768 (1972). Since *Just*, more cases seem to have allowed such regulation. *See* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY § 9.21 (1984).

Can the holding in the *Johnson* case be explained simply in terms of the severe limitation of use and diminution in value caused by such regulations or are other factors important? Let us assume the state of New Dorset or one of its subdivisions adopts a regulation limiting land use in a certain river [p*1085] valley to agriculture, forestry, parks, and wildlife sanctuaries—accessory structures for these uses are permitted but not permanent residences. Is the constitutionality of this regulation affected by its purpose? Such regulations can serve a wide range of objectives—limiting flood damage, preserving a natural area of financial importance to the state, preventing pollution, maintaining an attractive vista, and so on. Generally the objectives are mixed. Would you expect a higher rate of success for floodplain zoning measures than wetlands preservation?

The *Kusler* article concludes: "Although a variety of tests have been posed by courts and legal commentators for determining whether regulations validly regulate or unconstitutionally 'take' property, no single test appears to be wholly satisfactory." Kusler, *Open Space Zoning*, *supra* at

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[1] The promised chapter on this topic in the 2d ed., D. HAGMAN & J. JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW (2d ed.1986), has not yet appeared. *Cf. id.* at 160–61.

12. Consider some of the questions which courts and commentators have spoken of as "a test" or "the test," or merely a factor bearing upon the ultimate issue. What degree of importance would you assign each? Bear in mind that it is possible for a question to be a test in one of two ways. It can be a true watershed with one answer indicating "taking" and the opposite answer pointing with equal certainty to valid regulation; or it can furnish a definitive answer on one side only. An example of the latter would be a question for which a "yes" answer indicates "taking" while a "no" does not absolutely rule one out.

(a) Has the government been guilty of a physical invasion of the land in question? *See* Sax, *Takings*, *Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

(b) Has the regulation substantially (severely, grossly, or some such) diminished the land's value?

(c) Has it severely limited the range of uses possible? Has it effectively blocked "all reasonable use?"

(d) Is the regulation aimed at nuisance—like uses or threats to the public health or safety (or morals?) or some less substantial harm?

(e) Does it prevent harm or require landowners to bestow a public benefit?

(f) Is there reciprocity of benefit, in the sense that the limited property can be viewed as a benefiting from the very regulatory scheme of which the owner is complaining? (*E.g.*, the owner of lot in single-family residence district is prevented from putting in a store but also assured his neighbor won't do the same.)

(g) Is the government operating in a proprietary capacity rather than in its capacity as arbiter of private disputes? *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

(h) Does the harm prevented by the regulation outweigh the hardship it causes?

Are there any of the above which in your view furnish a satisfactory overall framework for dealing with the preceding principal cases, and those noted with them? If you conclude that none individually can do the job, which several would you list as most important?

To the extent that the economic impact of the regulation determines or at least bears upon the question of "taking" some subsidiary questions arise: [p*1086]

(a) What is the unit? Is the case where *A* owns a large parcel encompassing both strictly limited wetlands and upland areas which receive some benefit from the regulation any different from the case of *B* whose parcel is exclusively wetlands? What about the case of a *C* who holds two parcels separate but nearby—one wetlands, one uplands? And then there is *D*, a wealthy recipient of lots of past government favors, for whom the loss in value of a small wetlands lot is insignificant.

(b) Is it relevant that the current owner of the affected parcel bought the land while it was subject to the regulations? Is the price paid relevant?

See Michelman, *Property*, *Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV.L.REV. 1165, 1190–93, 1229–34 (1967); *see generally* Stoebuck, *Police Power*, *Takings*, *and Due Process*, 37 WASH. & LEE L.REV. 1057 (1980); B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977).

We have resisted the temptation to edit all the references out of the following cases. In an area such as this one, where the future direction is by no means clear, courts build on doctrine by making arguments based on their prior cases. You have already seen many of the cases cited here. Others are sufficiently described in the opinions themselves. The notes between the cases, among other things, fill in what happened in between. If you have only an imperfect recollection of

Goldblatt v. Town of Hempstead, *supra*, p. S**Error! Bookmark not defined.**; *Village of Euclid v. Ambler Realty Co*., *supra*, p. S**Error! Bookmark not defined.**; *Nectow* v. *City of Cambridge*, *supra* p. S**Error! Bookmark not defined.**, you might want to review those cases now. Another case frequently referred to is United States v. Causby, 328 U.S. 256 (1946), DKM3, p. 274. In it, the Supreme Court affirmed the holding of the Court of Claims that United States had 'taken' an easement over the plaintiff's chicken farm when it used the airspace above it as a glide path to reach an airport that it was using for military purposes.

PENN CENTRAL TRANSPORTATION CO. v. NEW YORK CITY

Supreme Court of the United States

438 U.S. 104 (1978)

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

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. . . . [p*1087]

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." [N.Y.C.Admin.Code] § 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*), 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 masterplan, 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. [p*1088] 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. [Citation omitted.] 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 a transferee lot may not be increased by more than 20% above its authorized level, the ordinance permitted transfers from a landmark parcel to property across the street or across a street intersection. In 1969, the law governing the conditions under which transfers from landmark parcels could occur was liberalized [citation omitted] apparently to ensure that the Landmarks Law would not unduly restrict the development options of the owners of Grand Central Terminal. [Citation omitted.] The class of recipient lots was expanded to include lots "across a street and opposite to another lot or lots which except for the intervention of streets or street intersections f[or]m a series extending to the lot occupied by the landmark building[, provided that] all lots [are] in the same ownership." [Citation omitted.] In addition, the 1969 amendment permits, in highly commercialized areas like midtown Manhattan, the transfer of all unused development rights to a single parcel. . . .

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 [p*1089] Commission, it did not seek judicial review of the final designation decision.

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

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

Appellants did not seek judicial review of the denial of either certificate. Because the Terminal site enjoyed a tax exemption, remained suitable for its present and future uses, and was not the subject of a contract of sale, there were no further administrative remedies available to appellants as to the Breuer I and Breuer II Revised plans. . . . Further, appellants did not avail themselves of the opportunity to develop and submit other plans for the Commission's consideration and approval. Instead, appellants filed suit in New York Supreme Court, Trial Term, claiming, *inter alia*, that the application of the Landmarks Preservation Law had "taken" their property without just compensation in violation of the Fifth and Fourteenth Amendments and arbitrarily deprived them of their property without due process of law in violation of the Fourteenth Amendment. Appellants sought a declaratory judgment, injunctive relief barring the city from using the

Landmarks Law to impede the construction of any structure that might otherwise lawfully be constructed on the Terminal site, and damages for the "temporary taking" that occurred between August 2, 1967, the designation date, and the date when the restrictions arising from the Landmarks Law would be lifted. The trial court granted the injunctive and declaratory relief, but severed the question of damages for a "temporary taking."

Appellees appealed, and the New York Supreme Court, Appellate Division, reversed. [Citation omitted.]

The New York Court of Appeals affirmed. . . .

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 [p*1090] 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. . . .

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 compensated by the government, rather than remain disproportionately concentrated on a few persons. See *Goldblatt* v. *Hempstead*, 369 U.S. 590, 594 (1962). Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." [Citations omitted.]

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. See *Goldblatt v. Hempstead*, *supra*, at 594. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, see, *e.g.*, *United States* v. *Causby*, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Pennsylvania Coal Co*. v. *Mahon*, 260 U.S. 393, 413 (1922), and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example. A second are the decisions in which this Court has dismissed "taking" challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes. See, *e.g.*, *United States* v. *Willow River Power Co*., 324 U.S. 499

(1945) (interest in high-water level of river for runoff for tailwaters to maintain power head is not property) [further citations omitted].

More importantly for the present case, in instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. See *Nectow* v. *Cambridge*, 277 U.S. 183, 188 (1928). Zoning laws are, of course, the classic example, see *Euclid* v. *Ambler Realty Co*., 272 U.S. 365 (1926) (prohibition of industrial use) [further citations omitted]. [p*1091]

Zoning laws generally do not affect existing uses of real property, but "taking" challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm. . . .

