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Confiscation: A Rationale of the Law of Takings

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I. INTRODUCTION

The takings provision of the Fifth Amendment is succinct: "nor shall private property be taken for public use, without just compensation." As viewed by the Supreme Court, the constitutional guarantee "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." But this characterization is more a question than an answer. Under what circumstances can it be said that fairness and justice require that a particular burden "be borne by the public as a whole?"

As originally conceived, the takings provision was intended to prevent military commanders from seizing civilian properties without providing compensation, and to compel payment when private lands were taken for public projects such as roads. But as society has become more complex, so has the takings problem. In recent years, a deluge of judicial decisions and scholarly literature has inquired: When does government action so adversely affect private property as to constitute a taking, thereby triggering the constitutional requirement of just compensation? The answer seems as elusive as ever. Some approaches, characteristic of many decisions and some scholarly discussions, treat each case as a discrete phenomenon, bringing to bear a seemingly inexhaustible supply...

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1. U.S. CONST. amend. V. The provision is applicable to the states as a result of incorporation into the Fourteenth Amendment. Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226, 241 (1897). The concept of "takings" does not normally encompass isolated incidents of harm for which redress in tort is the usual remedy. See Keokuk & Hamilton Bridge Co. v. United States, 260 U.S. 125, 127 (1922) (damage from blasting); Kirk v. United States, 451 F.2d 690, 694 (10th Cir. 1971) (damage from sonic boom), cert. denied, 406 U.S. 963 (1972); see also In re Chicago, M., St. P. & P.R.R., 799 F.2d 317, 325-26 (7th Cir. 1986), cert. denied, 481 U.S. 1068 (1987).


3. Id.

of "factors" to support a conclusion one way or the other. The opposing view, more common in the scholarly literature, is to identify a particular feature as decisive, seeking to resolve all disputes by recourse to a single criterion.

Neither approach implements the constitutional provision in a sensible manner, and neither has been productive in yielding a workable methodology for dealing with the multifarious problems posed. This Article identifies three objectives intended to be advanced by the just compensation provision and analyzes takings problems in light of these objectives. Part II identifies and discusses the pertinent objectives. Part III discusses the role of just compensation in protecting an owner's possessory interest from physical interference by the government. Part IV considers the circumstances in which government regulation of real property may be found to be a taking. Part V addresses the same question in the context of personal property and financial liabilities. Part VI discusses rent control as a taking. Part VII provides a brief summation.

II. THE OBJECTIVES OF JUST COMPENSATION

The requirement of just compensation serves three purposes: (1) It alleviates insecurity among owners of private property; if their property is taken by the government, they will be compensated; (2) it provides a normative structure supportive of individual endeavor and private investment; absent the threat of confiscation, more effort will be devoted to productive undertakings and more investments will be made; and (3) it imposes a measure of discipline upon those exercising governmental authority; if they require private property for a public undertaking, they

5. See, e.g., Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-28, 135-38 (1978). The Court in Penn Central relied in part on Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165 (1967) [hereinafter Michelman, Property]. Penn Central, 438 U.S. at 128. The Michelman approach, while more sharply focused than the Court's opinion, employs concepts that are themselves quite diffuse. See, for example, the definition of "demoralization costs." Id. at 1214. In a more recent article, Michelman moves more explicitly toward a balancing approach sensitive to specific situations. See Frank I. Michelman, Takings, 1987, 88 COLUM. L. REV. 1600, 1625-29 (1988) [hereinafter Michelman, Takings].

must obtain public funds to pay for the property.\textsuperscript{7}

\textit{A. The Alleviation of Insecurity}

The takings provision appears in the Bill of Rights, intended to protect individuals against the predations of the state.\textsuperscript{8} The First Amendment precludes government persecution of persons voicing unpopular ideas or practicing unpopular religions;\textsuperscript{9} the Third Amendment guards households against the quartering of soldiers in time of peace;\textsuperscript{10} the Fourth Amendment prohibits unreasonable searches and seizures;\textsuperscript{11} the Fifth Amendment, in addition to the takings clause, protects persons against deprivations of life, liberty, and property without due process of law;\textsuperscript{12} the Fifth Amendment, and the Sixth and Eighth Amendments,\textsuperscript{13} erect a series of safeguards to protect persons against irregular procedures and oppressive impositions in the prosecution and punishment of crimes.\textsuperscript{14} In this series of interrelated measures, the Bill of Rights extends to the public a measure of assurance against the perils of a powerful and potentially tyrannical state.\textsuperscript{15}

\textsuperscript{7} For a similar tripartite approach to the problem, see Susan Rose-Ackerman, \textit{Against Ad Hocery: A Comment on Michelman}, 88 COLUM. L. REV. 1697, 1702-07 (1988) [hereinafter Rose-Ackerman, \textit{Ad Hocery}]. Her development of the three issues differs significantly from the approach taken in this Article. A revised version of Rose-Ackerman's article appears as \textit{Regulatory Takings: Policy Analysis and Democratic Principles}, in \textit{TAKING PROPERTY AND JUST COMPENSATION} 25-44 (Nicholas Mercuro ed., 1992).


\textsuperscript{9} U.S. CONST. amend. I. Protection of free expression provides a check, not only on government oppression, but on government indifference as well. For example, free speech is one of society’s most effective safeguards against famine. \textit{See JEAN DREZÉ & AMARTYA SEN, HUNGER AND PUBLIC ACTION} 212, 263-64 (1989).

\textsuperscript{10} U.S. CONST. amend. III.

\textsuperscript{11} Id. amend. IV.

\textsuperscript{12} Id. amend. V.

\textsuperscript{13} Id. amends. V, VI, VIII.

\textsuperscript{14} See also id. art. I, § 9 (prohibiting bills of attainder and ex post facto laws and limiting suspension of the writ of habeas corpus); id. art. I, § 10 (prohibiting impairment of contracts by the States).

\textsuperscript{15} The predecessors of the takings provision of the Fifth Amendment, the Vermont Constitution of 1777, the Massachusetts Constitution of 1780, and the Northwest Ordinance of 1787, were responses to particularized threats of legislative interference with property holdings. \textit{See Treanor I, supra} note 4, at 702-04, 706-08; \textit{see also} Thompson, \textit{supra} note 4, at 1458-59, 1461-62, 1483. The general colonial practice was to provide compensation for government appropriations of land. \textit{See James W. Ely, Jr. “That due satisfaction may be made:” the Fifth Amendment and the Origins of the Compensation Principle}, 36 AM. J. LEGAL Hist. 1, 4-15 (1992) (discussing colonial and post-revolutionary practices). But undeveloped lands were sometimes acquired for roads, without explicit compensation, under a variety of theories. \textit{See id.} at 7-12; MORTON J. HORWITZ, \textit{THE TRANSFORMATION OF AMERICAN LAW 1780-1860}, at 63-64, 289 n.4 (1977); FORREST MCDONALD,
Owners of property are typically risk-averse. A thriving insurance industry attests to the efforts of owners to avoid risks, particularly risks of a catastrophic nature such as fires, explosions, and the like. But private insurance is unavailable to protect owners against the possibility of government confiscation. The just compensation requirement provides insurance against that risk.

As an insurance device, just compensation is admittedly imperfect. It provides less than the full protection because: (1) compensation is limited to the market value of the property taken and excludes idiosyncratic losses to the owner of the property; and (2) compensation does not include the costs of litigating about the taking or the costs of relocation subsequent to the taking. Moreover, if adverse governmental action stops short of a taking, no compensation is payable despite substantial economic loss.

Some argue that the insurance provided by just compensation is unnecessary in many cases. If a property owner is large enough, it can self-insure by diversifying its holdings so that only a small portion will

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be vulnerable in any discrete case. But diversification is not available to many owners, and even large diversified companies apparently are averse to at least some risks; they do not uniformly abjure all forms of insurance.

The insurance aspect of the just compensation requirement is of particular importance in protecting small property holders against substantial losses inflicted by government. However, as subsequent discussions will show, the role of insurance is influenced more by the nature of the risk than by the size or character of the claimant.

B. The Promotion of Economic Development

The prosperity of a society depends ultimately on work, savings, and investment. Without a social ethic that encourages such behavior, a society cannot hope to escape from poverty. The Constitution was written against a background of economic turmoil and stands as a commitment to economic progress. Congress is empowered to regulate interstate and foreign commerce; to establish a currency; to provide uniform laws on bankruptcy; to build post offices and post roads; and to issue patents and copyrights for the express purpose of promoting growth.
science and the useful arts. Further, the institution of "property," doubly protected by the Fifth Amendment, is a critical means of mobilizing human energies to productive purposes. Accordingly, the takings provision may properly be viewed as a means of encouraging work, saving, and investment by providing security for the fruits of economic endeavors.

Yet some argue that the just compensation clause provides too much security. Owners of property, not properly discounting for the risk of a government taking, invest too much. The argument in its broadest form is unpersuasive. As previously noted, just compensation is not full compensation; an investor almost always absorbs some loss in the event

27. Id. cl. 8.
28. John Locke recognized that human industry was spurred by the rewards of property. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, ch. V, §§ 34, 41-43, pp. 21-22, 26-27 (Macpherson ed., 1980). He advocated strict limits on government interference with property rights. Id. at ch. XI, §§ 138-140, pp. 73-74. See also, C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM 211-14 (1962) (discussing Locke’s views on property and economic progress). David Hume emphasized the role of property in providing a stable environment for economic activity. See DAVID HUME, A TREATISE OF HUMAN NATURE, book III, part II, § II, pp. 484-501 (L.A. Selby-Bigge ed., 2d ed. 1978). Locke and Hume were among the political theorists most widely known and cited by the framers of the Constitution. See McDonald, supra note 15, at 1, 7, 59-66, 132-34, 144-45, 162-65. To be sure, the ideas of Locke and Hume were part of a broader intellectual debate that also encompassed “republican” emphasis on majoritarian decision-making. See Treanor II, supra note 4, at 819-25. But that debate did not preclude adoption of a Takings Clause protective of property.
29. See, e.g., Michelman, Property, supra note 5, at 1210-15, 1239; Rose-Ackerman, Ad Hocery, supra note 7, at 1700-01. For most of the Revolutionary War, New York City was occupied by the British. It had many British and Loyalist merchants. If they could have expected fair treatment after the British evacuation, they might have remained and facilitated an orderly return to peacetime commercial prosperity. But persecutions of Loyalists upstate, coupled with a huge direct property tax on persons who had remained in New York City during the British occupation, caused these merchants to flee, leaving the city’s economy “a shamble.” See McDonald, supra note 21, at 39. The takings clause should be viewed as consistent with the main themes of the original Constitution since, unlike other provisions of the Bill of Rights, it emanated from the same source. No state convention requested a takings clause. It was formulated by James Madison and adopted without dispute. See JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 55 (1992). The relationship between the protection of property and the furtherance of economic prosperity continues to this day. See GERALD W. SCULLY, CONSTITUTIONAL ENVIRONMENTS AND ECONOMIC GROWTH 4-6, 119, 122-25, 174-79 (1992).

For critiques of this position, see Farber, supra note 17, at 295-96; Fischel & Shapiro, supra note 16, at 277-86; Knetsch & Borcherding, supra note 18, at 243. For an evaluation of the opposing positions, see Schill, supra note 4, at 851-56.
of a taking. More importantly, the United States is not laboring under a burden of excessive investment. Simply stated, there is too little housing, not too much; too few productive facilities, not too many. Investments are required to alleviate the plights of the homeless and ill-housed, the unemployed and the underemployed. The imposition of an across-the-board risk of uncompensated confiscation poses a needless impediment to socially productive investments.

In particular cases, measures should be taken by owners of property to guard against investments that will prove worthless in the event of hostile public action. But decisions on whether to take for a public use are made by government officials not private investors; the government should bear the principal burden of precluding inefficient private investments. It controls the timing and placement of public acquisitions and it can use a variety of institutional measures to limit inappropriate private investments. For example, it can acquire property in anticipation of future needs, or it can impose a moratorium on particular forms of private development (itself a “taking,” but a less costly one). In most cases, the government is the least cost avoider.

Viewing the just compensation clause in the context of economic development, particular care must be taken to guard against undermining investments made in the course of such development—e.g., socially productive investments in farms, factories, mines, housing. Investments

31. From 1980 to 1993, the United States population increased by 30.5 million, more than 2.3 million persons per year. U.S. Dept. of Commerce, Statistical Abstract of the United States, 1994 at 8 (Table 2). During the same period, gross domestic product and gross domestic private investment increased at a more rapid rate. Id. at 446 (Table 684), 454 (Table 696). But key indices depict a pattern of stagnation in the U.S. economy: the nation’s unemployment rate remained at 6.7% (it was 7.0% in 1980), id. at 395 (Table 614); real hourly compensation showed little change (99.5 in 1980, 107.4 in 1993), id. at 426 (Table 658); the percent of the population in poverty increased from 13.0% to 14.5%, id. at 475 (Table 727); and starts of new privately owned housing units were 1.3 million in both years, id. at 730 (Table 1203). For discussions of housing availability, see William C. Apgar Jr., Rental Housing in the United States 14-41 (Joint Center for Housing Studies of Harvard University Working Paper W88-1, 1988); Timothy S. Grall, Households at Risk: Their Housing Situation 13-15 (Current Housing Reports H121/94-2) (1994); Joint Center for Housing Studies of Harvard University, The State of the Nation’s Housing, 1990 at 20-24 (1990).

32. See, e.g., the discussion of “coming to the nuisance,” infra notes 143-44.

33. See, e.g., William F. Baxter & Lillian R. Altree, Legal Aspects of Airport Noise, 15 J.L. & Econ. 1, 9 (1972) (suggesting an approach to govern compensation for noise from airport operations). The proposal "(1) requires that the airport developer file a public declaration of intention to construct the airport; (2) classifies investments made prior to the declaration as pre-existing uses [eligible for compensation]; (3) classifies investments made after the declaration as subsequent uses ineligible for compensation." The proposal has numerous additional refinements, not necessary to pursue for present purposes. Id. at 9.
in undeveloped land may be less worthy of protection, but the potential for future development should not be ignored.  

C. The Quest for Fiscal Responsibility

There is general agreement that governments should act to advance social welfare; in short, gains from government programs should exceed the losses such programs inflict. One way to advance that objective is to require that winners compensate losers. If such compensation is not possible—if losses exceed gains—then the program should not be undertaken. It impoverishes society and does not advance the general welfare. The requirement of just compensation imposes a restraint on at least some governmental inefficiencies, making projects unattractive if reimbursement of private losses is greater than expected gains to the public.  

To this generalization, two qualifications are important. First, in some cases gains may exceed losses, but it may be impracticable to ascertain all of the gains and losses with the specificity needed to impose charges on winners in order to compensate losers. Or the administrative expense of so doing may be too high. Second, some government programs are intended to redistribute wealth and may not, in the short run at least, show any net gains. There is no objection in principle to

34. The distinction between developed and undeveloped land, while finding support in both theory and practice, may have deleterious side-effects in encouraging anticipatory investment; owners of undeveloped property may build sooner rather than later in order to avoid possible future changes in the regulatory regime. See, e.g., William A. Fischel, Introduction: Utilitarian Balancing and Formalism in Takings, 88 COLUM. L. REV. 1581, 1595 n.67 (1988). This problem can be reduced by timely use of the technique described supra note 33. See also Robin P. Malloy, A Classical Liberal Critique of Takings Law: A Struggle Between Individualist and Communitarian Norms, in TAKING PROPERTY AND JUST COMPENSATION, supra note 7, at 199, 210-11.


For a critical evaluation of the government constraint theory, see Farber, supra note 17, at 287-94. But Farber concludes that the just compensation provision does restrict at least some inappropriate governmental actions. See id. at 296-99. See also Merrill, supra note 17, at 1583-84; Rose-Ackerman, Ad Hocery, supra note 7, at 1706-07.

For a more radical critique, see Thompson, supra note 4, at 1489-90, 1502-06. Thompson argues that just compensation may be evaded without impropriety when some imperfection in the political process would preclude a desirable government measure if compensation is required. The argument appears to be inconsistent with any conception of responsible democratic government.

36. See Jones, supra note 8, at 571-75.
redistributive programs; but if that is the goal, a rational and effective program requires that the burden of redistribution be broadly based, as in taxying and spending measures. Imposing the burden on a narrow segment of the population is often ineffective because the resources available for the redistributive purpose are too limited. Moreover, unless the public, acting through the political process, is prepared to devote the necessary public resources to the redistributive program, the question of public support for the program is never put to the test in a meaningful manner.\(^{37}\)

In a number of its provisions, the Constitution stands as an affirmation of fiscal responsibility, responding to the antecedent irresponsibility of the states.\(^ {38}\) In particular, the Constitution bars the states from issuing currency or bills of credit.\(^ {39}\) At the same time, the Constitution responds to the need for revenue to support the credit and pay the debts of the central government:\(^ {40}\) Congress has the power to tax and borrow money; but it has the commensurate responsibility to pay the country's debts; the Constitution expressly acknowledges and pledges repayment of all antecedent debts.\(^ {41}\) A fair implication is that the government will meet its fiscal obligations by taxation or borrowing, not by selective seizures of private property.\(^ {42}\) The Just Compensation provision makes the implication explicit.

In general, government programs should be found to require just compensation when two conditions are met: (1) gains and losses can be

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\(^{37}\) The position asserted is rooted in concerns about the political process. Redistribution of wealth is an appropriate, and probably indispensable, governmental function. But it is unusually susceptible to abuse. By requiring that significant redistributions flow through the taxing and spending process, publicity and political accountability are increased, reducing the prospect of abuses such as favoritism and exploitation. The rationale is essentially the same as the one underlying the appropriation process governing compensation of public officers. They must pursue the same channels as programs pertaining to redistribution; they cannot simply help themselves from the public treasury. See Ulen, \textit{supra} note 18, at 164-66.\(^ {38}\) See \textit{JENSEN, supra} note 23, at 310-26; \textit{THE FEDERALIST, supra} note 23, No. 10, at 23, No. 44, at 127 (James Madison).\(^ {39}\) \textit{U.S. CONST.} art I, § 10.\(^ {40}\) This was one of the central problems sought to be resolved by the new Constitution. See \textit{THE FEDERALIST, supra} note 23, No. 15, at 29-30 (Alexander Hamilton); \textit{JENSEN, supra} note 23, at 383-98, 407-20; \textit{MCALGHUN, supra} note 23, at 48-58; \textit{RICHARD B. MORRIS, THE FORGING OF THE UNION 1781-1789,} at 284 (1987).\(^ {41}\) \textit{U.S. CONST.} art. I, § 8, cl. 1.\(^ {42}\) The implication could hardly be otherwise given the high priority accorded to the protection of property by leaders in the colonies and in post-Revolutionary America, including the Founding Fathers. See \textit{MCDONALD, supra} note 15, at 1-4, 12-13, 152-54, 270; \textit{Ely, supra} note 15, at 17-18. On the propriety of reading the takings clause in the context of the main themes of the original Constitution, see \textit{supra} note 29.
identified with enough specificity to say that particular persons are being saddled with disproportionately large losses—disproportionate to any gains they may expect to derive from the program at issue and disproportionate to the losses being imposed on others in the community; and (2) it is practicable as an administrative matter to fund the program from the public treasury. The absence of public funding signals the absence of fiscally responsible support for the program. By contrast, the impracticability of measuring specific gains and losses or of making appropriate collections and payments is a good reason for holding that a government program does not constitute a taking.  

D. A Digression on Exploitation, Factionalism, and Rent Seeking

The just compensation requirement may be viewed as a bar to exploitation and factionalism. This position is consistent with the constitutional guarantee and finds support in the general constitutional scheme. But this perspective provides no incremental insight in analyzing particular taking cases.

The danger of exploitation is met by the insurance objective of just compensation. If compensation is mandated for all persons facing similar deprivations of property, opportunities for exploitation are significantly curtailed. The vulnerable minorities that might be victimized by confiscatory measures are protected as a subset of a larger population of insured entities.

Concerns about factionalism are met by the objective of fiscal responsibility. Absent the compensation required by that objective, factions might press for gains at the expense of other members of the community. The requirement of compensation makes such aggrandize-

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43. A similar approach is articulated in Michelman's conclusion that "compensation is due whenever demoralization costs exceed settlement costs, and not otherwise." Michelman, Property, supra note 5, at 1215.

44. On exploitation, factionalism, and rent seeking, see Fischel & Shapiro, supra note 16, at 281-83; Merrill, supra note 17, at 1577-79, 1586-89; Michelman, Property, supra note 5, at 1214-17; Schill, supra note 4, at 861-65.

For a particularized version, targeting suburban exclusion of newcomers, see Robert C. Ellickson, Suburban Growth Controls: An Economic and Legal Analysis, 86 Yale L.J. 385, 405-10 (1977); Fischel, supra note 34, at 1582-83.

45. The government may, if it wishes, award compensation in excess of the constitutional norm, see Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 675-77 (1923), and in circumstances in which compensation is not constitutionally required. See United States v. Gerlach Live Stock Co., 339 U.S. 725, 739 (1950). Given this discretion, prevention of discrimination may require fairly generous constitutional standards as to both the level of compensation and the circumstances under which compensation will be forthcoming.
ment less attractive. It does not preclude all efforts to achieve one-sided gains; but it bars some of the most blatant.

In an important sense, exploitation and factionalism are two sides of the same coin. Absent a requirement of compensation, one faction (a majority or a powerful special-interest group) will seek gains at the expense of other factions (minorities or other groups vulnerable to exploitation). The aggressive faction will invest resources in its selfish endeavor; prospective victims will expend resources in defensive measures. All such expenditures may be characterized as “rent seeking,” a dissipation of social wealth that yields no gain for society at large. Existing resources are sought to be transferred from one group to another, at substantial cost, without generating any offsetting gain.

As a general matter, the Constitution guards against the excesses of factionalism and exploitation by prescribing an elaborate set of checks and balances, implicit in its division of powers. For example, revenue measures are to originate in the House of Representatives and require the concurrence of the Senate. This congressional check on executive action—its “power of the purse”—would be negated if the executive could seize property for its purposes without providing compensation.

The just compensation requirement imposes an important brake on some kinds of exploitation, factionalism, and associated rent seeking; but this function need not be addressed separately. The objectives of insurance and fiscal responsibility, if successfully achieved, provide as effective a deterrent as is feasible within the general ambit of the compensation requirement.

E. Summation

In a world of clearly defined and immutable property rights (and zero transaction costs), the three objectives of the Takings Clause would be largely coterminous. Unless the government paid just compensation

47. During the debates on ratification of the Constitution, this issue was addressed in the context of concerns about a standing army. The Federalists responded that the army’s size and continuance depended on continuing congressional appropriations. See The Federalist, supra note 23, No. 24, at 63-64, No. 26, at 72-75 (Alexander Hamilton).
48. The Supreme Court considered aspects of this issue in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The majority opinion, enjoining President Truman’s seizure of steel plants to terminate a labor dispute, found it doubtful that the owners of the seized plants could recover just compensation for “properties unlawfully taken by government officials.” Id. at 583. Justice Douglas, concurring, invoked the Takings Clause as a limit on presidential authority, emphasizing the need for congressional authorization. Id. at 631-32.
for every property right acquired, its actions would be fiscally irresponsible, inflicting harm on owners, usually risk-averse, and discouraging private investment and economic progress. But in a world of uncertainty and change (and positive transaction costs), it is more illuminating to give separate scrutiny to each of the three objectives:

(1) Does the government's action expose risk-averse owners to substantial uninsurable losses?

(2) Will the action impede economic progress by discouraging work, saving, and investment?

(3) Does the government's action manifest fiscal irresponsibility, obtaining public benefits at private expense in circumstances in which taxpayers would not have expended public funds to obtain the same benefits?49

III. PROTECTION OF POSSESSION

The just compensation requirement has been applied most consistently in protecting owners of property against physical intrusions or seizures by the government. There is less consistency in the protection afforded against other governmental actions that physically interfere with the use and enjoyment of property.

49. This Article accords no independent weight to various noneconomic arguments supporting just compensation—e.g., the sanctity of property rights, the role of property in protecting the liberty of the owner, vindicating some conception of personhood. For a summary of these views, see Thompson, supra note 4, at 1473-77, 1492-93. Attempts to implement these alternative approaches yield solutions that either are hopelessly indeterminate or substantially coincide with lines of inquiry pursued in this Article. As will be apparent from subsequent discussions, a government measure that is (a) fiscally responsible, (b) consistent with the promotion of economic progress, and (c) protective of risk-averse owners, is one that accords a substantial measure of protection to property rights and to dependent interests in liberty and personhood.

One commentator would distinguish between "personal" property (such as a home) and "fungible" property (such as commercial holdings), making the former virtually immune to taking, even with compensation, while subjecting the latter to almost unlimited state appropriation. See, e.g., MARGARET J. RADIN, REINTERPRETING PROPERTY 139-45, 153-59 (1993). The argument has no basis in the text or history or logic of the constitutional provision, a matter about which Radin is untroubled. Id. at 138-39. At the opposite extreme, Richard Epstein would read the takings provision to invalidate a vast array of tax, regulatory, and welfare measures, also adopting an untrammeled reinterpretation of the Constitution. See RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). In a similar vein, see MARK L. POLLOT, GRAND THEFT AND PETIT LARCENY: PROPERTY RIGHTS IN AMERICA 69-90 (1993).
A. Physical Intrusions on Land

The leading case is the nineteenth century decision in *Pumpelly v. Green Bay Co.* Acting under state statutes, the Green Bay Company constructed a dam that caused a river to overflow and inundate plaintiff’s farm. Plaintiff sought redress under the just compensation provision of the Wisconsin Constitution, and the Supreme Court found in his favor. The Court described the flooding as one that “worked an almost complete destruction of the value of the land,” it ruled that “where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution.”

*Pumpelly* advances the three purposes of the just compensation requirement. Plaintiff is awarded compensation for a substantial and unavoidable loss (the insurance objective); the farm, a productive investment, is protected against confiscation (the economic development objective); and the Green Bay Company, exercising delegated governmental responsibility, is required to account for losses associated with its enterprise (the fiscal responsibility objective).