Goldblatt v. Hempstead, *supra*, is a recent example. There, a 1958 city safety ordinance banned any excavations below the water table and effectively prohibited the claimant from continuing a sand and gravel mining business that had been operated on the particular parcel since 1927. The Court upheld the ordinance against a "taking" challenge, although the ordinance prohibited the present and presumably most beneficial use of the property and had . . . severely affected a particular owner. The Court assumed that the ordinance did not prevent the owner's reasonable use of the property since the owner made no showing of an adverse effect on the value of the land. Because the restriction served a substantial public purpose, the Court thus held no taking had occurred. It is, of course, implicit in *Goldblatt* that a use restriction on real property may constitute a "taking" if not reasonably necessary to the effectuation of a substantial public purpose, see *Nectow* v. *Cambridge*, *supra*; cf. *Moore* v. *East Cleveland*, 431 U.S. 494, 513–514 (1977) (STEVENS, J. concurring), or perhaps if it has an unduly harsh impact upon the owner's use of the property.

Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393 (1922), is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a "taking." [Further discussion of this case will be found *infra* p. S**Error! Bookmark not defined.**.] . . .

Finally, government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute "takings." *United States* v. *Causby*, 328 U.S. 256 (1946), is illustrative. In holding that direct overflights above the claimant's land, that destroyed the present use of the land as a chicken farm, constituted a "taking," Causby emphasized that Government had not "merely destroyed property [but was] using a part of it for the flight of its planes." . . .

In contending that the New York City law has "taken" their priority in violation of the Fifth and Fourteenth Amendments, appellants make a series of arguments, which, while tailored to the facts of this case, essentially urge that any substantial restriction imposed pursuant to a landmark law must be accompanied by just compensation if it is to be constitutional. Before considering these, we emphasize what is not in dispute. . . . [A]ppellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal. They also do not dispute that the restrictions imposed on its parcel are appropriate means of securing the purposes of the New York City law. Finally, appellants do not challenge any of the specific factual premises of the decision below. They accept for present purposes both that the parcel of land occupied by Grand Central Terminal must, in its present state, be regarded as capable of earning a reasonable return, 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." [p*1092]

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

Apart from our own disagreement with appellants' characterization of the effect of the New York City law, . . . the submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. Were this the rule, this Court would have erred not only in upholding laws restricting the development of air rights, see *Welch* v. *Swasey*, [214 U.S. 91 (1900)], but also in approving those prohibiting both the subjacent, see *Goldblatt* v. *Hempstead*, 369 U.S. 590 (1962), and the lateral [citation omitted] development of particular parcels. "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 at "taking" because it significantly diminished the value of the Terminal site. Appellants concede that the decisions sustaining other land-use regulations, which, like the New, York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a "taking," see *Euclid* v. *Ambler Realty Co*., 272 U.S. 365 (1926) (75% diminution in value caused by zoning law) . . . . Appellants, moreover, also do not dispute that a showing of diminution in property value would not establish a "taking" if the restriction had been imposed as a result of historic-district legislation, see generally *Maher* v. *New Orleans*, 516 F.2d 1051 (CA5 1975), but appellants argue that New York City's regulation of individual landmarks is fundamentally different from zoning or from historic-district legislation because the controls imposed by New York City's law apply only to individuals who own selected properties.

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

It is true, as appellants emphasize, that both historic-district legislation and zoning laws regulate all properties within given physical communities whereas landmark laws apply only to selected parcels. But, contrary to appellants' suggestions, landmark laws are not like discriminatory, or "reverse spot," zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones. [Citation omitted.] 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 [p*1093] 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.

Equally without merit is the related argument that the decision to designate a structure as a landmark "is inevitably arbitrary or at least subjective, because it is basically a matter of taste,"

[citation omitted] thus unavoidably singling out individual landowners for disparate and unfair treatment. . . .

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

Next, appellants observe that New York City's law differs from zoning laws and historic-district ordinances in that the Landmarks Law does not impose identical or similar restrictions on all structures located in particular physical communities. It follows, they argue, that New York City's law is inherently incapable of producing the fair and equitable distribution of benefits and burdens of governmental action which is characteristic of zoning laws and historic-district legislation and which they maintain is a constitutional requirement if "just compensation" is not to be afforded. It is of course, true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a "taking." Legislation designed to promote the general welfare commonly burdens some more than others. The owners of . . . the gravel and sand mine in *Goldblatt* v. *Hempstead* were uniquely burdened by the legislation sustained in th[at] case[]. Similarly, zoning laws often affect some property owners more severely than others but have not been held to be invalid on that account. For example, the property owner in *Euclid* who wished to use its property for industrial purposes was affected far more severely by the ordinance than its neighbors who wished to use their land for residences.

In any event, appellants' repeated suggestions that they are solely burdened and unbenefited is factually inaccurate. This contention overlooks the fact that the New York City law applies to vast numbers of structures in the city in addition to the Terminal—all the structures contained in the 31 historic districts and over 400 individual landmarks, many of which are close to the Terminal. Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole—which we are unwilling to do—we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law. Doubtless appellants believe they are more burdened than benefited by the law, but that must have been true, too, of the property owners in . . . *Euclid*, and *Goldblatt*.

Appellants' final broad-based attack would have us treat the law as an instance, like that in *United States* v. *Causby*, in which government, acting in an enterprise capacity, has appropriated part of their property for some strictly governmental purpose. Apart from the fact that *Causby* was a case of invasion of airspace that destroyed the use of the farm beneath and this New York City law has in nowise impaired the present use of the Terminal, the Landmarks Law neither exploits appellants' parcel for city purposes nor facilitates nor arises from any entrepreneurial operations of the city. . . . [p*1094]

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. We now must consider whether the interference with appellants' property is of such a magnitude that "there must be an exercise of eminent domain and compensation to sustain [it]." *Pennsylvania Coal Co*. v. *Mahon*, 260 U.S., at 413. That inquiry may be narrowed to the question of the severity of the impact of the law on appellants' parcel, and its resolution in turn requires a careful assessment of the impact of the regulation on the Terminal site.

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

Appellants, moreover, exaggerate the effect of the law on their ability to make use of the air rights above the Terminal in two respects. First, it simply cannot be maintained, on this record, that appellants have been prohibited from occupying any portion of the airspace above the Terminal. While the Commission's actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit any construction above the Terminal. The Commission's report emphasized that whether *any* construction would be allowed depended upon whether the proposed addition "would harmonize in scale, material, and character with [the Terminal]." [Citation omitted.] Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal.

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 preexisting 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. . . . While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation. Cf. *Goldblatt* v. *Hempstead*, 369 U.S., at 594 n.3.

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. [p*1095]

Affirmed.

[The dissenting opinion by REHNQUIST, J., joined by BURGER, C.J. and STEVENS, J., is omitted.]

Notes and Questions

1. Is there any good reason for a regulation which requires an owner to maintain and preserve an existing structure to be more suspect than one which stipulates what a new building must be like if and when the owner chooses to build?

2. Does a regulatory program designed to protect historic structures or districts pose again the question of the validity of purely aesthetic controls? *See* p. S**Error! Bookmark not defined.** *supra*. Courts have, with little hesitation, upheld historic district regulation against such an attack. In City of New Orleans v. Levy, 223 La. 14, 64 So.2d 798 (1953), the Louisiana Supreme Court said:

> Perhaps esthetic considerations alone would not warrant an imposition of the several restrictions contained in the Vieux Carre Commission Ordinance. But . . . this legislation is in

> the interest of and beneficial to the inhabitants of New Orleans generally, the preserving of the Vieux Carre section being not only for its sentimental value but also for its commercial value, and hence it constitutes a valid exercise of the police power.

Id. at 28–29, 64 So.2d at 802–03; *cf*. Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir.1975), cited in the principal case. A similar rationale was employed by the Massachusetts Supreme Judicial Court in upholding zoning control over construction on Nantucket. *See* Opinion of the Justices, 333 Mass. 773, 128 N.E.2d 557 (1955). Consider the array of purposes cited for the New York City Law:

> [T]o
>
> (a) effect and accomplish the protection, enhancement, and perpetuation of such improvements and of districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history;
>
> (b) safeguard the city's historic aesthetic and cultural heritage, as embodied and reflected in such improvements and districts;
>
> (e) stabilize and improve property values in such districts;
>
> (d) foster civic pride in the beauty and noble accomplishments of the past;
>
> (e) protect and enhance the city's attractions to tourists and visitors and the support and stimulus to business and industry thereby provided;
>
> (f) strengthen the economy of the city; and
>
> (g) promote the use of historic districts and landmarks for the education, pleasure and welfare of the people of the city.

NEW YORK, N.Y., ADMINISTRATIVE CODE ch. 8–A, § 205–1.0(b) (1971). A New York court has held that the constitutionality of regulation for these purposes is beyond dispute. Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d 376, 288 N.Y.S.2d 314 (1968).