Subsequent decisions have followed *Pumpelly* in awarding compensation to owners deprived of the use of their land by flooding or by other physical occupation attributable to the government. *United States v. Causby* carried the logic a step further. Plaintiffs owned land

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50. 80 U.S. (13 Wall.) 166 (1871).
51. Id. at 167-81.
52. Id. at 177.
53. Id. at 181.
55. 328 U.S. 256, 256-59 (1946); accord Griggs v. Allegheny County, 369 U.S. 84, 85-87 (1962). For a precursor to *Causby* and *Griggs*, see Portsmouth Harbor Land and Hotel Co. v. United States, 260 U.S. 327 (1922) (remanding for trial a claim that the government had taken a servitude on claimant’s property by firing missiles over the land).
on which they raised chickens; they also resided on the premises. Military aircraft from a nearby airport, passing overhead at low altitudes, caused such noise and glare that plaintiffs had to abandon their chicken farm. Further, plaintiffs' use of the property as a residence was impaired, the noise and glare resulting in sleeplessness and anxiety. The Supreme Court awarded compensation for diminution in the value of the property; the government, in its operations, had taken an "easement of flight." The Court conceded that:

enjoyment and use of the land [had not been] completely destroyed. But that does not seem to us to be controlling. The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value.57

Again, the decision comports with the purposes of the just compensation requirement. Compensation was paid for a substantial, though not a total, loss (the insurance objective); the Court recognized that the productive capacity of the land had been seriously impaired (the economic development objective); and the government, in undertaking military aviation operations, was compelled to take account of the losses inflicted on adversely affected landowners (the fiscal responsibility objective).

A similar result was reached in Kaiser Aetna v. United States.58 Kuapa Pond, nonnavigable and physically separated from the adjacent bay, was developed into a private marina by the dredging of channels and by other improvements made at private expense. Fees collected from private owners paid for maintenance of the marina. The government sought to have the marina opened to all without charge.59 The Supreme Court found an unlawful taking, ruling that, if the government wants "a public aquatic park after petitioners have proceeded as far as they have here," it must invoke the power of eminent domain.60 The decision protects the investment of private owners from conversion into a public facility (thereby serving the insurance and economic development

56. Causby, 328 U.S. at 261.
57. Id. at 262.
59. Id. at 167-68.
60. Id. at 180.
objectives) and, it requires the government to pay for any "public aquatic park" it seeks to create (the fiscal responsibility objective).61

Not every physical intrusion constitutes a taking. The leading decision on this point is PruneYard Shopping Ctr. v. Robins.62 The shopping center, with twenty-one acres and a daily patronage of 25,000, sought to enforce a nondiscriminatory ban against political activity—in this case, the distribution of pamphlets and the circulation of petitions. The activity was peaceful and occurred without objection by the shopping center’s patrons. A state court ruled that the political activists were exercising free speech rights under state law.63

The Supreme Court held that the state court ruling did not constitute a taking of the shopping center’s property. The political activity did not “unreasonably impair the value or use of [the] property as a shopping center.”64 PruneYard could adopt “time, place, and manner regulations that will minimize any interference with its commercial functions,”65 and the political activity in issue was orderly and confined to the common areas of the shopping center.66 Under these circumstances, the Court concluded that there had been no taking even though the activists had “physically invaded” the shopping center’s property.67

The decision is consistent with the just compensation requirement. In the absence of an impairment of value, there was no contravention of either the insurance objective or the economic development objective. And since the access requirement imposed no burden on any private party, fiscal responsibility was not an issue.

More troublesome is the decision in Loretto v. Teleprompter Manhattan CATV Corp.68 A New York statute required landlords to permit local cable companies to maintain cable facilities on their premises—in order to provide service to tenants—on payment of a fee to each landlord, fixed by regulation at a one-time charge of one dollar.69 The Supreme Court found a taking and remanded the case to

61. Id. at 179-80.
63. PruneYard, 447 U.S. at 78.
64. Id. at 83.
65. Id.
66. Id. at 83-84.
67. Id. at 84.
determine whether the one-dollar fee was just compensation.\textsuperscript{70} The cable facilities were modest in size (less than two cubic feet in all); they were relatively unobtrusive (plaintiff landlord ignored them for several months); and there was no evidence that they had impaired the use of the property or diminished its value. But the Court ruled that any permanent physical occupation authorized by government is a taking even if it “has only minimal economic impact on the owner.”\textsuperscript{71}

Clearly, the decision is not justified by any of the objectives of just compensation: there is no need to insure against a trivial loss; a nonburdensome requirement does not impede economic development; and failure to compensate for so minor an intrusion does not impugn governmental fiscal responsibility. But \textit{Loretto} had a different end in view. The Court was seeking to establish a “bright line” for a class of takings that was readily identifiable and for which compensation could be ascertained with relative ease.\textsuperscript{72} To be sure, the category was overinclusive in terms of the objectives of just compensation. But is that problematic? If the intrusion at issue is trivial, then just compensation is likewise trivial. On remand in \textit{Loretto}, the state courts limited compensation to the one-dollar fee.\textsuperscript{73}

\textit{PruneYard} was distinguished in \textit{Loretto} on the ground that the former constituted a temporary rather than a permanent intrusion.\textsuperscript{74} The distinction is unsound; the two cases should have been treated in the same manner. Either both should have been viewed as takings, with accompanying awards of nominal damages, or both should have been rejected as takings, because damages were \textit{de minimus}. The choice is essentially a matter of judicial administration, raising issues of efficiency

\textsuperscript{70} Id. at 441.

\textsuperscript{71} Id. at 434-35.

\textsuperscript{72} For a discussion of the advantages of a “bright line,” see Farber, supra note 17, at 299, 302-03.


\textsuperscript{74} \textit{Loretto}, 458 U.S. at 434. For other examples of the same distinction, see NLRB v. Babcock \& Wilcox Co., 351 U.S. 105, 112-13 (1956) (no taking if union organizers require access to communicate with workers); Montana Co. v. St. Louis Mining \& Milling Co., 152 U.S. 160, 169 (1894) (no taking if access needed to inspect mine or mining claim). While transient intrusions are less likely to affect market value than permanent intrusions, sometimes the latter inflict no damage. For example, in Soon Duck Kim v. City of New York, 613 N.Y.S.2d 31 (App. Div.), \textit{appeal dismissed}, 647 N.E.2d 123 (N.Y. 1994), the city placed side fill on plaintiff’s property to support the elevated grade of an abutting street. A taking claim was rejected because the fill had no impact on plaintiff’s business or his use of the land. Id. at 32.

For an ambitious effort to reconcile the precedents, see Berger, supra note 62, at 678-82. Berger recognizes the possibility of nominal compensation. Id. at 682-84.
in adjudicating cases rather than reflecting any deep philosophic divide. Probably *Loretto* is preferable.\textsuperscript{75} It affords the owner a day in court on the issue of diminished value; she has the burden of proof; and if she cannot show significant impairment, she obtains nominal damages as a return on her investment in litigation expenses—not a good bargain. On the other hand, if she can show significant loss, compensation is appropriate and should be forthcoming. Governments are well positioned to process small claims; they have the advantage of specialization stemming from repetitive disposition of numerous similar cases. Private owners are poorly positioned to assert such claims and would be unlikely to do so absent a substantial loss and a reasonable probability of success.\textsuperscript{76}

\textbf{B. Interference With the Use and Enjoyment of Land}

In dealing with cases of flooding, the Supreme Court initially distinguished between permanent flooding, for which compensation was payable under *Pumpelly*, and occasional or intermittent flooding, for which compensation was denied. Thus, in *Manigault v. Springs*,\textsuperscript{77} a dam caused some flooding of claimant’s lands but compensation was denied because, unlike *Pumpelly*, there was no "practical destruction, or material impairment of the value of plaintiff’s lands." Plaintiff was "merely put to some extra expense in warding off the consequences of the overflow" by raising its own dikes.\textsuperscript{78} Similarly, in *Sanguinetti v. United States*,\textsuperscript{79} compensation was denied for periodic flooding of plaintiff’s lands.

\textsuperscript{75} This approach is supported by the result, though not the reasoning, of *Hodel v. Irving*, 481 U.S. 704 (1987). Because Indian interests in land had become fragmented and unproductive through successive generations of devise and descent, a federal statute provided that small holdings would escheat to the Indian Tribe in order to create more productive aggregations. The statute was invalidated as an uncompensated taking; the properties in issue varied substantially in value. *Id.* at 710, 712-14. The Court found that while some regulation of devise and descent was acceptable, total abolition went "too far." *Id.* at 717-18. No distinction was made based on the value of any particular holding. For further discussion, see Ronald Chester, *Is the Right to Devise Property Constitutionally Protected?—The Strange Case of Hodel v. Irving*, 24 SW. U. L. REV. 1195 (1995).


\textsuperscript{77} 199 U.S. 473 (1905).

\textsuperscript{78} *Id.* at 484-85.

\textsuperscript{79} 264 U.S. 146 (1924).
because none of the land "was permanently flooded, nor was it over-
flowed for such a length of time in any year as to prevent its use for
agricultural purposes."80

By contrast, in Jacobs v. United States,81 a government dam caused
an increase in occasional overflows of plaintiff's lands. Compensation
was held to be appropriate: "A servitude was created by reason of
intermittent overflows which impaired the use of the lands for agricul-
tural purposes."82 Similarly, in United States v. Dickinson,83 which
involved some lands subject to permanent flooding and other lands
subject to intermittent flooding, the Supreme Court required compensa-
tion in both instances: "Property is taken in the constitutional sense when
inroads are made upon an owner's use of it to an extent that, as between
private parties, a servitude has been acquired either by agreement or in
course of time."84

These cases, of course, involve physical intrusions on land, and the
evolution from Manigault and Sanguinetti to Jacobs and Dickinson is
consistent with Causby, Kaiser Aetna, and Loretto.

With respect to nuisance, the Supreme Court has taken a similar
tack. In Richards v. Washington Terminal Co.,85 the plaintiff sued for
harms resulting from the operation of a railroad near his property. The
Court disallowed damages resulting from the noise, dust, and vibrations
of normal railroad operations, but awarded damages for gases and smoke
forced out of a tunnel onto plaintiff's land by the railroad's tunnel
exhaust system.86 The Court stated that "while the legislature may
legalize what otherwise would be a public nuisance, it may not confer
immunity from action for a private nuisance of such a character as to
amount in effect to a taking of private property for public use."87 Under
this rule, railroads were not liable for noises and vibrations incident to
train operations, emissions of smoke and sparks from locomotives, or
similar annoyances inseparable from the normal and nonnegligent
operation of railroads. To hold otherwise would "bring the operation of

80. Id. at 147.
81. 290 U.S. 13 (1933).
82. Id. at 16.
83. 331 U.S. 745 (1947).
84. Id. at 748; see also United States v. Cress, 243 U.S. 316, 327-29 (1917) (compensation
provided in instances of partial flooding and total flooding).
85. 233 U.S. 546 (1914).
86. Id. at 558.
87. Id. at 553.
railroads to a standstill." But with respect to the gases and smoke emitted from the tunnel and forced onto plaintiff's property "in such manner as to materially contribute to render his property less habitable than otherwise it would be, and to depreciate it in value," compensation is required. Plaintiff's property cannot be subjected to "so direct and peculiar and substantial a burden . . . without compensation to him." 88

As previously noted, United States v. Causby 89 awarded compensation for diminution in value caused by aircraft flying low above the plaintiff's land. 90 But what of properties not in the flight path but adjacent to the airport? Their value is also adversely affected by the noise, fumes, and glares associated with airport operations. Most state court decisions award compensation in such instances, 92 but the leading federal Court of Appeals decision is to the contrary. In Batten v. United States, 93 plaintiff property owners complained of vibrations that caused windows and dishes to rattle; loud noises that made conversations and use of the telephone, radio, and television impossible, and also interrupted sleep; and smoke that left an oily black deposit on their properties. Declines in the values of their properties ranged from 41% to 55%. In denying recovery, the Court of Appeals characterized the sound waves, shock waves, and smoke as "a neighborhood inconvenience" not actionable unless directed against particular property, as in the Richards

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88. Id. at 555.
90. 328 U.S. 256 (1946).
91. See supra text accompanying notes 55-57.
case, or "unless they force the abdication of the use of space within the landowner’s dominion." 94

The Batten ruling is unduly restrictive.95 The proper approach, as suggested by Dickinson and Richards, is to ask whether, if the objectionable conduct were that of a private party, it would give rise to an action in nuisance? Or, to apply the same test from a different perspective, would a private party have to negotiate for a servitude (and pay for it) in order to subject plaintiff’s lands to the vibrations, noises, and glares emitted by the objectionable activity?