3. In New York there is a specific enabling act to support landmark regulation by a municipality. To what extent is that necessary? Could a community set up a scheme like New York City's under the Standard State Zoning Enabling Act? *See* p. S**Error! Bookmark not defined.** *supra*; *cf*. p. S**Error! Bookmark not defined.** *supra*. [p*1096]

4. Just as commentators have begun to wonder about the exclusionary effects of architectural controls, so too they have begun to ask whether historic zoning has the effect of excluding or displacing low-income and minority people. *See*, *e.g*., Note *Historic Districts: Preserving City Neighborhoods for the Privileged*, 60 N.Y.U.L.REV. 64 (1985). On the general subject of historic property preservation see J. MORRISON, HISTORIC PRESERVATION LAW (2d ed.1965); Comment, *Legal Methods of Historic Preservation*, 19 BUFF.L.REV. 611 (1970); Note, *La Recherche du Temps Perdu: Legal Techniques for Preservation of Historic Property*, 55 VA.L.REV. 302 (1969). In addition the Summer 1971 issue of *Law and Contemporary Problems* is devoted to the subject. On the New York scheme see Rankin, *Operation and Interpretation of the New York City Landmarks Preservation Law*, 36 LAW & CONTEMP.PROB. 366 (1971); Wolf, *The Landmark Problem in New York*, 22 N.Y.U.INTRAMURAL L.REV. 99 (1967).

5. *The 1987 "Tetralogy."* In 1987, the Supreme Court decided four "takings" cases, the import of which is still debated and which are likely to affect the course of takings law for some time to come. They are treated in some depth in the Note that follows, p. S**Error! Bookmark not defined.** *infra*. In addition to the cases that are adequately described in what follows, the Supreme Court decided the following "takings" cases between *Penn Central* and 1987:

(a) Andrus v. Allard, 444 U.S. 51 (1979). In an action "challenging validity of regulations promulgated by the Secretary of Interior that prohibit commercial transaction in parts of birds

legally killed before birds came under protection of Eagle Protection Act and Migratory Bird Treaty Act," the Court held: "(1) both the Eagle Protection Act and the Migratory Bird Treaty Act contemplate regulatory prohibition of commerce in parts of protected birds, without regard to when those birds are originally taken, and (2) prohibition of commercial transactions in preexisting avian artifacts under the Eagle Protection Act and the Migratory Bird Treaty Act do not violate Fifth Amendment property rights." *Id*.

(b) Kaiser Aetna v. United States, 444 U.S. 164 (1979), DKM3, p. 139. Through dredging and filling operations in developing a marina-style subdivision community, petitioners, the owner and lessee of an area which included Kuapa Pond, a shallow lagoon on the island of Oahu, Hawaii, that was contiguous to a navigable bay and the Pacific Ocean but separated from the bay by a barrier beach, converted the pond into a marina and thereby connected it to the bay. The Army Corps of Engineers had advised petitioners that they were not required to obtain permits for the development of and operations in the pond, and petitioners ultimately made improvements that allowed boats access to and from the bay. Petitioner lessee controls access to and use of the pond, which, under Hawaii law, was private property, and fees are charged for maintaining the pond. Thereafter, the United States filed suit in Federal District Court against petitioners to resolve a dispute as to whether petitioners were required to obtain the Corps' authorization, in accordance with § 10 of the Rivers and Harbors Appropriation Act of 1899, for future improvements in the marina, and whether petitioners could deny the public access to the pond because, as a result of the improvements, it had become a navigable water of the United States. 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," subject to regulation by the Corps, but further held that the Government lacked authority to open the pond to the public without payment of compensation to the owner. The Court of Appeals agreed that the pond fell within the scope of Congress' regulatory authority, but held, reversing the District Court, 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 giving the public a right of access to what was once petitioners' private pond. The Court, in an opinion by Chief Justice Rehnquist, with Blackmun, Brennan, and Marshall, JJ, dissenting, held that if the Government wished to make what was formerly Kuapa Pond into a public aquatic park after petitioners had proceeded as far as they had, it may not, without invoking its eminent domain power and paying just compensation, require them to allow the public free access to the dredged pond. The opinion affirmed both lower courts on the regulatory issue.

(c) PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980). *See* p. **Error! Bookmark not defined.** *infra*.

(d) Agins v. City of Tiburon, 447 U.S. 255 (1980). In a "complaint against city seeking damages for inverse condemnation and declaration that zoning ordinances were facially unconstitutional," the Court "held, that: (1) city's open-space land zoning ordinances, which restricted previously purchased five-acre tract of land to single-family residences and open-space use, did not take the property without just compensation, where the zoning permitted construction of one to five residences on the land, advanced legitimate governmental goals, would benefit the landowners as well as the public by assuring careful and orderly development, and neither prevented the best use of the land nor extinguished a fundamental attribute of ownership, and (2) municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, did not so burden landowners' enjoyment of their property as to constitute a taking." *Id*.

(e) San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 (1981). The company brought an action alleging that city had taken its property without just compensation by "downzoning" the property to prevent industrial development. . . . The Court, per Blackmun, J., and over the

dissents of Brennan, Stewart, Marshall, and Powell, JJ., "held that where California Court of Appeal decided [p*1097] that monetary compensation was not an appropriate remedy but did not decide whether any other remedy was available and appeared to have contemplated further proceedings in the trial court on remand to resolve disputed factual issues, decision of Court of Appeal was not a final judgment and thus appeal would be dismissed." *Id*.

(f) Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). In an opinion by Marshall, J., with Blackmun, Brennan and White, JJ., dissenting, the Court invalidated a New York law that required that a landlord must allow a cable television company to install cables in rental property. The Court held: "(1) physical occupation of plaintiff's rental property which occurred in connection with cable television company's installation of . . . cables on plaintiff's five-story apartment building constituted a 'taking' notwithstanding that statute might be within state's police power as authorizing rapid development and maximum penetration by means of communication having important educational and community aspects; (2) allegedly minimal size of the physical installation was not determinative; (3) fact that statute applied only to rental property did not make it simply a regulation of use of real property; and (4) statute could not be construed as merely granting a tenant a property right as an appurtenance to his leasehold." *Id*.

(g) Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984). "Trustees of landholding estates sought judgment declaring Hawaii Land Reform Act of 1967 unconstitutional." *Id*. The Court held that the Act, which substantially changes the land tenure system in Hawaii by massive condemnation and land redistribution, does not violate the "public use" requirement of the fifth amendment for taking of private property.

(h) Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984). "Applicant for registration of pesticide brought suit seeking injunctive and declaratory relief from operation of data-consideration and data-disclosure provisions of Federal Insecticide, Fungicide, and Rodenticide Act alleging that the challenged provisions effected a 'taking' of property without just compensation in violation of Fifth Amendment." The Court "held that: (1) to extent that applicant for registration of pesticides had an interest in its health, safety, and environmental data cognizable as a trade-secret property right under Missouri Law, that property right was protected by taking clause of the Fifth Amendment; (2) Environmental Protection Agency's consideration or disclosure of data submitted by applicant to the agency prior to 1972 amendments to Federal Insecticide, Fungicide, and Rodenticide Act or after effective date of 1978 amendments to the Act did not effect a taking; however, EPA consideration or disclosure of health, safety, and environmental data would constitute a taking if applicant submitted the data to the agency between October 22, 1972, and September 30, 1978, under certain circumstances [because of unclarity of the statute during that period]; and (3) Tucker Act was available as a remedy for any uncompensated taking applicant for registration of pesticide might suffer as result of operation of data-consideration and data-disclosure provisions of Federal Insecticide, Fungicide, and Rodenticide Act." *Id*.

(i) Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985). The Bank sued for damages on the ground that the Commission's refusal to allow it to develop in a way that had, it alleged, already been approved constituted a "taking." The Court "held that even assuming that government regulation may effect a taking for which Fifth Amendment requires just compensation and that Fifth Amendment requires payment of money [p*1098] damages to compensate for taking, jury verdict awarding damages for temporary taking of property was premature." *Id*.

(j) MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986). Over the dissent of Burger, C.J., and White, Powell and Rehnquist, JJ., the Court "held that it could not determine whether a 'taking' had occurred as a result of rejection of a subdivision proposal or whether county failed to provide 'just compensation' in absence of the final and authoritative

determination by county planning commission as to how it would apply the challenged regulations to the property in question." *Id.*

NOTES ON THE 1987 "TETRALOGY" AND TWO POUSSES-CAFÉ *FROM 1994 AND 1997*

There are three long cases in DKM3 between the introductory material on takings and *Lucas*. I hope that some of you will be sufficiently interested to read the omitted cases, but the only things that you need for the class are the brief introduction to "takings" jurisprudence (pp. 1082–86, 1096–99), this Note, and the *Lucas* case.