Most government operations, including roads, schools, and post offices, do not trigger liability in the usual case because the activity, if conducted by a private party, would not be an actionable nuisance—either because the adverse impact on any one parcel of land is not sufficiently large or because an impact, though substantial, is consistent with the character of the locality (a business operation in a business district).96 But some government operations, such as the airport in Batten and government garbage and incinerator facilities, normally could not claim such immunity. If conducted by private parties, they could be challenged as nuisances and their continuance would depend upon: (i) the purchase of a servitude on the burdened lands; or (ii) the judicial imposition of a servitude upon payment of compensation by the objectionable operation.97 The Government should be compelled to purchase servitudes in similar circumstances. Unlike Batten, state courts generally impose a requirement of compensation in such cases.98

94. Id. at 585.
95. For a comprehensive discussion of airport noise as a “taking,” see Baxter & Altree, supra note 33, at 34-63. See also Jay M. Zitter, Annotation, Airport Operations or Flight of Aircraft as Constituting Taking or Damaging of Property, 22 A.L.R.4th 863 (1983).
96. See, e.g., Reichelderfer v. Quinn, 287 U.S. 315 (1932), where residences adjoining a park declined in value following construction of a fire station on park land. Compensation was denied. Clearly, plaintiffs had no claim that the park site be continued as such. Whether fire engines might cause disruptions sufficient to constitute a nuisance was not discussed. On the significance of a concept of “normalcy” of land use, see Robert C. Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. Chi. L. Rev. 681, 729-33 (1973).
98. For examples of the general rule, see Varjabedian v. City of Madera, 572 P.2d 43, 51 (Cal. 1978) (sewage treatment plant; remanded for hearing); Carter v. City of Porterville, 22 Cal. Rptr. 2d 76, 86 (Cal. Ct. App.) (ordered not officially published) (dangerous dam; taking found), review denied, 1993 Cal. LEXIS 5697 (Nov. 10, 1993); Duffield v. DeKalb County, 249 S.E.2d 235, 237 (Ga. 1978) (water pollution plant; “damaging” found); Washington Suburban Sanitary Com’n v. CAE-Link Corp., 622 A.2d 745, 761-63 (Md.) (sewage treatment plant; taking found), cert. denied, 114 S. Ct. 288 (1993); Ashley Park Charlotte Assocs. v. City of Charlotte, 827 F. Supp. 1223, 1227 (W.D.N.C. 1993) (city landfill; remanded for hearing); City of Abilene v. Downs, 367 S.W.2d 153,
The approach advocated here is consistent with the objectives of just compensation. Absent compensation, property owners are subjected to uninsurable losses of significant magnitude. (Insignificant losses would be unlikely to trigger the law of nuisance.) To permit government destruction of privately created values in homes and businesses is to discourage the work and saving and investment that created those values. Finally, as a matter of fiscal responsibility, government agencies should be compelled to reckon with severe destructions of private values and to proceed only if they are prepared to pay compensation—i.e., only where public gains exceed private losses. Practical administration is assured by restricting claims to substantial impacts peculiar to the properties of the claimants—impacts sufficient to provide standing in suits for private nuisance.9

By this standard, recovery could well be extended beyond the bounds of Richards. Several lower court cases have recognized that unusually severe highway noises and fumes can result in substantial impairments of property values and have held that compensation should be awarded in such instances.10 Though a minority view, it is the right


Most state courts provide compensation when a government use of land violates a restrictive covenant applicable to that land. Id. at 128-38. For example, in Southern California Edison Co. v. Bourgerie, 507 P.2d 964 (Cal. 1973), damages were awarded for loss in property value when an electric transmission station was constructed on land restricted by covenant to residential use. Covenant and nuisance cases are analogous: in the covenant cases, the government must pay for the loss incurred by the dominant estate resulting from breach of covenant; in the nuisance cases, the government must pay for the loss incurred by the injured property owner resulting from breach of the common law rules pertaining to nuisance. The practical problems of implementation—distinguishing proximate from remote properties—are substantially the same in both classes of cases.

99. Government interference also may take the form of denying access to the property, e.g., by closing or changing streets. Early precedents rejected liability for a taking in such cases. See, e.g., Smith v. Corp. of Washington, 61 U.S. (20 How) 135 (1857); Callender v. Marsh, 18 Mass. 418 (1823). But most modern courts find a "taking" if government action precludes reasonable access to property. See, e.g., Rivet v. Department of Trans. & Dev., 635 So. 2d 295 (La. Ct. App.), writ denied, 646 So. 2d 397 (La. 1994); Maloley v. City of Lexington, 536 N.W.2d 916 (Neb. Ct. App. 1995) (temporary blockage of access can be a taking). For a comprehensive review of the authorities, see STOEBUCK, supra note 76, at 21-71.

100. See, e.g., United States v. Certain Parcels of Land, 252 F. Supp. 319, 323 (W.D. Mich. 1966); Knight v. City of Billings, 642 P.2d 141, 144-46 (Mont. 1982) (increased traffic coupled with refusal to rezone). For examples of the prevailing contrary view, see Friends of H St. v. City of
Contrary to the suggestion in Richards, highway construction will not be brought to a standstill if compensation is paid to adjacent property owners incurring substantial losses.  

C. Seizure or Destruction of Personal Property

Personal property, both tangible and intangible, is protected by the Fifth Amendment. Compensable takings have been found when the government has seized tangible personal property, has extinguished private liens on governmentally held property, or has seized interest accruing on funds deposited by private persons. These rulings are consistent with the three objectives of just compensation—insurance, economic progress, and fiscal responsibility—for the reasons advanced in connection with Pumpelly and related cases. More complex issues are posed by government interventions affecting contract rights.

At one extreme is Long Island Water Supply Co. v. Brooklyn. The water company had a twenty-five year contract with a city under which it received rentals for fire hydrants. When the city acquired the property of the water company in condemnation proceedings, the company objected to abrogation of its contract. The Supreme Court ruled that "a contract is property, and . . . may be taken under condemnation proceedings for public use." In this case, just compensation was required and was paid: "the condemnation proceedings did not repudiate


101.  Highways construction may well decline if additional compensation is required for injured property owners. See Joseph J. Cordes & Burton A. Weisbrod, Governmental Behavior in Response to Compensation Requirements, 11 J. PUBLIC ECON. 47, 55-58 (1979) (finding a reduction in highway construction when statutes required payment of relocation expenses of displaced owners).


105. See supra text accompanying notes 50-61.

106. 166 U.S. 685 (1897); accord City of Cincinnati v. Louisville & N.R.R., 223 U.S. 390, 400 (1912) (sustaining the appropriation of contract rights on payment of just compensation).

the contract but appropriated it and fixed its value." In short, the government must pay for any contract rights appropriated for government use.

At the other extreme is *Louisville & Nashville Railroad v. Mottley.* In settlement of a personal injury claim, plaintiffs obtained a contract right to free passes on defendant's railroad. Congress subsequently proscribed such free passes, and the defendant thereafter refused to honor its contract with the plaintiffs. The Supreme Court sustained the railroad's position, upholding the power of Congress to revise railroad regulations notwithstanding adverse impacts on existing contracts. As to the Fifth Amendment, the Court quoted from an earlier opinion observing that the just compensation clause

> has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war, may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts.

In this case, unlike *Long Island Water Supply,* the government was not seeking to appropriate, for its own benefit, the contract right in issue. The contract was a casualty of a new regulatory regime and simply ceased to be of value to anyone.

A case close to the line is *Omnia Commercial Co. v. United States.* During World War I, the United States requisitioned the entire production of steel from a mill. In consequence, the mill was unable to perform a prior contract with plaintiff providing for delivery of steel at a favorable price. Plaintiff claimed that the government had taken its contract and sued for its value. The Supreme Court rejected the claim, holding that the contract had been destroyed, not taken. The Court cited the extensive intervention of the government in the economy in the course of waging war and observed that, under plaintiff's theory, the government "took and became liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its action made impossible. . . . Frustration and appropriation are

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108. *Id.* at 691.
109. 219 U.S. 467 (1911).
110. *Id.* at 482-86. The Court left open the possibility that plaintiffs might have other redress against the Railroad. *Id.* at 486.
111. *Id.* at 484 (quoting The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1870)).
112. 261 U.S. 502 (1923).
essentially different things." But a distinction between destruction and appropriation, when the government is the beneficiary, is dubious; the flooding cases treat the two as coterminous. Is there a better rationale under the three objectives of just compensation?

First, as suggested elsewhere in the Court's opinion, all contracts are subject to the defense of impossibility or frustration stemming from adverse governmental actions. No taking occurs in such cases because contracting parties are presumed to be aware of these doctrines and proceed with forewarning that contractual expectations may be disappointed if the actions of the government intervene. Accordingly, no need arises to provide insurance against risks all contracting parties necessarily assume. (This reasoning also supports the result in the Mottley case, invalidating the contract for free railroad passes.)

Second, the government in Omnia was conducting a war. Disruptions of peace-time arrangements are an inevitable concomitant of war. But the war also generates opportunities. While complete symmetry cannot be assured, it seems likely that parties losing the benefits of favorable peace-time contracts as a result of war measures will find opportunities for profitable production in other war measures. On balance, the incentives associated with economic progress are unlikely to be diminished.

Finally, it is obviously impracticable, in the context of a war, to provide compensation for all disruptions in contract expectations. The scope of the war effort is too vast and the repercussions of war measures too numerous and dispersed. The government's actions in Omnia were fiscally responsible; it had no other practicable course of action.

In sum, the protection of personal property against seizure or destruction parallels the protection afforded to real property. Some close

113. Id. at 513. Compare Omnia with Brooks-Scanlon Corp. v. United States, 265 U.S. 106 (1924). The United States appropriated rights under a ship construction contract, requiring performance be continued for the benefit of the government. A taking was found and just compensation required. Brooks-Scanlon, 265 U.S. at 119-22. For decisions in accord with Omnia, see 767 Third Ave. Assocs. v. United States, 48 F.3d 1575 (Fed. Cir. 1995) and cases cited therein at 1581-82.

114. See supra text accompanying notes 50-54, 77-84.

115. See Omnia, 261 U.S. at 510-11.


117. See 767 Third Ave. Assocs. v. United States, 48 F.3d 1575, 1580-82 (Fed. Cir. 1995) (no taking when United States terminated leases of foreign entities in United States); Chang v. United States, 859 F.2d 893, 897 (Fed. Cir. 1988) (no taking when United States terminated employment contracts between United States persons and Libyan entities). In each instance, claimants had contracted against the background of United States control over foreign policy.
cases may arise with respect to contract rights, but generally they receive such protection as is warranted by the three objectives of just compensation.

IV. GOVERNMENT REGULATIONS AFFECTING REAL PROPERTY

The concept of "harm" plays a critical role in takings jurisprudence. Governments are privileged to abate harmful uses of property without paying compensation to the source of the harm. Yet this general rubric encompasses a varied group of cases, not all warranting the same treatment. It is useful to distinguish among: (1) uses of land that contravene general social norms not premised on the relationship of the land to surrounding terrain; (2) uses of land that are not unacceptable, but which pose problems because of their proximity to other, inharmonious uses, i.e., instances of "incompatible adjacencies;" and (3) uses of land that are normally acceptable, and not incompatible with adjacent uses, but which are viewed as posing a threat to the environment or raising similar ecological concerns.

A. Uses Contravening General Social Norms

The leading case on prevention of harm dates from the nineteenth century. Mugler v. Kansas involved the application of a state prohibition statute to shut down two breweries. Both were constructed prior to enactment of the prohibitory legislation; and the Supreme Court apparently accepted the view that they were erected for the purpose of making beer and could not be put to any other use without severe loss of value. In rejecting a takings claim, the Court ruled 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." Accordingly, 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 for the public benefit."122

118. See, e.g., Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2910-12 (1992) (citing cases where the Court had upheld government regulations prohibiting harmful uses of property).
119. 123 U.S. 623 (1887).
120. Id. at 654, 657.
121. Id. at 665.
122. Id. at 668; accord Kidd v. Pearson, 128 U.S. 1, 15-16 (1888). Mugler was decided prior to the formal incorporation of the takings clause into the Fourteenth Amendment's restriction on state action. See supra note 1. However, the takings issue was raised by the brewers and was resolved on
The language of the Court has broad sweep and could be viewed as subjecting all property to uncompensated destruction at the hands of the legislature. So viewed, the decision would contravene all three of the objectives of just compensation—insurance, economic development, and fiscal responsibility. The facts of the case suggest a narrower focus.

The normative structure of a society is not constant. Products once viewed as beneficial or acceptable may, in the light of new information or new attitudes or new insights, be viewed as harmful. In that context, the Court is correct in affirming that the government cannot be burdened with the condition that it compensate owners “for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.”

Manufacturers of alcohol, tobacco, and guns, to name a few, proceed in the face of a very real risk of government curtailment. Even manufacturers of products seemingly benign at the outset—asbestos in building blocks or DES in pharmaceuticals—assume the risk that their products may be found to be harmful; future production could be barred either explicitly or by threat of massive civil liability.

_Mugler_ is an example of product failure—here by reason of adverse societal norms embodied in prohibitory legislation. Every enterprise runs the risk of product failure. The risk—whether it originates in technological change, varying public tastes, or shifts in social norms—is an unavoidable part of entrepreneurial endeavor. It is not an insurable risk under any circumstances; its occurrence does not impede other efforts to market successful products; and prohibition of a product harmful to the public involves no issue of fiscal irresponsibility. Even a community without funds must have the capacity to interdict poisons, guns, explosives, and other harmful substances. Compensation is not an issue in such cases.

the merits by the Court. _Mugler_, 123 U.S. at 664, 668.

123. _Mugler_, 123 U.S. at 669. The issue of just compensation was not raised in several similar cases, but the opinions are in accord in their approach. See _Murphy v. California_, 225 U.S. 623, 630 (1912) (prohibition of billiard halls sustained); _L'Hote v. New Orleans_, 177 U.S. 587 (1900) (restriction on houses of prostitution sustained); _Stone v. Mississippi_, 101 U.S. 814 (1879) (prohibition of lotteries sustained); _see also Powell v. Pennsylvania_, 127 U.S. 678 (1888) (barring compensation where a state statute banned the manufacture and sale of oleomargarine).