1. *Keystone Bituminous Coal Ass'n v. DeBenedictis* involved legislation similar to that which had been struck down in *Pennsylvania Coal Co. v. Mahon* in 1922. In effect, coal companies in Pennsylvania were required to leave sufficient coal in place, so as not to cause the subsidence of any land over which there structures, even if they had already purchased from the landowner the right, known in Pennsylvania as the "support estate", to cause such a subsidence. The Court, in an opinion by Stevens, J., held the statute constitutional:

a. *Mahon* was distinguished. That case involved a single owner of a private house who sold his support estate to the coal company and then sought to escape from the consequences of what he had done by taking advantage of the act. The statements in *Mahon* that the Act went too far and thus constituted a taking were characterized as dicta. The Act in question unlike the Act under consideration in *Mahon* was accompanied by a legislative finding that the public interest, not just the interests of the individual landowners affected, required that subsidence mining cease because of the environmental disasters that it caused.

b. The Court considered the applicability of the *Goldblatt* standard. The majority felt that the cases were close but apparently did not rest entirely on that case.

c. Rather the case goes on to consider the impact of the statute on the mine owners, and finding that it requires only that the mine owners must leave an additional 2% of their coal in place finds that the combination of the purpose of the statute and its impact on the coal owners are not sufficient to prevail in a facial attack on the statute.

d. A strong dissent by Rehnquist, CJ., Powell, O'Connor and Scalia, JJ., focuses first on the craftsmanship of the *Mahon* distinction, second on the "nuisance" exception, and third on the total taking of the support estate.

2. In *Hodel v. Irving*, the Court held unconstitutional the portions of the Indian Land Consolidation Act that provided for the escheat without compensation to the Indian tribe of small fractional shares of land held by deceased members of the tribe that would otherwise pass by devise or descent and become further fractionated. The Court was unanimous in its judgment. The opinion for the Court by O'Connor, J., emphasizes the importance of passage of property at death as one of the "sticks in the bundle of rights" that the property-owner holds. Brennan, Marshall and Blackmun, JJ., in concurrence emphasized that the case did not limit *Andrus v. Allard*, a case which had held constitutional a statute that prohibited the sale of artifacts made with eagle feathers, to its facts, while Scalia, J., Rehnquist, C.J., and Powell, J., emphasized in concurrence that it did. A separate concurring opinion by Stevens and White, JJ., rested on the ground not that the statute had effected a "taking" but that Congress had provided an inadequate grace period for the property owners to preserve their rights.

Congress had, in fact, emended the provision at stake in *Hodel* prior to the case. In 1997, the Court had occasion to consider whether the amendments passed the constitutional barriers established in *Hodel*. Under the amended provision some fractional shares could be devised, the grace-period in which a holder of such a share could save it from escheat was longer, and the tribes were given the power to establish rules about the disposition of fractional shares subject to the approval of the Secretary of the Interior. None of these amendments, in the view of a majority of the Court sufficed to take the statute out of the condemnation of *Hodel*. Only Justice Stevens

dissented. For him the additional time was sufficient to take the statute out of the realm of the unconstitutional. Babbitt v. Youpee, 519 U.S. 234 (1997). Congress is still working on the problem.

3. In *First English Evangelical Lutheran Church v. County of Los Angeles*, in an opinion by Rehnquist, C.J. (but the majority included Marshall and Brennan, JJ.), the Court held that where the County had denied all building permits in a flood-plain area, a property owner had stated a cause of action when he sued for damages for a regulatory taking. The principal issue in the case was whether the claim was ripe, granted that the plaintiff had made no application for a building permit. The Court held that it was, granted that the County had said that it would grant no building permits. That turned the case into a question whether a state could make the sole remedy for invalid regulations an action to declare them invalid. The Court held that it could not, because even if the plaintiff succeeded he would have been deprived of the use of his property during the interim period. Justice Stevens, joined by O'Connor and Blackmun, JJ., dissented on the ripeness question. Justice Stevens alone questioned the wisdom the decision as a matter of policy. In his view, it set the penalty for enacting an invalid regulation too high. Upon remand the California court held that the denial was justified on the "nuisance" exception. (A disasterous flood had occurred in the flood-plain in question.) The Supreme Court denied certiorari.

4. In *Nollan v. California Coastal Commission*, the Court, in an opinion by Scalia, J., held that the Commission could not condition the granting of a building permit on the grant by the landowner of a easement of public access across the beach in question. Even though the Commission could have denied the permit outright, it could not condition the granting of the permit on the grant by the landowner of something that was unrelated to the building they were about to build. Justice Brennan in dissent with Justice Marshall argued that there was a rational nexus here. Justices Blackmun and Stevens basically joined Justice Brennan in separate opinions.

5. In 1994, in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court held (5–4), that the *Nollan* test not only required that there be a nexus between the required dedication but that there be "rough proportionality" of the burden on the property owner and the benefit that the city gets. The facts of the case were a required dedication of open space and a bicycle path at the back of a store that was being allowed to pave its parking lot. The Court, per Rehnquist, C.J., held: (1) city's requirement that landowner dedicate a portion of her property lying within flood plain for improvement of storm drainage system and property adjacent to flood plain as bicycle/pedestrian pathway, as condition for building permit allowing expansion of landowner's commercial property, had nexus with legitimate public purposes; (2) findings relied upon by city to require landowner to dedicate portion of her property in flood plain as public greenway, did not show required reasonable relationship necessary to satisfy requirements of Fifth Amendment; and (3) city failed to meet its burden of demonstrating that additional number of vehicle and bicycle trips generated by proposed commercial development reasonably related to city's requirement of dedication of pedestrian/bicycle pathway easement. Justice Stevens in dissent argued that this is a return to *Lochner*; Justice Souter in dissent argued that the Court got the facts wrong.

6. *The paranoid planner's view of all this.* The cases caused quite a stir in the planning community, and the view I would like to pose is that of the "paranoid planner," someone who thinks that as a result of these cases the roof has fallen in. Here's the paranoid planner's view of the 1987 tetralogy:

a. *Five out of six cases go against the government*. Very few Supreme Court cases in the planning area have gone against the government. *Moore* (p. 1078) can explained on the ground that privacy was involved. *Kaiser Aetna* (p. 139) and *Loretto* (p. 1097) can both be regarded as cases involving physical takings. *Ruckleshouse* (p. 1097) didn't have anything to do with planning or even with land use. You really have to back to *Mahon* to find a case in which the Court invalidated a land-use regulation that didn't involve a physical invasion and where there

weren't other constitutional issues involved. *Keystone* looks to me like it overrules *Mahon*. That's all to the good. I never could figure that case out anyway. But then we get five cases that go the other way. That can't be good for the profession.

b. *Another absolute has been added to the right to exclude*. It looks like another absolute has been added to the right to exclude (*Irving*, *Youpee*). This type of question probably won't come up very often, but I'm concerned about absolutes, particularly when they stand in the way of sensible assembling of parcels of land for development purposes.

c. First English *means that no regulation can now be passed without fear of dire consequences*. It's bad enough to have to run the risk of having a regulation declared invalid. It costs a lot of money to fight these suits, and they involve a lot of delay. If the city has to pay every landowner who wins one these suits, my bosses are going to tell me to stay well within the limits of the tried and true. There's even some language in Justice Stevens's opinion that suggests that I might be sued personally. I'm also worried about the application of the case to moratoria. It's quite common, when development seems to be getting out of hand or the city's ability to provide services is being strained, for the planners to put a moratorium on building permits. Do we have to pay for these now?

d. *Nollan* and *Dolan* mean that Planned Unit Developments are unconstitutional. At least that's the way I read it. We negotiate with developers all the time. They want planning permission, and we need something, assurance that the development won't load a whole bunch of costs on the taxpayers of the city. Or take the case of PUD's. In the old days we insisted on minimum lot sizes. That gave you Levittown. Then came the PUD's. A developer will get permission to build densely in one area in return for dedicating open-space land in another. Everybody comes out ahead. What's so wrong about that?

Here are some possible answers to the parnoid planner (derived, in no small part, from Michelman in *Columbia Law Review* (1988) (pp. 1112–13, 1125–26, 1142–43)):

7. a. Yes, it is true that an unusual number of cases go against the government here but what do they actually hold. *Keystone*, in particular, is most interesting not for its "amazing" reading of *Mahon*, but for its recognition of the "nuisance exception." What it seems to say is that you can go a lot further with regulation when you're trying to stop legislatively-declared harms (which are subject to judicial review to make sure that they are harms) than you can when you're trying to get landowners to confer benefits on the public. I'm not sure that the distinction makes much sense, particularly if we take a Coasean view of nuisance (p. 882), but that's what the Court said. (The "nuisance exception" will become a star player in *Lucas* (p. 1144).)

b. In *Irving* the power to dispose of property at death was totally denied not simply regulated. I'm not sure that analogies to "physical takings" can be drawn here. *Andrus* said that the state could take certain property out of the market in order to conserve the wildlife from which the property came; *Irving* said that a landowner could not be deprived of the power to dispose of property at death, in the highly unusual context of Indian tribal land that was subject to extensive existing rules designed to preserve the tribe's autonomy. One or the other case will probably be confined to its facts, but it is by no means clear that it won't be *Irving*.

c. *First English* does raise the stakes for planners who pass unconstitutional regulations, but the history of the case suggests that even the drastic measure of total denial of building permits may be allowed where there is justification. So far as your argument about bureaucratic caution is concerned, you may be right. Anyone who is afraid of potential liability will tend to stop far short of the permissible line, particularly where the line is as fuzzy as it is in the takings area. On the other hand, there is nothing in the case law so far that suggests that a planner acting in good faith who strays over the constitutional line will be personally liable under the Civil Rights Act. The reported cases applying the Civil Rights Act either involve corruption or racial discrimination. As

to your fears about moratoria, the Court did say: "We . . . do not deal with the quite different questions that would arise in the case of . . . changes in zoning ordinances . . . ." The types of moratoria you are talking about are frequently passed in conjunction with proposed zoning changes. I would think that the Court's caveat would apply even more to the situation where the city was seeking ways to expand its services and needed time to do so.

d. *Nollan* may stand for the proposition that regulations of property will be subjected to a kind of intermediate scrutiny for rationality like that to which statutes that discriminate on the basis of gender are subjected. On balance, however, the citations of *Loretto* and *Kaiser Aetna* suggest that we are dealing here with the "peculiar talismanic force" that the Supreme Court attaches to direct physical invasions. If I am wrong about the latter, I am not sure that we are in any different position from that in which most of the state cases have put us. Most of those cases ask that there be a rational nexus between the exaction and the development. Certainly it should not be objectionable under *Nollan* for a city to condition planning permission on the developer's providing streets in the development, sewer hook-ups, water connections, etc. There may be more serious problems with requirements for the dedication of land for parks and schools, but I doubt it. The most controversial exactions under *Nollan* are likely to be the ones that are already most controversial, "linkage" of development permission to the provision of totally unrelated services, like low-income housing outside of the development. As for PUD's, I don't see anything in the opinion that should cast any doubt on the device as a general matter.

e. The notion that there must be some proportionality between what the regulation requires of the landowner and the public benefits to be obtained (*Dolan*) can hardly be objected to as a matter of principle. Whether the Court went too far in this case in shifting the burden to the city is a closer question. Again, much seems to ride on the "peculiar talismanic force" attached to physical invasions.

LUCAS v. SOUTH CAROLINA COASTAL COUNCIL

Supreme Court of the United States
505 U.S. 1003 (1992)

SCALIA, J. In 1986, petitioner David H. Lucas paid $975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes. In 1988, however, the South Carolina Legislature enacted the Beachfront Management Act, S.C. Code § 48–39–250 *et seq*. (Supp. 1990) (Act), which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels. See § 48–39–290(A). A state trial court found that this prohibition rendered Lucas's parcels "valueless." . . . 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." . . .

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 . . . , 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" . . . 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]." [Citation omitted.]

In the late 1970's, Lucas and others began extensive residential development of the Isle of Palms, a barrier island situated eastward of the City of Charleston. Toward the close of the development cycle for one residential subdivision known as "Beachwood East," Lucas in 1986 purchased the two lots at issue in this litigation for his own account. No portion of the lots, which

were located approximately 300 feet from the beach, qualified as a "critical area" under the 1977 Act; accordingly, at the time Lucas acquired these parcels, he was not legally obliged to obtain a permit from the Council in advance of any development activity. His intention with respect to the lots was to do what the owners of the immediately adjacent parcels had already done: erect single-family residences. He commissioned architectural drawings for this purpose.

The Beachfront Management Act brought Lucas's plans to an abrupt end. Under that 1988 legislation, the Council was directed to establish a "baseline" connecting the landward-most "point[s] of erosion . . . during the past forty years" in the region of the Isle of Palms that includes Lucas's lots. [Citation omitted.] 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 [citation omitted]. The Act provided no exceptions. . . .

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. . . . The trial court . . . found that the Beachfront Management Act decreed a permanent ban on construction insofar as Lucas's lots were concerned, and that this prohibition "deprive[d] Lucas of any reasonable economic use of the lots . . . , eliminated the unrestricted right of use, and render[ed] them valueless." . . . The court thus concluded that Lucas's properties had been "taken" by operation of the Act, and it ordered respondent to pay "just compensation" in the amount of $1,232,387.50. . . .

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." [Citation omitted.] 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. [Citation omitted.] The Court ruled that when a regulation respecting the use of property is designed "to prevent serious public harm" . . . , no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value. . . .

As a threshold matter, we must briefly address the Council's suggestion that this case is inappropriate for plenary review. After briefing and argument before the South Carolina Supreme Court, but prior to issuance of that court's opinion, the Beachfront Management Act was amended to authorize the Council, in certain circumstances, to issue "special permits" for the construction or reconstruction of habitable structures seaward of the baseline. [Citation omitted.] According to the Council, this amendment renders Lucas's claim of a permanent deprivation unripe, as Lucas may yet be able to secure permission to build on his property. "[The Court's] cases," we are reminded, "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald*, *Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 351 (1986). [Further citation omitted.] Because petitioner "has not yet obtained a final decision regarding how [he] will be allowed to develop [his] property," *Williamson County Regional Planning Comm'n of Johnson City* v. *Hamilton Bank*, 473 U.S. 172, 190 (1985), the Council argues that he is not yet entitled to definitive adjudication of his takings claim in this Court.

We think these considerations would preclude review had the South Carolina Supreme Court rested its judgment on ripeness grounds, as it was (essentially) invited to do by the Council . . . .

The South Carolina Supreme Court shrugged off the possibility of further administrative and trial proceedings, however, preferring to dispose of Lucas's takings claim on the merits. [Citation omitted.] This unusual disposition does not preclude Lucas from applying for a permit under the 1990 amendment for *future* construction, and challenging, on takings grounds, any denial. But it does preclude, both practically and legally, any takings claim with respect to Lucas's past deprivation, *i.e.*, for his having been denied construction rights during the period before the 1990 amendment. See generally *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304 (1987) (holding that temporary deprivations of use are compensable under the Takings Clause). Without even so much as commenting upon the consequences of the South Carolina Supreme Court's judgment in this respect, the Council insists that permitting Lucas to press his claim of a past deprivation on this appeal would be improper, since "the issues of whether and to what extent [Lucas] has incurred a temporary taking . . . have simply never been addressed." . . . Yet Lucas had no reason to proceed on a "temporary taking" theory at trial, or even to seek remand for that purpose prior to submission of the case to the South Carolina Supreme Court, since as the Act then read, the taking was unconditional and permanent. Moreover, given the breadth of the South Carolina Supreme Court's holding and judgment, Lucas would plainly be unable (absent our intervention now) to obtain further state-court adjudication with respect to the 1988–1990 period.

In these circumstances, we think it would not accord with sound process to insist that Lucas pursue the late-created "special permit" procedure before his takings claim can be considered ripe. Lucas has properly alleged Article III injury-in-fact in this case, with respect to both the pre-1990 and post-1990 constraints placed on the use of his parcels by the Beachfront Management Act.[1] That there is a discretionary "special permit" procedure by which he may regain—for the future, at least—beneficial use of his land goes only to the prudential "ripeness" of Lucas's challenge, and for the reasons discussed we do not think it prudent to apply that prudential requirement here. [Citation omitted.] We leave for decision on remand, of course, the questions left unaddressed by the South Carolina Supreme Court as a consequence of its categorical disposition.[2] . . .