124. _See, e.g., In re Joint E. Dist. & S. Dist. Asbestos Litig._, 18 F.3d 126 (2d Cir. 1994).

125. _See T. Nicolaus Tideman, Takings, Moral Evolution, and Justice_, 88 COLUM. L. REV. 1714, 1720-21 (1988) (compensation is not required when slaves are emancipated or a product is found to have harmful effects); _see also Rubenfeld, supra_ note 4, at 1151-52 (disallowing compensation in the case of “contraband”). For a modern example, _see Allied-Gen. Nuclear Servs._ v. _United States_, 839 F.2d 1572 (Fed. Cir.), _cert. denied_, 488 U.S. 819 (1988). With government
Social norms also affect uses internal to the property—measures designed to assure the safety of employees, tenants, patrons or other occupants. Such measures impose costs, and in some cases may make use of a particular property economically unviable. Yet compensation is uniformly denied. As long as the protective measures are of broad applicability, reflecting prevailing social norms, owners must conform to such measures or abandon the use in question. No one has a constitutional right to maintain an unsafe or unsanitary building or to demand compensation if abatement is ordered.

This point was addressed tangentially in First English Evangelical Lutheran Church v. County of Los Angeles. An ordinance, adopted as an interim measure, prohibited any construction on land in a flood plain, precluding plaintiff from rebuilding structures swept away in an earlier flood. The California courts refused to consider a claim for damages for deprivation of use, requiring that plaintiff first obtain a judgment testing the validity of the regulation. The Supreme Court reversed, holding that the Fifth Amendment requires compensation for “temporary” regulatory takings—those regulatory takings which are ultimately invalidated by the courts. If a taking is found, the state may reconsider and repeal the objectionable measure; but it must pay for the temporary taking while the regulation was in effect.

encouragement, Allied-General (“A-G”) constructed a plant for processing nuclear waste into plutonium and other nuclear products. Id. at 1573. The United States then denied A-G an operating license because operation of the plant was incompatible with a newly enunciated government policy against nuclear proliferation. Id. at 1574. Compensation was denied, partly in reliance on Mugler. Id. at 1576. The Court also ruled that A-G had assumed the risk of a regulatory denial. Id. at 1577.

126. See, e.g., Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946) (refusing to hold unconstitutional a statute requiring installation of an expensive wet pipe sprinkler system without compensation); Moeschen v. Tenement House Dep't 203 U.S. 583 (1906) (tenant safety legislation), aff'g, 72 N.E. 231 (N.Y. 1904).

127. See Lawton v. Steele, 152 U.S. 133, 136 (1894). The Court held that the police power is used “to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the State may order the destruction of a house falling to decay or otherwise endangering the lives of passers by . . . .” Id.


130. First English, 482 U.S. at 319. The reasoning of First English may prove influential in resolving issues of “condemnation blight”—instances in which the value of property is depressed by impending condemnation, announced by the government but not implemented for a long period or not implemented at all. For contrasting positions, with extensive citations to authorities, see Lincoln Loan Co. v. State, 545 P.2d 105 (Or. 1976) (taking found); Westgate, Ltd. v. State, 843
The Court made plain that it was not dealing with normal delays incident to obtaining building permits, variances, changes in zoning ordinances and the like. More importantly for present purposes, the Court did not decide whether the denial of use was "insulated as a part of the State's authority to enact safety regulations." On remand, protection of the safety of prospective residents was one of the grounds adopted in sustaining the ordinance. Similar reasoning has been employed in upholding other restrictions on construction in flood plains and similar measures protective of public safety. Such measures are rarely controversial. Property owners, like other members of society, are subject to the law of negligence. Legislatively mandated safety measures are particularized implementations of the negligence principle, requiring that costs of care be incurred when warranted by the probability and magnitude of harm—a principle that governs virtually all interactive behavior in the United States.

In sum, normative judgments may preclude particular uses of land, without requiring compensation, in two kinds of cases: First, the norm—as in Mugler—may have nothing to do with land use; the prohibition statute there at issue would be violated whether a distillery

S.W.2d 448 (Tex. 1992) (no taking). See also Gideon Kanner, Condemnation Blight: Just How Just is Just Compensation?, 48 NOTRE DAME L. REV. 765 (1973); Fischel, REGULATORY TAKINGS, supra note 129, at 167-171.


132. First English, 482 U.S. at 313.


136. This is the "Learned Hand formula," first articulated in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).
was located at a fixed site or installed in a moving railroad car. Second, the norm—as in *First English*—may be triggered by a particular land use, but it implements a principle having broad application; dangerous habitats must be vacated whether they are located in a flood plain or in an area contaminated by hazardous waste or in buildings that are structurally unsound. The common denominator is a *generality* of application of the norm, divorced from the identity or ownership of any particular parcel of land. As such, the norm reflects a risk borne by all members of society whether or not they own property.

The emphasis on generality also provides an important, though not infallible, check on miscarriages of the political process. The more general the norm, the more people affected; the wider the impact, the less likely the norm can be employed for the surreptitious capture of private values for public consumption.

**B. Incompatible Adjacencies: The Initial Approach**

In a series of decisions dating back to the nineteenth century, the Supreme Court has sustained restrictions on the use of property based solely on the appropriateness of the use to the particular locality.

In *Fertilizing Co. v. Hyde Park*, a village banished a fertilizing plant from its midst, citing offensive odors, depreciation of property values, and aesthetic affronts. The Supreme Court sustained the measure even though the fertilizing plant, when originally constructed, was situated in an area largely uninhabited; the villagers came to the plant.

In *Reinman v. City of Little Rock*, a city banned the operation of a livery stable in the most densely populated area of the city, citing offensive odors and threats of disease. The Supreme Court again upheld the ban even though the stable was a lawful operation when originally instituted.

In *Hadacheck v. Sebastian*, a municipal ordinance prohibited brick-making within a residential district, reducing the value of the affected property from $800,000 to $60,000. Once again, the targeted operation was there first; the residents and municipal annexation came later. The Supreme Court sustained the ordinance on the ground that brickmaking was deleterious to "the health and comfort of the communi-

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137. 97 U.S. 659 (1878); see also *Laurel Hill Cemetery v. City & County of San Francisco*, 216 U.S. 358, 364 (1910), where the Court upheld a ban on future interments in plaintiff’s cemetery.
139. 239 U.S. 394 (1915).
With respect to the earlier investment by the brick-yard, which would be largely lost, the Court reasoned:

A vested interest [in the brick-yard] cannot be asserted against [the police power] because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community. The logical result of [the brickyard's] contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground . . . .

The reasoning is obviously inadequate. Granted that the development of a community cannot be stymied by a fertilizer plant or livery stable or brickyard in its midst. But that does not respond to the issue posed by just compensation: Should the offensive use—lawful when undertaken, and lawful now if undertaken elsewhere—be banished without compensation for losses associated with irretrievable investments of the enterprise in the initially lawful location?

The answer to this question is dependent on solving an antecedent issue of private law: the problem of “coming to the nuisance.” In Fertilizing Co. or Reinman or Hadacheck, an action might have been initiated by a private resident invoking the common law of nuisance. If that suit would have succeeded, clearly the challenged business would have had no right to compensation simply because the nuisance was abated by a public authority rather than a private plaintiff. In principle, these businesses were vulnerable to attack and abatement at the behest of private plaintiffs. While the common law is not unequivocal on this point, plaintiffs tend to prevail in cases like the ones at issue—where a use, once appropriate, has ceased to be appropriate in view of changes in the surrounding area.

140. Id. at 411.
141. Id. at 410 (citations omitted).
142. For subsequent opinions to the same effect, see Consolidated Rock Prods. v. City of Los Angeles, 370 P.2d 342, 354 (Cal.) (prohibition against continuance of quarrying was sustained), appeal dismissed, 371 U.S. 36 (1962); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (ordinance governing depth of excavation pit was valid and did not lead to a taking); Pierce Oil Corp. v. City of Hope, 248 U.S. 498, 499 (1919) (restriction on storage of petroleum products in close proximity to a residence was valid); Northwestern Laundry v. City of Des Moines, 239 U.S. 486, 491-92 (1916) (smoke abatement ordinance was valid even if discontinuance of use of the property were required).
143. See, e.g., Ellickson, supra note 96, at 758-60. For a recent example, see Anne Arundel County Fish & Game Conservation Ass'n v. Carlucci, 573 A.2d 847, 853 (Md. Ct. Spec. App.), cert.
This approach is a sound one from the perspective of economic efficiency. A business with objectionable externalities should seek an isolated location. But isolation will not suffice if residents follow and subsequently challenge the nuisance. The solution is for the business to buy up sufficient surrounding terrain to create a buffer zone so that subsequent settlers cannot get close enough to complain. The objectionable activity then has three options if the community moves in its direction: it can stay put, safe behind its buffer zone; it can move, selling the plant site and the buffer zone at the high prices made possible by municipal expansion; or it can sell the buffer zone and remain nonetheless, relying on contracts with the purchasers of its buffer land to preclude subsequent challenges to its operations.

To purchase surrounding terrain is not costless; but it provides a good test of whether the degree of isolation is sufficient. If the surrounding terrain is too costly for the business to purchase, the business has not achieved the requisite degree of isolation. Of course, a business may choose not to establish a buffer zone and to assume the risk that newcomers will challenge its use and eventually obtain an order of abatement. But then it cannot complain that a risk it assumed, in preference to purchase of a buffer zone, has in fact materialized.\textsuperscript{144}

This excursion into private law is relevant for two reasons. First, it suggests that the entrepreneurs in \textit{Fertilizing Co., Reinman,} and \textit{Hadacheck} knew, or should have known, of the risks they were assuming, and that they might have taken protective measures to reduce or eliminate the risks. Second, it enables the government to act in such cases with a substantial measure of latitude. Common law courts are not the only lawmaking institutions in the land; legislators may invoke the same background principles of nuisance in seeking to deal with incompatible adjacencies.

The dispositions in \textit{Hadacheck} and earlier cases were therefore

\textsuperscript{144} For other discussions of the problem of “noxious uses,” see FISCHEL, \textit{ZONING}, \textit{supra} note 20, at 159-60; Ellickson, \textit{supra} note 96, at 728-33; Fischel & Shapiro, \textit{supra} note 16, at 290-91; Michelman, \textit{Property, supra} note 5, at 1237, 1241-45. Michelman criticizes the buffer zone analysis by asking “why . . . is it not incumbent on the homebuilder to acquire a buffer zone?” \textit{Id.} at 1243. The answer is that, if the homebuilder seeks to avoid subsequent interference by noxious uses, he must indeed acquire a buffer zone. Otherwise, he may find himself engulfed by objectionable uses he is powerless to abate because they, not he, conform to the prevailing local standard.
correct. The firms there involved should be viewed as having voluntarily assumed the risks of future abatement. This negates any need for insurance; risks assumed in this manner are not normally insurable. It places economic development on sound footing; potentially objectionable businesses must find suitable locations. Further, government actions challenging incompatibility are not fiscally irresponsible; they simply impose losses upon parties knowingly assuming risks.

This analysis sets the stage for Pennsylvania Coal Co. v. Mahon, the most frequently cited opinion in the law of takings. The Coal Company acquired both the surface rights and mineral rights in substantial tracts of land. It then sold the surface rights, reserving to itself the unencumbered right to extract coal without regard to harm to the surface owner—i.e., expressly negating any duty to support the surface. In effect, the Coal Company sought to use the contractual route to respond to the problem of incompatible adjacencies: selling surface rights solely to those who would not object to its mining operations.

A state statute subsequently forbade the mining of coal that would cause subsidence under a structure used for human habitation unless the structure and the subsurface coal were under common ownership. Relying on the statute, Mahon sought to enjoin the Coal Company from mining coal under his house and endangering the structure. Local authorities also objected to the undermining of public streets, forbidden by another provision of the statute. The Supreme Court, in an opinion by Justice Holmes, held that the statute was invalid as an uncompensated taking of the Coal Company's property. The main thrust of the opinion paid no attention to the contractual aspects:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits. . . . One fact for consideration in determining such limits is the extent of the diminution. . . .

The general rule at least is, that while property may be regulated

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145. 260 U.S. 393 (1922).
146. For an extended discussion of the case and its implications, see Carol M. Rose, Mahon Reconstructed: Why the Takings Issue is Still a Muddle, 57 S. Cal. L. Rev. 561 (1984). See also FISCHER, REGULATORY TAKINGS, supra note 129, at 13-47.
148. Id. at 414.
to a certain extent, if regulation goes too far it will be recognized as a taking. . . . As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions.  

This branch of the Court’s reasoning has launched courts upon a series of ad hoc inquiries, evaluating the extent of the diminution of value inflicted by regulation, an approach to which we shall return. But Mahon ultimately turned on the Company’s contractual resolution of the problem of incompatible adjacencies; this factor was critical to Holmes’ disposition of the case. He observed that the statute “is not justified as a protection of personal safety. That could be provided for by notice. . . . [and in this case] defendant gave timely notice of its intent to mine under the house.” But notice would have been pointless if the Coal Company had not, by contract, reserved the unfettered right to mine under Mahon’s house. As for undermining public streets, the Court observed:

The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much.

The case is much stronger if viewed from the perspective of contractual resolution of the problem of incompatible adjacencies than as one in which the state simply went “too far” in precluding the mining of coal. The latter approach is vulnerable to the Brandeis thrust in the dissenting opinion: “If by mining anthracite coal the owner would necessarily unloose poisonous gasses [sic], I suppose no one would doubt the power of the State to prevent the mining, without buying his coal fields.” In support of his view, Brandeis cited Mugler, Hadacheck, and related cases. Ultimately, the Brandeis view prevailed as the Supreme Court, some forty-five years later, resolved the subsidence

149. Id. at 413-16. The Court also observed that “[w]hat makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.” Id. at 414.

150. Id. at 414.

151. Id. at 415.

152. Id. at 418 (Brandeis, J., dissenting).

153. Id. at 418-20 (Brandeis, J., dissenting).
dispute against the coal companies in *Keystone Bituminous Coal Association v. DeBenedictis.* 154

But the contractual aspect of the *Mahon* case is not so easily challenged.155 Society seeks to encourage productive endeavors while avoiding incompatible adjacencies. One valuable means to that end is for the potential nuisance to buy up the rights of neighbors to protest against the nuisance. If at a later time that solution seems no longer to be acceptable, then the government can revise it. But the revision must be accompanied by compensation, since the initial arrangement not only had the sanction of law but was a valuable means of resolving serious future problems. Do we wish to discourage parties from resorting to contract to resolve the potentially disruptive problems of incompatible adjacencies? Assume that a garbage dump had purchased a buffer zone around its facilities to provide immunity against nuisance complaints. It then sells some of these properties to residential buyers subject to covenants that they will not object to its operations. Rejection of the Coal Company’s position in *Mahon* is equivalent to appropriating these restrictive covenants and then shutting down the garbage dump as a nuisance when the residents complain—an obviously untenable position.156

The insurance objective of just compensation had some basis in *Mahon,* but the foothold was precarious. *Keystone* found that the diminution in value was not so great as Holmes imagined in *Mahon* and struck a different balance, this time favoring the public’s right to


155. Discounting the contract, one commentator has argued that the state statute “could not have been sustained on the ground that all parties whom subsidence might harm had waived their rights. There were plenty of people not party to the deeds—for example, children—whom the state could have claimed to be protecting from injury.” Rubenfeld, supra note 4, at 1086 n.59. But if a record owner of property sells it to another, all must vacate at the demand of the new owner—including children in the household “not party to the deed”—without regard to what harms might befall them in a cold, cruel world.

Another commentator, seeking to avoid the contract, turns to “spillover effects [which] come from, among other things, the abandonment of damaged structures, which in turn affects neighborhood quality and the use of undamaged structures.” Fischel, supra note 34, at 1586 n.22. But owners generally may contract for the removal of a building or for its replacement. Alternatively, they may fail to maintain it in good repair. The latter may be actionable, but the responsibility, given the contract, rests with the owner, not the coal company.

156. See supra note 98 (discussing compensability for the taking of restrictive covenants limiting the use of neighboring land). For a case in which a garbage dump protected itself against nuisance claims by restrictive covenants, see Waldrop v. Town of Brevard, 62 S.E.2d 512 (N.C. 1950).
regulate.\textsuperscript{157} But the contractual aspect of \textit{Mahon} bears importantly on the objective of economic development; its disregard is a form of fiscal irresponsibility. If the state wants a larger stake in the coal mines, the path to purchase is not elusive. The \textit{Keystone} Court gave short shrift to the contractual aspects, not recognizing (or refusing to recognize) that the contracts played a key role in defining the scope of the coal companies’ property interests,\textsuperscript{158} which were important to economic development.\textsuperscript{159}

Another important decision dealing with incompatible adjacencies is \textit{Miller v. Schoene}.\textsuperscript{160} Plaintiffs had red cedar trees on their property. The trees were host to a fungus called cedar rust which, while harmless to the cedars, had a destructive effect on adjacent apple trees. Plaintiffs were ordered to cut down a large number of infested cedars to prevent spread of the fungus to valuable apple orchards, the order encompassing all such cedars within two miles of an apple orchard. The Supreme Court sustained the order notwithstanding the absence of compensation to the owners of the cedars.

The Court observed that the red cedar was principally ornamental, neither cultivated nor dealt in commercially on any substantial scale. By contrast, apple growing was one of the principal agricultural pursuits in the state, with millions of dollars invested. Forced to choose between the two, the state may decide upon “the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public.”\textsuperscript{161}

This seems sound. But the Court’s reasoning does not explain why the owners of the cedars should be denied compensation for property destroyed in order to protect the apple orchards. Suppose that, to protect the orchards, it was necessary to demolish every tree, crop, and structure within two miles, leaving nothing but barren ground. Would the owners

\begin{footnotesize}
\textsuperscript{157} \textit{Keystone}, 480 U.S. at 498-99; accord M & J Coal Co. v. United States, 47 F.3d 1148 (Fed. Cir. 1995).
\textsuperscript{158} \textit{Keystone}, 480 U.S. at 502-05 (analyzing the problem as a Contracts Clause issue); see also \textit{id.} at 500-02 (minimizing the significance of the “support estate” claimed by the coal companies).
\textsuperscript{159} For a recent case following the theory of \textit{Pennsylvania Coal}, see Miller Bros. v. Department of Natural Resources, 513 N.W.2d 217, 221 (Mich. Ct. App.) (bar on oil and gas development held to be a taking; injury to surface owner not pertinent since waived by contract), appeal denied, 527 N.W.2d 513 (Mich. 1994). \textit{See also Whitney Benefits v. United States, 926 F.2d 1169 (Fed. Cir.) (statutory preclusion of mining held to be a taking), cert. denied, 502 U.S. 952 (1991); United Nuclear Corp. v. United States, 912 F.2d 1432 (Fed. Cir. 1990) (government interference with mining lease held to be a taking).}
\textsuperscript{160} 276 U.S. 272 (1928).
\textsuperscript{161} \textit{id.} at 279. The owners of the cedars were compensated for the costs of removal. \textit{id.} at 277.
\end{footnotesize}
of this ground be without remedy, simply because their holdings were less valuable than the apple orchards at risk? The reasoning of the Court is obviously incomplete.

Miller should be considered in light of the three objectives of just compensation. The cedars were not particularly valuable in their own right; they simply added value to the properties on which they were situated. Their destruction did not significantly diminish the values of those properties. In this context, the insurance objective of just compensation is relatively weak. Second, the trees were ornamental and indigenous to the region; their destruction did not impede or discourage economic development. Finally, while fiscal responsibility would have supported compensation (for example, by a tax on the apple orchards), the small amounts at issue may not have justified the administrative expense.

More importantly, Miller is a classic example of the reciprocal nature of harm. Absent the apple trees, the cedar rust was innocuous. Absent the cedar trees, no threat of disease existed. It was the two, in proximity, that created the problem. Further, unlike traditional nuisance cases, it apparently was not practicable here to turn to the nature of the locality to determine whether one use or the other should be preferred. In such cases, any number of judicial or legislative solutions might have passed muster—placing all costs on one party or the other or dividing costs among all affected parties. Absent a controlling precedent or principle, any outcome is arbitrary and none can be held to be unlawful.

Similar problems have arisen in grade crossing cases and in other instances involving safety hazards posed by railroads. Although the reasoning of the courts is sometimes opaque, the results are consistent with a recognition of the reciprocal nature of harm. Where, for example, a railroad is required to eliminate a grade crossing—by moving the rail line to a bridge over the highway or to a tunnel under the highway—courts typically have deferred to legislative judgments on the share of the cost to be borne by the railroad.

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162. Miller claimed a loss in land value of $5000 to $7000. There was strong evidence that the value of the land had not been diminished at all. See Frank R. Strong, Substantive Due Process of Law: A Dichotomy of Sense and Nonsense 155 (1986). But since Miller's proffer of proof had been excluded by the trial court, the Supreme Court could not base its decision on a theory of minimal harm. See also Fischel, Regulatory Takings, supra note 129, at 151-57.

Miller is related to other lines of authority concerned with destruction of property. In time of war, property may be destroyed to prevent it from falling into the hands of the enemy.\textsuperscript{164} In fighting a fire, property may be destroyed to prevent the spread of conflagration.\textsuperscript{165} In neither case is compensation required.\textsuperscript{166} These results could be defended by focusing on the minimal values of the properties at the time of destruction. How much is property worth if it is about to be captured by the enemy or consumed by an approaching fire? But the courts have not rested their rulings on this ground. The argument is that the decisions in issue have to be made in haste, under great pressure, and that the long-term interests of society are advanced by having officials on the spot not concern themselves about the prospects of civil liability. The argument is a slim reed, but it has some history to support it.\textsuperscript{167} A sounder basis for denial of compensation is the minimal value of the properties at risk.\textsuperscript{168}

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\textsuperscript{165} See Bowditch v. Boston, 101 U.S. 16, 18 (1879).


\textsuperscript{167} In Respublica v. Sparhawk, 1 Dall. 357, 380 (Pa. 1788), the court observed that in 1666, when London was on fire, the Lord Mayor refused to pull down forty wooden houses belonging to lawyers of the temple, "for fear he should be answerable for a trespass; and in consequence of this conduct, half that great city was burnt." \textit{Id}. at 363.

\textsuperscript{168} See Warner/Elektra/Atlantic Corp. v. County of DuPage, 991 F.2d 1280, 1286 (7th Cir. 1993) (Posner, J).
C. Zoning as a Response to Incompatible Adjacencies

Zoning is an effort to deal with the problem of incompatible adjacencies on a comprehensive basis. It seeks to segregate, in advance of development, uses of land that may be incompatible with one another. Probably the most important aspects of zoning are: (1) the separation of commercial or business districts from residential districts; and (2) the separation of apartment houses from private residences. Both elements were at issue in *Village of Euclid v. Ambler Realty Co.*, the landmark Supreme Court decision upholding comprehensive zoning regulation. Ambler Realty owned undeveloped land in the Village of Euclid, which had a value for industrial purposes of $10,000 per acre and for commercial purposes of $150 per front foot. Ambler’s properties were zoned residential, excluding industrial and commercial uses and reducing their values to $2,500 per acre and $50 per front foot. Ambler claimed a deprivation of property without due process of law.

With respect to the separation of business and residential uses, the Court began by observing that there was no difficulty in “excluding from residential sections offensive trades, industries and structures likely to create nuisances,” citing *Reinman* and *Hadacheck*, the livery stable and brickyard cases. But the Court recognized that the zoning at issue would exclude industries “which are neither offensive nor dangerous.” Such overbreadth was accepted by the Court as “a reasonable margin to insure effective enforcement,” recognizing “the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation.”

The Court then turned to a more general assessment of zoning, considering the exclusion of apartment buildings as well as all business establishments, including retail shops, from strictly residential areas. It observed that the segregation of different types of buildings made it

170. Id. at 384.
171. Id.
172. Id. at 373-74. Although the Fifth Amendment was not specifically invoked, the argument of counsel, and the Court’s response, followed traditional “takings” lines. See STRONG, supra note 162, at 121; *Euclid*, 272 U.S. at 387-88.
174. Id.
175. Id. at 388-89.
easier to provide suitable fire-fighting apparatus, tended to prevent street accidents, decreased noise, and preserved a "more favorable environment in which to rear children." In the case of apartment buildings, their height and bulk interfered with "the free circulation of air," they monopolized "the rays of the sun which otherwise would fall upon the smaller homes;" and they brought increased noise and traffic, thus detracting from the safety of the streets and depriving children of "quiet and open spaces for play." In the end, the neighborhood as a place of detached residences would be "utterly destroyed;" under these circumstances, apartment houses "come very near to being nuisances."

Despite its panegyric on zoning, beginning and ending with attenuated analogies to nuisance, the Court never answered the question that precipitated the litigation. Why should an owner of land, purchased with the expectation of industrial and commercial development, be saddled with losses ranging from 67% to 75% without compensation from the community that presumably will benefit from this mandated sacrifice?

The outcome reached by the Court is explicable in terms of the three objectives of just compensation. First, as to insurance, we are not now dealing with the owner of a home or a farm or a factory. We are dealing with a speculator in undeveloped land, the value of which is dependent on the course of future events. These include governmental decisions—not only on zoning, which might have been unanticipated at the time—but on the extension of infrastructure, the routing of traffic, and the imposition of clearly lawful restrictions which are protective of public health and safety. Land speculators by nature are not risk-averse. They gamble on the future, and sometimes they lose.