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[1] JUSTICE BLACKMUN insists that this aspect of Lucas's claim is "not justiciable" . . . , because Lucas never fulfilled his obligation under *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), to "submi[t] a plan for development of [his] property" to the proper state authorities. . . . But such a submission would have been pointless, as the Council stipulated below that no building permit would have been issued under the 1988 Act, application or no application. . . . Nor does the peculiar posture of this case mean that we are without Article III jurisdiction, as JUSTICE BLACKMUN apparently believes . . . . Given the South Carolina Supreme Court's dismissive foreclosure of further pleading and adjudication with respect to the pre-1990 component of Lucas's taking claim, it is appropriate for us to address that component as if the case were here on the pleadings alone. Lucas properly alleged injury-in-fact in his complaint . . . (asking "damages for the temporary taking of his property" from the date of the 1988 Act's passage to "such time as this matter is finally resolved"). No more can reasonably be demanded. Cf. *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 312–313 (1987). JUSTICE BLACKMUN finds it "baffling" . . . that we grant standing here, whereas "just a few days ago, in *Lujan* v. *Defenders of Wildlife*, 504 U.S. ___ (1992)," we denied standing. He sees in that strong evidence to support his repeated imputations that the Court "presses" to take this case . . . , is "eager to decide" it . . . , and is unwilling to "be denied" . . . . He has a point: The decisions are indeed very close in time, yet one grants standing and the other denies it. The distinction, however, rests in law rather than chronology. *Lujan*, since it involved the establishment of injury-in-fact at the *summary judgment stage*, required specific facts to be adduced by sworn testimony; had the same challenge to a generalized allegation of injury-in-fact been made at the pleading stage, it would have been unsuccessful.

[2] 2. JUSTICE BLACKMUN states that our "intense interest in Lucas' plight . . . would have been more prudently expressed by vacating the judgment below and remanding for further consideration in light of the

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 [citation omitted], or the functional equivalent of a "practical ouster of [the owner's] possession." [Citations omitted.] 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 disappear[ed]." *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 "engag[e] 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 . . . , even though the facilities occupied at most only 1½ cubic feet of the landlords' property . . . .

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).[3] As we have said on numerous

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1990 amendments" to the Beachfront Management Act. . . . That is a strange suggestion, given that the South Carolina Supreme Court rendered its categorical disposition in this case *after* the Act had been amended, and *after* it had been invited to consider the effect of those amendments on Lucas's case. We have no reason to believe that the justices of the South Carolina Supreme Court are any more desirous of using a narrower ground now than they were then; and neither "prudence" nor any other principle of judicial restraint requires that we remand to find out whether they have changed their mind.

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

JUSTICE BLACKMUN describes that rule (which we do not invent but merely apply today) as "alter[ing] the long-settled rules of review" by foisting on the State "the burden of showing [its] regulation is not a

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).[4]

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). "[F]or what is the land but the profits thereof [?]" 1 E. Coke, Institutes ch. 1, § 1 (1st Am. ed. 1812). Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," *Penn Central Transportation Co.*, 438 U.S., at 124, 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

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taking." . . . This is of course wrong. Lucas had to do more than simply file a lawsuit to establish his constitutional entitlement; he had to show that the Beachfront Management Act denied him economically beneficial use of his land. Our analysis presumes the unconstitutionality of state land-use regulation only in the sense that *any* rule-with-exceptions presumes the invalidity of a law that violates it—for example, the rule generally prohibiting content-based restrictions on speech. See, *e.g.*, *Simon & Schuster*, *Inc.* v. *New York Crime Victims Board*, 502 U.S., (slip op., at 8) (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech"). JUSTICE BLACKMUN'S real quarrel is with the substantive standard of liability we apply in this case, a long-established standard we see no need to repudiate.

[4] 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 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.

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). The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation. [Citations omitted.] 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.[5] . . .

The trial court found Lucas's two beachfront lots to have been rendered valueless by respondent's enforcement of the coastal-zone construction ban.[6] 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. [Citation omitted.] By neglecting to dispute the findings enumerated in the Act or otherwise to challenge the legislature's purposes, petitioner "concede[d] that the beach/dune area of South Carolina's shores is an extremely valuable public resource; that the erection of new construction, *inter alia*, contributes to the erosion and destruction of this public

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[5] JUSTICE STEVENS criticizes the "deprivation of all economically beneficial use" rule as "wholly arbitrary", in that "[the] landowner whose property is diminished in value 95% recovers nothing," while the landowner who suffers a complete elimination of value "recovers the land's full value." . . . This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally. *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (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).

[6] This finding was the premise of the Petition for Certiorari, and since it was not challenged in the Brief in Opposition we decline to entertain the argument in respondent's brief on the merits . . . that the finding was erroneous. Instead, we decide the question presented under the same factual assumptions as did the Supreme Court of South Carolina. See *Oklahoma City* v. *Tuttle*, 471 U.S. 808, 816 (1985).

resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm." [Citation omitted.] 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).

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. . . . 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" . . . . "Harmful or noxious use" analysis was, in other words, simply the progenitor of our more contemporary statements that "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' . . . ." *Nollan*, *supra*, at 834 (quoting *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.[7] [Citations omitted.]

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[7] 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" [citation omitted] 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 § 48–39250(1)(b) (Supp. 1991), in "provid[ing] habitat for numerous species of plants and animals, several of which are threatened or endangered," § 48–39–250(1)(c), and in "provid[ing] a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being." § 48–39–250(1)(d). It would be pointless to make the outcome of this case hang upon this terminology, since the same interests could readily be described in "harm-preventing" fashion.

JUSTICE BLACKMUN, however, apparently insists that we *must* make the outcome hinge (exclusively) upon the South Carolina Legislature's other, "harm-preventing" characterizations, focusing on the declaration that "prohibitions on building in front of the setback line are necessary to protect people and property from storms, high tides, and beach erosion." . . . He says "[n]othing in the record undermines [this] assessment" . . . , 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

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. . . . 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. . . . 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.[8]

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 would essentially nullify *Mahon*'s affirmation of limits to the noncompensable exercise of the police power. Our cases provide no support for this: None of them that employed the logic of "harmful use" prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land. See *Keystone Bituminous Coal Assn.*, 480 U.S., at 513–514 (REHNQUIST, C.J., dissenting).[9]

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.[10]

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permits for new construction in violation of the uniform prohibition, see S.C. Code § 48–39–290(D)(1) (Supp. 1991).

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

[9] *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).

[10] Drawing on our First Amendment jurisprudence [citation omitted], JUSTICE STEVENS would "loo[k] to the generality of a regulation of property" to determine whether compensation is owing. . . . The Beachfront Management Act is general, in his view, because it "regulates the use of the coastline of the entire state." . . . There may be some validity to the principle JUSTICE STEVENS proposes, but it does not properly apply to the present case. The equivalent of a law of general application that inhibits the practice of religion without being aimed at religion [citation omitted], is a law that destroys the value of land without being aimed at land. Perhaps such a law—the generally applicable criminal prohibition on the manufacturing of alcoholic beverages challenged in *Mugler* comes to mind—cannot constitute a compensable taking. See 123 U.S., at 655–656. But a regulation *specifically directed to land use* no more acquires immunity by plundering landowners generally than does a law specifically directed at religious

This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S., at 413. 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.[11]

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.[12]

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practice acquire immunity by prohibiting all religions. JUSTICE STEVENS' approach renders the Takings Clause little more than a particularized restatement of the Equal Protection Clause.

[11] After accusing us of "launch[ing] 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 . . . ("No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation")[)], we decline to do so as well.

[12] 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. [Citations omitted.]

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. . . . 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); [further citation omitted], this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional. When, however, a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.

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 [citation omitted]. 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 . . . ." [Citation omitted.] 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.[13]

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[13] JUSTICE BLACKMUN decries our reliance on background nuisance principles at least in part because he believes those principles to be as manipulable as we find the "harm prevention"/"benefit conferral" dichotomy . . . . There is no doubt some leeway in a court's interpretation of what existing state law permits—but not remotely as much, we think, as in a legislative crafting of the reasons for its confiscatory regulation. We stress that an affirmative decree eliminating all economically beneficial uses may be

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

So ordered.

KENNEDY, J., concurring in the judgment. . . .