Second, as to economic development, it is again important that the

176. Id. at 394.
177. Id.
178. Id. at 394-95. In Nectow v. City of Cambridge, 277 U.S. 183 (1928), the Court invalidated the application of a zoning ordinance to particular properties because, in the Court's view, the particular application did not advance the health, safety, convenience, and general welfare of the community. Id. at 188-89; accord Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121 (1928). In Agins v. City of Tiburon, 447 U.S. 255 (1980), the Supreme Court read Euclid and Nectow to support the proposition that "application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land . . . ." Id. at 260 (citations omitted). The ordinance at issue in Agins was sustained because it permitted residential development of as many as five houses on a five-acre tract. Id. at 261-63. For a discussion of Agins, see Fischel, REGULATORY TAKINGS, supra note 129, at 52-54.
Whatever happened, the land would not disappear. Zoning might alter the value of the land by channeling it to one use rather than another, but no fruits of productive labor would be taken or destroyed. This does not mean that land speculators do not serve a useful social purpose; they do, in providing liquidity for land holdings. Nor are their efforts necessarily unproductive; they may assemble configurations of holdings needed for a factory or a shopping center or a residential subdivision, an important prelude to further development. The point is simply that the net social gain accruing from the ownership of undeveloped land is modest at most, and that no socially important losses are visited upon the owners of such land if their development plans are frustrated by the government's zoning measures. The great land lottery will continue no matter how often the government changes its course. Finally, and of particular importance, the land was not being zoned into idleness. It could be put to a productive use, though one different from the use envisaged by the owner.

As regards fiscal responsibility, the very nature of zoning precludes compensation for losses. On this score, *Miller* was a much closer case because compensation there would have been relatively straightforward: a tax on apple growers to compensate the owners of destroyed cedar trees. But in the case of zoning, compensation is well nigh impossible. At any moment in time, some properties gain from restrictions imposed on others; at some later moment, the balance of gains and losses may shift dramatically. It is unfeasible, both at the time of initial zoning and at each subsequent revision in zoning, to reckon up the gains and losses of each owner of property and compel the winners to compensate the losers. In the long run, all may end up winners if the zoning is sound in creating an attractive and viable community, or all may lose if the zoning is irrational and unstable. The gains and losses are speculative and shifting and any effort at monetary compensation would be an administrative impossibility. In sum, zoning with compensatory

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179. The distinction between improved and unimproved land has origins dating back to the compensation practices of the colonial legislatures. See *supra* note 15. For examples of decisions imposing major losses on owners of undeveloped land, see William C. Haas & Co. v. City & County of San Francisco, 605 F.2d 1117, 1120-21 (9th Cir. 1979) (diminution in value of land from $2 million to $100,000), *cert. denied*, 445 U.S. 928 (1980); HFH, Ltd. v. Superior Court, 542 P.2d 237, 246 (Cal. 1975) (recovering loss in value of undeveloped land equated to obtaining refund for a "losing sweepstakes ticket"), *cert. denied*, 425 U.S. 904 (1976); Gardner v. New Jersey Pinelands Comm'n, 593 A.2d 251, 259-62 (N.J. 1991) (zoning restriction limited development to one private home per 40 acres).

180. 276 U.S. 272 (1928).
payments is not a practicable option and a government does not act irresponsibly if, assuming that zoning is advantageous, it pursues the only course open to it: the imposition of restrictions on land use without monetary compensation for losses in the value of particular parcels.

That this explanation is plausible is illustrated by the points at which zoning is most vulnerable to judicial challenge:

(1) If an owner of land is not a speculator, but an individual or business seeking to develop property for its own use, a court will scrutinize carefully any zoning restriction that makes development of the particular parcel economically unfeasible. In this instance, the insurance objective plays a more prominent role than in cases involving substantial tracts of land held for future development.

(2) If zoning interferes with the use of structures presently on the land, a court will likely strike down the restriction. Zoning ordinances routinely protect preexisting structures as “non-conforming uses.” The practice is in accord with the objective of economic development.

(3) If the government seeks to employ zoning, not to preclude inharmonious land development, but to lighten the burden on the public treasury—e.g., by compelling the land to be used for some public purpose, such as a downtown parking garage—the courts will find an

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183. See Blundell, 522 S.W.2d at 666.
improper taking.\textsuperscript{184} This result accords with the objective of fiscal responsibility.

Zoning has created a welter of litigation. All of the diverse decisions cannot be explained by this (or any other) analysis. But the major trends appear to reflect the three objectives supporting the requirement of just compensation.

\section*{D. More Expansive Conceptions of Land Use Control}

As suggested by the discussion in \textit{Euclid}, zoning seeks to do more than simply avoid the kinds of inharmonious land development that would lead to confrontations akin to nuisance litigation. Prior to \textit{Euclid}, the Supreme Court had upheld a state statute limiting residential structures to heights of eighty to one hundred feet, while countenancing higher buildings in commercial areas. The Court had sustained the residential height restriction on the ground that it was reasonably related to firefighting.\textsuperscript{185} Under \textit{Euclid}, the same restriction could have been premised, more realistically, on efforts to preserve light and air and avoid overcrowding. Also prior to \textit{Euclid}, the Supreme Court had upheld a ban on billboards on residential streets,\textsuperscript{186} citing fire risks from accumulations of combustible materials, unsanitary conditions, and concealments afforded for “immoral practices, and for loiterers and criminals.”\textsuperscript{187} Aesthetic concerns are a more plausible basis.

In \textit{Gorieb v. Fox},\textsuperscript{188} decided shortly after \textit{Euclid}, the Supreme Court sustained the validity of a set-back restriction: the building at issue was required to be set back thirty-five feet from the street. The Court cited the advantages of the extra space in reducing road and fire hazards, in providing room for lawns and trees, in keeping dwellings further from the dust, noise and fumes of the street, and in adding to “the attractive-

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{185} Welch v. Swasey, 214 U.S. 91, 107 (1909).
\item\textsuperscript{186} \textit{Thomas Cusack Co. v. City of Chicago}, 242 U.S. 526 (1917); \textit{accord}, \textit{St. Louis Poster Advertising Co. v. City of St. Louis}, 249 U.S. 269 (1919).
\item\textsuperscript{187} \textit{Thomas Cusack Co.}, 242 U.S. at 529.
\item\textsuperscript{188} 274 U.S. 603 (1927).
\end{enumerate}
\end{footnotesize}
ness and comfort of a residential district."

While not wholly emancipated from narrow concerns about firefighting and street safety, the Court cited Euclid as supporting a much more expansive view of land use controls, one that embraced aesthetic concerns and choices about life style. The full scope of the transition is illustrated by Village of Belle Terre v. Boraas, decided in 1974, almost five decades after Euclid. The village—less than one square mile in size—restricted land use to one-family dwellings, excluding lodging houses, boarding houses, fraternity houses, and multiple dwelling buildings. Challenged by a group of students seeking to rent a one-family house, the restrictions were upheld by the Supreme Court:

The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . [Government may] lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

While some state courts continue to balk at land-use restrictions premised solely on aesthetic or life-style preferences, the takings clause of the Federal Constitution is no bar to such measures.
Land use control has been carried to extreme lengths in ordinances concerned with preservation of historic buildings. One such ordinance was at issue in the Court of Appeals decision in *Maher v. City of New Orleans*,¹⁹⁵ which was concerned with structures in the historic French Quarter of New Orleans. Maher owned a cottage in the Quarter and sought to demolish it and erect in its place a seven-apartment complex.¹⁹⁶ His proposal was rejected and Maher claimed a taking.¹⁹⁷ The Court sustained the ordinance, likening it to ordinances regulating other aspects of land ownership, “such as building height, set back or limitations on use.”¹⁹⁸ Further, Maher did not show that “the ordinance so diminished the property value as to leave Maher, in effect, nothing. . . . [He] did not show that the sale of the property was impracticable, that commercial rental could not provide a reasonable rate of return, or that other potential use of the property was foreclosed.”¹⁹⁹ The District Court had observed that rental values in the French Quarter were reputedly relatively high; the Court of Appeals declined to take judicial notice of the point, treating it as irrelevant.²⁰⁰ From the perspective of sound analysis, the final point is crucial.

It is relevant, under the insurance objective, that the loss imposed on Maher was not unduly large. But the fact that Maher was left with more than “nothing,” and that he might be able to obtain a “reasonable” commercial rental for the cottage (whatever that may mean), is not indicative of the extent of Maher’s loss. There is nothing to suggest that Maher or his predecessor was a speculator, assuming unusual risks.

From the perspective of economic development, it is troublesome that Maher was precluded from making more profitable use of his property. On its face, the ordinance appears to be a barrier to economic progress.

Finally, it could be argued that Maher was being pressed into public service to provide a part of a tourist attraction beneficial to the economy.

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¹⁹⁵. 516 F.2d 1051 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976).
¹⁹⁶. *Id.* at 1054.
¹⁹⁷. *Id.* at 1054-55.
¹⁹⁸. *Id.* at 1066.
¹⁹⁹. *Id.*
²⁰⁰. *Id.* at 1066 n.84.
of New Orleans—or to provide a source of pleasure for residents of the city, akin to a public park. If so, the ordinance is an effort to evade the city's fiscal responsibilities. If the city wants a tourist attraction, or the equivalent of a park for its residents, it should pay for it with public funds.

But these points are not compelling if Maher derives a benefit from the ordinance—if rents in the French Quarter are in fact relatively high. If the value of Maher’s building is enhanced by the historic character of the French Quarter, Maher cannot complain when he is denied a “free ride” on the historic preservations of others; he, too, must do his part to maintain the historic character of the neighborhood. The situation is the same in principle as the requirement that a residential owner, benefiting from the low-density and noncommercial character of a neighborhood, must maintain that character by complying with restrictions pertaining to height, set back, and limitations on use. The analogy by the court to such zoning requirements is pertinent; the balance of the court’s discussion is wide of the mark. In sum, Maher is probably correct, but not for the reasons advanced by the Court of Appeals.

The issue of landmark preservation came before the Supreme Court in *Penn Central Transportation Co. v. New York City.* Penn Central sought to build a fifty-five floor tower above its New York City terminal in conformity with all zoning and space requirements. The tower, once constructed, would provide Penn Central with additional annual revenues of at least $2 million. Permission to build was denied because the terminal had been designated a landmark by the City and the

201. Similarly, in Kelly v. Tahoe Regional Planning Agency, 855 P.2d 1027, 1035 (Nev. 1993), cert. denied, 114 S. Ct. 684 (1994), the court upheld a regulatory restriction on the timing of development of some of plaintiff's lots, observing that plaintiff was a beneficiary of the regulatory plan since “every single one of Mr. Kelly's lots will eventually diminish in value if Lake Tahoe is despoiled.” Id. at 1035 (quoting the lower court's decision).

202. Similar results have been reached in cases involving extractions from a common pool, where restrictions are required to protect the rights of all participants. See Walls v. Midland Carbon Co., 254 U.S. 300 (1920); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900).


205. *Id.*
tower was incompatible with the historic character of the building.\textsuperscript{206} In lieu of the right to build, Penn Central received transferrable development rights, of uncertain value, enabling it to utilize air space above other structures in the area.\textsuperscript{207} A majority of the Court found no taking;\textsuperscript{208} a minority would have remanded to determine whether the transferrable development rights were sufficiently valuable to constitute just compensation for the taking of Penn Central’s right to build the tower (its “air rights”).\textsuperscript{209}

The majority opinion began by identifying the factors to be considered in determining whether there has been a compensable taking:

\begin{quote}
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 . . . relevant considerations. So, too, is the character of the governmental action. A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.\textsuperscript{210}
\end{quote}

In upholding the government action in this case, the Court observed that the law did not interfere with present use of the terminal, described as Penn Central’s “primary expectation concerning the use of the parcel.”\textsuperscript{211} Moreover, Penn Central will be able “to obtain a ‘reasonable return’ on its investment.”\textsuperscript{212} As to the air rights themselves, the Court commented that Penn Central might be permitted to build a smaller tower\textsuperscript{213} and that it had received transferrable development rights: “these rights may well not have constituted ‘just compensation’ if a ‘taking’ had occurred, [but] the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on [Penn Central] and, for that reason, are to be taken into account in considering the impact of regulation.”\textsuperscript{214}

\textsuperscript{206}Id. at 117-18.
\textsuperscript{207}Id. at 129.
\textsuperscript{208}Id. at 138.
\textsuperscript{209}Id. at 152 (Rehnquist, J., dissenting).
\textsuperscript{210}Id. at 124 (citations omitted).
\textsuperscript{211}Id. at 136.
\textsuperscript{212}Id.
\textsuperscript{213}Id. at 136-37.
\textsuperscript{214}Id. at 137. On this point, the Court cited John J. Costonis, The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks, 85 Harv. L. Rev. 574, 585-89 (1972). See also id. at 620-31; John J. Costonis, The Disparity Issue: A Context for the Grand Central Terminal
Since New York City landmarks are relatively few in number and scattered throughout the city, the result in *Penn Central* cannot be defended on the reasoning employed in upholding the outcome in *Maher*. There is no historic district to which all participants contribute and from which all derive benefits. Considered in light of the objectives of just compensation, *Penn Central* is an unsound decision.

Bearing on the insurance objective, the Court sought to minimize the financial impact of the regulation on Penn Central. On this, the dissent's position provides a better resolution: remand to determine whether the transferable development rights truly compensate Penn Central for an annual revenue loss in excess of $2 million. Some commentators have observed the Penn Central, as a diversified company, could self-insure, and thus did not require the insurance implicit in the just compensation clause. The point has merit, but it ignores the fact that just compensation insurance is mandatory. Penn Central could not elect to waive the constitutional guarantee and receive a rebate on its taxes representing a return of premium. Such reasoning, if taken seriously, also could lead to pointless distortions in property ownership—e.g., Penn Central could avoid the thrust of this argument by selling the terminal to an individual or to a nondiversified company.