The South Carolina Court of Common Pleas found that petitioner's real property has been rendered valueless by the State's regulation. . . . The finding appears to presume that the property has no significant market value or resale potential. This is a curious finding, and I share the reservations of some of my colleagues about a finding that a beach front lot loses all value because of a development restriction. . . . While the Supreme Court of South Carolina on remand need not consider the case subject to this constraint, we must accept the finding as entered below. See *Oklahoma City* v. *Tuttle*, 471 U.S. 808, 816 (1985). Accepting the finding as entered, it follows that petitioner is entitled to invoke the line of cases discussing regulations that deprive real property of all economic value. See *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980).

The finding of no value must be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979); *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978); [futher citation omitted]. The Takings Clause, while conferring substantial protection on property owners, does not eliminate the police power of the State to enact limitations on the use of their property. *Mugler* v. *Kansas*, 123 U.S. 623, 669 (1887). The rights conferred by the Takings Clause and the police power of the State may coexist without conflict. Property is bought and sold, investments are made, subject to the State's power to regulate. Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations.

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

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

The Supreme Court of South Carolina erred, in my view, by reciting the general purposes for which the state regulations were enacted without a determination that they were in accord with

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defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.

the owner's reasonable expectations and therefore sufficient to support a severe restriction on specific parcels of property. [Citation omitted.] The promotion of tourism, for instance, ought not to suffice to deprive specific property of all value without a corresponding duty to compensate. Furthermore, the means as well as the ends of regulation must accord with the owner's reasonable expectations. Here, the State did not act until after the property had been zoned for individual lot development and most other parcels had been improved, throwing the whole burden of the regulation on the remaining lots. This too must be measured in the balance. See *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 416 (1922).

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

BLACKMUN, J., dissenting. Today the Court launches a missile to kill a mouse. . . .

[Justice Blackmun adds the following to the Court's recital of the facts and legislative background of the case:]

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.[1] 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. . . .

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 "protect[ing] 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) . . . .

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

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). . . .

My disagreement with the Court begins with its decision to review this case. This Court has held consistently that a land-use challenge is not ripe for review until there is a final decision about what uses of the property will be permitted. The ripeness requirement is not simply a gesture of good-will to land-use planners. In the absence of "a final and authoritative determination of the type and intensity of development legally permitted on the subject property," *MacDonald*, *Sommer & Frates* v. *Yolo County*, 477 U.S. 340, 348 (1986), and the utilization of state procedures for just compensation, there is no final judgment, and in the absence of a final judgment there is no jurisdiction. See *San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S. 621, 633 (1981); *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980).

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

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

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

That petitioner's property fell within the critical area as initially interpreted by the Council does not excuse petitioner's failure to challenge the Act's application to his property in the administrative process. The claim is not ripe until petitioner seeks a variance from that status. "[W]e have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking." *United States* v. *Riverside Bayview Homes*, *Inc.*, 474 U.S. 121, 126 (1985). See also *Williamson County*, 473 U.S., at 188 (claim not ripe because respondent did not seek variances that would have allowed it to develop the property, notwithstanding the Commission's finding that the plan did not comply with the zoning ordinance and subdivision regulations).[2]

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[2] Even more baffling, given its decision, just a few days ago, in *Lujan* v. *Defenders of Wildlife*, ___ U.S. ___ (1992), the Court decides petitioner has demonstrated injury in fact. In his complaint, petitioner made no allegations that he had any definite plans for using his property. . . . At trial, Lucas testified that he had

Even if I agreed with the Court that there were no jurisdictional barriers to deciding this case, I still would not try to decide it. The Court creates its new taking jurisprudence based on the trial court's finding that the property had lost all economic value. This finding is almost certainly erroneous. Petitioner still can enjoy other attributes of ownership, such as the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979). Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer. State courts frequently have recognized that land has economic value where the only residual economic uses are recreation or camping. [Citations omitted.] Petitioner also retains the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house.

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

Clearly, the Court was eager to decide this case.[3] But eagerness, in the absence of proper jurisdiction, must—and in this case should have been—met with restraint. . . .

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

The South Carolina Supreme Court's decision to defer to legislative judgments in the absence of a challenge from petitioner comports with one of this Court's oldest maxims: "the existence of facts supporting the legislative judgment is to be presumed." *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 (1938). . . .

The Court does not reject the South Carolina Supreme Court's decision simply on the basis of its disbelief and distrust of the legislature's findings. It also takes the opportunity to create a new scheme for regulations that eliminate all economic value. From now on, there is a categorical rule

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house plans drawn up, but that he was "in no hurry" to build "because the lot was appreciating in value." . . . The trial court made no findings of fact that Lucas had any plans to use the property from 1988 to 1990. "'[S]ome day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." [*Lujan*, *supra*.] The Court circumvents *Defenders of Wildlife* by deciding to resolve this case as if it arrived on the pleadings alone. But it did not. Lucas had a full trial on his claim for "damages for the temporary taking of his property from the date of the 1988 Act's passage to such time as this matter is finally resolved" . . . and failed to demonstrate any immediate concrete plans to build or sell.

[3] The Court overlooks the lack of a ripe and justiciable claim apparently out of concern that in the absence of its intervention Lucas will be unable to obtain further adjudication of his temporary-taking claim. . . . Whatever the explanation for the Court's intense interest in Lucas' plight when ordinarily we are more cautious in granting discretionary review, the concern would have been more prudently expressed by vacating the judgment below and remanding for further consideration in light of the 1990 amendments. At that point, petitioner could have brought a temporary-taking claim in the state courts.

finding these regulations to be a taking unless the use they prohibit is a background common-law nuisance or property principle. . . .

This Court repeatedly has recognized the ability of government, in certain circumstances, to regulate property without compensation no matter how adverse the financial effect on the owner may be. More than a century ago, the Court explicitly upheld the right of States to prohibit uses of property injurious to public health, safety, or welfare without paying compensation: "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property." *Mugler* v. *Kansas*, 123 U.S. 623, 668–669 (1887). On this basis, the Court upheld an ordinance effectively prohibiting operation of a previously lawful brewery, although the "establishments will become of no value as property." [Citation omitted.]

Mugler was only the beginning in a long line of cases. . . . In *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915), the Court upheld an ordinance prohibiting a brickyard, although the owner had made excavations on the land that prevented it from being utilized for any purpose but a brickyard. *Id.*, at 405. In *Miller* v. *Schoene*, 276 U.S. 272 (1928), the Court held that the Fifth Amendment did not require Virginia to pay compensation to the owner of cedar trees ordered destroyed to prevent a disease from spreading to nearby apple orchards. The "preferment of [the public interest] over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." *Id*., at 280. . . .

More recently, in *Goldblatt*, the Court upheld a town regulation that barred continued operation of an existing sand and gravel operation in order to protect public safety. 369 U.S., at 596. "Although a comparison of values before and after is relevant," the Court stated, "it is by no means conclusive."[4] *Id*., at 594. In 1978, the Court declared that "in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulation that destroyed . . . recognized real property interests." *Penn Central Transp. Co*., 438 U.S., at 125. In *First Lutheran Church* v. *Los Angeles County*, 482 U.S. 304 (1987), the owner alleged that a floodplain ordinance had deprived it of "all use" of the property. *Id.*, at 312. The Court remanded the case for consideration whether, even if the ordinance denied the owner all use, it could be justified as a safety measure.[5] *Id.*, at 313. And in *Keystone Bituminous Coal*, the Court summarized over 100 years of precedent: "the Court has repeatedly upheld regulations that destroy or adversely affect real property interests."[6] 480 U.S., at 489, n. 18. . . .

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[4] That same year, an appeal came to the Court asking "[w]hether zoning ordinances which altogether destroy the worth of valuable land by prohibiting the only economic use of which it is capable effect a taking of real property without compensation." . . . The Court dismissed the appeal for lack of a substantial federal question. *Consolidated Rock Products Co.* v. *Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, appeal dism'd, 371 U.S. 36 (1962).

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

[6] The Court's suggestion that *Agins* v. *Tiburon*, 447 U.S. 255 (1980), a unanimous opinion, created a new *per se* rule, only now discovered, is unpersuasive. In *Agins*, the Court stated that "no precise rule determines when property has been taken" but instead that "the question necessarily requires a weighing of public and private interest." *Id.*, at 260–262. The other cases cited by the Court . . . repeat the *Agins* sentence, but in no way suggest that the public interest is irrelevant if total value has been taken. The Court has indicated that proof that a regulation does *not* deny an owner economic use of his property is sufficient to defeat a facial taking challenge. See *Hodel* v. *Virginia Surface Mining & Reclamation Assn.*, *Inc*., 452

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

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

Until today, the Court explicitly had rejected the contention that the government's power to act without paying compensation turns on whether the prohibited activity is a common-law nuisance. The brewery closed in *Mugler* itself was not a common-law nuisance, and the Court specifically stated that it was the role of the legislature to determine what measures would be appropriate for the protection of public health and safety. See 123 U.S., at 661. In upholding the state action in *Miller*, the Court found it unnecessary to "weigh with nicety the question whether the infected cedars constitute a nuisance according to common law; or whether they may be so declared by statute." 276 U.S., at 280. See also *Goldblatt*, 369 U.S., at 593; *Hadacheck*, 239 U.S., at 411. Instead the Court has relied in the past, as the South Carolina Court has done here, on legislative judgments of what constitutes a harm.

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

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

U.S. 264, 295–297 (1981). But the conclusion that a regulation is not on its face a taking because it allows the landowner some economic use of property is a far cry from the proposition that *denial* of such use is sufficient to establish a taking claim regardless of any other consideration. The Court never has accepted the latter proposition. The Court relies today on dicta in *Agins*, *Hodel*, *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987), and *Keystone Bituminous Coal* v. *DeBenedictis*, 480 U.S. 470 (1987), for its new categorical rule. . . . I prefer to rely on the directly contrary holdings in cases such as *Mugler* and *Hadacheck*, not to mention contrary statements in the very cases on which the Court relies. See *Agins*, 447 U.S., at 260–262; *Keystone Bituminous Coal*, 480 U.S., at 489 n. 18, 491–492.

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

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

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

> "The colonists . . . inherited . . . a concept of property which permitted extensive regulation of the use of that property for the public benefit—regulation that could even go so far as to deny all productive use of the property to the owner if, as Coke himself stated, the regulation 'extends to the public benefit . . . for this is for the public, and every one hath benefit by it.'"
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> F. Bosselman, D. Callies & J. Banta, The Taking Issue 80–81 (1973) . . . .

Even into the 19th century, state governments often felt free to take property for roads and other public projects without paying compensation to the owners. . . . [Further historical discussion omitted.] . . .

In short, I find no clear and accepted "historical compact" or "understanding of our citizens" justifying the Court's new taking doctrine. Instead, the Court seems to treat history as a grab-bag of principles, to be adopted where they support the Court's theory, and ignored where they do not. If the Court decided that the early common law provides the background principles for interpreting the Taking Clause, then regulation, as opposed to physical confiscation, would not be compensable. If the Court decided that the law of a later period provides the background principles, then regulation might be compensable, but the Court would have to confront the fact that legislatures regularly determined which uses were prohibited, independent of the common law, and independent of whether the uses were lawful when the owner purchased. What makes the Court's analysis unworkable is its attempt to package the law of two incompatible eras and peddle it as historical fact.[7] . . .

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

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

I dissent.

STEVENS, J., dissenting. . . .

In addition to lacking support in past decisions, the Court's new ["categorical"] rule is wholly arbitrary. A landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value. . . .

Moreover, because of the elastic nature of property rights, the Court's new rule will also prove unsound in practice. In response to the rule, courts may define "property" broadly and only rarely find regulations to effect total takings. . . .

On the other hand, developers and investors may market specialized estates to take advantage of the Court's new rule. The smaller the estate, the more likely that a regulatory change will effect a total taking. Thus, an investor may, for example, purchase the right to build a multi-family home on a specific lot, with the result that a zoning regulation that allows only single-family homes would render the investor's property interest "valueless."[1] In short, the categorical rule will likely have one of two effects: Either courts will alter the definition of the "denominator" in the takings "fraction," rendering the Court's categorical rule meaningless, or investors will manipulate the relevant property interests, giving the Court's rule sweeping effect. To my mind, neither of these results is desirable or appropriate, and both are distortions of our takings jurisprudence. . . .

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

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

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

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[1] This unfortunate possibility is created by the Court's subtle revision of the "total regulatory takings" dicta. In past decisions, we have stated that a regulation effects a taking if it "denies an owner economically viable use of his *land*," *Agins* v. *Tiburon*, 447 U.S., 255, 260 (1980) (emphasis added), indicating that this "total takings" test did not apply to other estates. Today, however, the Court suggests that a regulation may effect a total taking of *any* real property interest. . . .

> The Court's holding today effectively freezes the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property. . . .

Arresting the development of the common law is not only a departure from our prior decisions; it is also profoundly unwise. The human condition is one of constant learning and evolution—both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners. Thus, when the Nation came to understand that slavery was morally wrong and mandated the emancipation of all slaves, it, in effect, redefined "property." On a lesser scale, our ongoing self-education produces similar changes in the rights of property owners: New appreciation of the significance of endangered species, see, *e.g.*, *Andrus* v. *Allard*, 444 U.S. 51 (1979); the importance of wetlands, see, *e.g.*, 16 U.S.C. § 3801 *et seq*.; and the vulnerability of coastal lands, see, *e.g.*, 16 U.S.C. § 1451 *et seq*., shapes our evolving understandings of property rights.

Of course, some legislative redefinitions of property will effect a taking and must be compensated—but it certainly cannot be the case that every movement away from common law does so. There is no reason, and less sense, in such an absolute rule. We live in a world in which changes in the economy and the environment occur with increasing frequency and importance. If it was wise a century ago to allow Government "'the largest legislative discretion'" to deal with "'the special exigencies of the moment,'" *Mugler*, 123 U.S., at 669, it is imperative to do so today. The rule that should govern a decision in a case of this kind should focus on the future, not the past.[2]. . .

Accordingly, I respectfully dissent.

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

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

Because the questionable conclusion of total deprivation cannot be reviewed, the Court is precluded from attempting to clarify the concept of total (and, in the Court's view, categorically compensable) taking on which it rests, a concept which the Court describes . . . as so uncertain under existing law as to have fostered inconsistent pronouncements by the Court itself. Because that concept is left uncertain, so is the significance of the exceptions to the compensation

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

requirement that the Court proceeds to recognize. This alone is enough to show that there is little utility in attempting to deal with this case on the merits.

The imprudence of proceeding to the merits in spite of these unpromising circumstances is underscored by the fact that, in doing so, the Court cannot help but assume something about the scope of the uncertain concept of total deprivation, even when it is barred from explicating total deprivation directly. Thus, when the Court concludes that the application of nuisance law provides an exception to the general rule that complete denial of economically beneficial use of property amounts to a compensable taking, the Court will be understood to suggest (if it does not assume) that there are in fact circumstances in which state-law nuisance abatement may amount to a denial of all beneficial land use as that concept is to be employed in our takings jurisprudence under the Fifth and Fourteenth Amendments. The nature of nuisance law, however, indicates that application of a regulation defensible on grounds of nuisance prevention or abatement will quite probably not amount to a complete deprivation in fact. The nuisance enquiry focuses on conduct, not on the character of the property on which that conduct is performed [citations omitted], and the remedies for such conduct usually leave the property owner with other reasonable uses of his property [citations omitted]. Indeed, it is difficult to imagine property that can be used only to create a nuisance, such that its sole economic value must presuppose the right to occupy it for such seriously noxious activity.

The upshot is that the issue of what constitutes a total deprivation is being addressed by indirection, and with uncertain results, in the Court's treatment of defenses to compensation claims. While the issue of what constitutes total deprivation deserves the Court's attention, as does the relationship between nuisance abatement and such total deprivation, the Court should confront these matters directly. Because it can neither do so in this case, nor skip over those preliminary issues and deal independently with defenses to the Court's categorical compensation rule, the Court should dismiss the instant writ and await an opportunity to face the total deprivation question squarely. Under these circumstances, I believe it proper for me to vote to dismiss the writ, despite the Court's contrary preference. [Citations omitted.]

Note

In the same term in which it decided *Lucas*, the Court held in Yee v. City of Escondido, 503 U.S. 519 (1992), that the plaintiff had no valid claim of a physical taking, where the city had fixed the rental rates for mobile home pads at below the market rate and the state had made it diffcult—the plaintiff claimed virtually impossible—to evict such tenants, even when the tenant had sold his mobile home to someone else. In doing this the Court disapproved the rulings to the contrary of two federal circuit courts of appeal and affirmed the holding of the California Court of Appeal. The Court was at pains, however, to point out that the plaintiff might have a valid claim of regulatory taking, but did not consider this claim because it had not been raised in the petition for certiorari. The judgment was unanimous. Justices Blackmun and Souter concurred, both, in different ways, refusing to join in the Court's statements about regulatory takings.