On economic development, the case is a major setback. Here we have a company penalized for doing the right thing: building a good structure. There is something wrong with a normative system that places a premium on mediocre or shoddy workmanship. Nor is the preservation of the status quo—Penn Central's continued use of the terminal—a satisfactory resolution. Economic development means economic progress, not standing still. Nor is it enough to assure Penn Central the ability to earn a reasonable return (even assuming the concept is capable of substantive content); a reasonable return is like a mediocre building—settling for less than the best, not striving to excel.

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215. *Penn Central, 438 U.S. at 138 n.1 (Rehnquist, J., dissenting).*
216. Id. at 152.
217. See Blume & Rubinfeld, supra note 16, at 611-12.
218. The point is recognized by Blume & Rubinfeld, id. at 614-15, but its applicability to *Penn Central* is not considered.
219. For a similar analysis of *Penn Central*, see Donald Wittman, *Liability for Harm or Restitution for Benefit?,* 13 J. LEGAL STUD. 57, 74-76 (1984) (also discussing the *Maher* case).
The most serious vice, however, is the fiscal irresponsibility implicit in the landmark designation measure. Some segment of society, including persons influential in city government, were persuaded that the preservation of historic landmarks was a good thing. The Court in *Penn Central* readily accepted the legitimacy of the objective. The problem, however, was that city officials, responsive to their taxpayer constituents, had not been willing to pay for the public good they had sought to obtain. So they pressed Penn Central’s building into public service, paying in the bogus currency of transferable development rights. If the benefits were so great, why not pay for them in dollars or in benefits that could be evaluated in dollars? The answer, quite obviously, is that the benefits of landmark preservation were not sufficiently great to warrant the expenditure of taxpayer dollars—i.e., the public benefits, determined in a democratic process, did not exceed the private costs, determined in an eminent domain proceeding.

On the “factors” advanced in the *Penn Central* opinion, some are relevant, but not as part of an undifferentiated mass. Consider, for example, the “economic impact of the regulation.” If the impact is slight, the case for the insurance objective is diminished. If the impact is diffuse (as in zoning and in many other regulatory schemes), it may be impracticable to provide compensation. But the impact in *Penn Central* was neither slight nor diffuse. A court could determine, in a narrowly directed inquiry, the substantial value of the air rights lost by Penn Central.

On “distinct investment-backed expectations,” it is hard to fathom what the court had in mind. Is the cottage inherited in the *Maher* case disqualified from protection because the current owner had made no investment to obtain it? If an investment is made in undeveloped land, with an expectation of commercial or industrial development, is that investment entitled to protection against adverse zoning despite the decision in *Euclid*? In *Penn Central*, the terminal had been constructed at the outset to support a tower. It is hard to imagine a more “distinct investment-backed expectation.”

The final factor, “the character of the governmental action,” simply differentiates physical occupations from other forms of government interference. The distinction is helpful in some contexts, but not

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221. *Id.* Similar terminology is used by Michelman, *Property*, supra note 5, at 1213.
particularly useful in *Penn Central* once the Court concedes, as it did, that “we do not embrace the proposition that a ‘taking’ can never occur unless government has transferred physical control over a portion of a parcel.”

In sum, *Penn Central* in its general approach is an invitation to continued confusion and obfuscation; it builds on the wrong branch of *Pennsylvania Coal*, the ad hoc inquiry into whether a regulation “goes too far.” As applied to the facts before it, *Penn Central* sanctions a government deprivation that warranted compensation under all the objectives of the just compensation requirement: insurance, economic development, and fiscal responsibility. Whatever the merits of the *Penn Central* structure as a historic landmark, the *Penn Central* opinion is a blight on the judicial landscape.

E. Denial of Development in the Name of the Environment

In recent years, controversies have arisen over the economic development of ecologically sensitive lands such as wetlands and coastal shores. State court decisions are divided in their approach to this issue.

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223. *Id.* at 123 n.25. Some commentators have argued that no taking should be found absent physical appropriation by the government. See Fred BosseLMAN ET AL., THE TAKING ISSUE 238-55 (1973); Treanor II, *supra* note 4, at 791-97; Note, *Taking Back Takings: A Coasean Approach to Regulation*, 106 Harv. L. Rev. 914, 917-21 (1993). Some early Supreme Court cases support the view. See Meyer v. Richmond, 172 U.S. 82, 96-99 (1898); Gibson v. United States, 166 U.S. 269, 275 (1897); Transportation Co. v. Chicago, 99 U.S. 635, 642 (1878); The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1870). But subsequent Supreme Court cases have made clear that government conduct beyond the premises may trigger the takings clause. See, e.g., Dugan v. Rank, 372 U.S. 609, 625 (1963) (interference, upstream of the property, with riparian owner's interest in river's flow); United States v. Virginia Elec. & Power Co., 365 U.S. 624, 627 (1961) (destruction of a flowage easement over the lands of another); United States v. Kansas City Life Ins. Co., 339 U.S. 799, 810-11 (1950) (interference with drainage of waters from a farm); United States v. Cress, 243 U.S. 316, 327-29 (1917) (interference with flowage of waters from a mill); United States v. Welch, 217 U.S. 333, 338-39 (1910) (extinguishment of private right-of-way appurtenant to a farm). For further discussion of riparian rights, see StOEBUCK, supra note 76, at 72-98. In addition, property owners are protected against government sponsored nuisances, government interference with access rights, and government appropriation of an owner's rights in the lands of another, all of which can occur without government intrusion on the owner's physical domain. See supra notes 72-84 and accompanying text. Even Bosselman and company concede that the takings clause is triggered if land is zoned exclusively for a public park or some other public use. BosseLMAN ET AL., supra, at 254.

224. A similar argument can be made with respect to at least some large-lot zoning: "Developers required to meet 'supernormal' standards, such as open-space requirements in communities where existing development is at high densities, should have to be compensated for the net burden of the regulation. . . . Owners of such land are often few in number [and receive] few implicit, in-kind benefits." Fischel, supra note 34, at 1584-85.
In *State v. Johnson*, a developer sought to fill and build upon land classified as coastal wetlands; permission having been denied, the builder sued, claiming denial of due process and an uncompensated taking. The land, if filled, was appropriate for the residences plaintiff sought to build. Left unfilled, the land had no commercial value. The court acknowledged that the area in question "plays an important role in the conservation and development of aquatic and marine life, game birds and waterfowl." Even so, the court held that the denial of the fill permit was equivalent to a taking because the wetlands constituted a valuable resource of the state and the "cost of its preservation should be publicly borne" and not thrust upon plaintiffs, who would be left with "commercially valueless land."

By contrast, in *Just v. Marinette County*, the owner of a shoreland tract was convicted of violating a zoning ordinance by depositing fill on the land, without a permit, with a view to constructing a residence. The court found no unconstitutional taking. The purpose of the ordinance was to protect navigable waters and the public rights therein from the degradation and deterioration which results from uncontrolled use and development of shorelands. . . . 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.

The sharp division between *Johnson* and *Just* is a difference in conception of the baseline of normalcy in the use of land. *Johnson* views preparation for residential construction to be a normal use; any restriction on that use confers a *benefit* upon the public and the public should pay

225. 265 A.2d 711 (Me. 1970).
226. *Id.* at 716 (quoting the lower court).
227. *Id.*
228. 201 N.W.2d 761 (Wis. 1972).
for depriving the property owner of a valuable use of his property. *Just*, on the other hand, views land in its natural state as the baseline of normalcy; any departure from that baseline, if it causes harm to the environment, is an *injury* to the public, which the public can prevent without payment of compensation.

This difference in perspective does not affect the insurance objective of just compensation. Neither Johnson nor *Just* appears to have been a speculator in land: Johnson was adding a modest tract to an existing development (the new addition was about two acres in all). *Just* was seeking to develop a single building lot. There was nothing to suggest that the owners should have been aware, at the time of their land acquisitions, that the government would bar development of their properties. The insurance objective would call for compensation in both cases.

The economic development objective is implicated to the same extent in each case. The government acted before substantial development efforts began, so economically valuable improvements were not destroyed. But the land was being zoned into idleness and that is troublesome from the perspective of economic development.

The fiscal responsibility objective cannot be evaluated without selecting an appropriate baseline. If *Johnson* is correct, compensation is called for because the state is seeking to obtain a “benefit” from the owner for which it should pay. Under *Just*, by contrast, the state is simply barring the owner from using his land to inflict an “injury,” a governmental action that carries no inappropriate fiscal implications.

To resolve this last issue, it is necessary to ask what it means to say that Johnson and *Just* “owned” their land. Title to land originates in the state or in state sanctioned transactions. Can the government argue that title, recognized by the state, is title to an empty box containing nothing of substance? Perhaps the government could do just that and require that owners of certain kinds of property assume all risk and proceed at their peril. The Supreme Court has done so with respect to improvements on navigable waterways; but the government’s navigation servitude dates back to the nineteenth century and is known to all affected parties.230 The critical point is *notice* to property owners that the title they acquire may not be worth the paper it is written on.

The issue came before the Supreme Court in *Lucas v. South*...
In 1986, Lucas paid $975,000 for two residential lots on the Isle of Palms in South Carolina. He intended to build two single family homes. In 1988, however, South Carolina enacted new legislation that barred Lucas from erecting any permanent habitable dwellings on the two parcels, a prohibition that rendered the parcels "valueless." (All adjacent lots had been developed for residential purposes at the time Lucas made his purchases). Lucas did not challenge the validity of the state legislation—adopted to protect the shoreline from erosion and excessive development—but he claimed a compensable taking. The South Carolina court rejected the claim. The Supreme Court reversed, finding sufficient merit in Lucas’ claim to warrant reexamination by the state courts.

The Supreme Court held that regulation constitutes a taking where it “denies all economically beneficial or productive use of land.” In such cases, it is unlikely that the legislature is “simply ‘adjusting the benefits and burdens of economic life’ in a manner that secures an ‘average reciprocity of advantage’ to everyone concerned.” Nor can it be claimed, in these “relatively rare situations” of complete deprivation, that “‘[g]overnment 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.’” Laws that leave the owner of property “without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.”

The Court rejected the benefit-injury dichotomy that divided the Johnson and Just courts because

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

232. Id. at 2896.
233. Id. at 2901-02.
234. Id. at 2893.
236. Lucas, 112 S. Ct. at 2894 (quoting Mahon, 260 U.S. at 415).
237. Lucas, 112 S. Ct. at 2894-95.
is necessary in order to prevent his use from "harming" South Carolina’s ecological resources; or, instead, in order to achieve the “benefits” of an ecological preserve.\(^\text{238}\)

In place of the prior takings jurisprudence, which permitted uncompensated takings to prevent “noxious-use[s],”\(^\text{239}\) the Court propounded a different approach:

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.\(^\text{240}\)

The Court continued by stating:

Any limitation [that prohibits all economically beneficial use of land] . . . must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts [in a suit to abate a public or private nuisance] . . . .\(^\text{241}\)

The Court gave as examples the denial of permission to fill a lake if the landfilling “would have the effect of flooding others’ land,” or the mandated removal of a nuclear generating plant sitting “astride an earthquake fault.”\(^\text{242}\) These uses were “always unlawful, and . . . it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.”\(^\text{243}\) The Court observed that the “fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition;”\(^\text{244}\) so, too, “does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant;”\(^\text{245}\) and it is unlikely “that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner’s

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\(^{238}\) Id. at 2897-98.
\(^{239}\) Id. at 2899.
\(^{240}\) Id.
\(^{241}\) Id. at 2900.
\(^{242}\) Id.
\(^{243}\) Id. at 2901.
\(^{244}\) Id.
\(^{245}\) Id.
land; they rarely support prohibition of the ‘essential use’ of land.”

The case was remanded to the South Carolina court to “identify background principles of nuisance and property law that prohibit the uses [Lucas] now intends in the circumstances in which the property is presently found” as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance.” On remand, the South Carolina court was unable to identify any prohibitory background principle and the case was remanded to the trial court to determine the extent of compensation, for at least a temporary taking, if Lucas were permitted to build.

The decision in Lucas—and its resolution of the division between Johnson and Just—is substantially in accord with the analysis advanced in connection with the earlier cases. The insurance objective is given weight regarding this owner since the protection of Lucas—at least as against a “total taking”—must be found in antecedent background principles of law, principles of which an owner should be apprised and subject to which he takes title to the property. The objective of economic development is implicated because the property is being zoned into idleness, although Lucas, like Johnson and Just, had not yet built on his land. Finally, the Court’s opinion insists on governmental fiscal responsibility. If the use prohibited is encompassed by antecedent background principles, then compensation is not required because nothing has been taken; the owner’s title was subject to such principles from the outset. On the other hand, if the owner had clear title as related to the newly enacted prohibition, then compensation must be paid. The Court emphasized that a “State, by ipse dixit, may not transform private property into public property without compensation.”

246. Id.
247. Id. at 2901-02.
248. Id. at 2901.
249. Lucas v. South Carolina Coastal Council, 424 S.E.2d 484 (S.C. 1992). On remand to the trial court, the case was settled with a state purchase of the Lucas lots. The state then sold the lots to a private developer for residential construction. Confronted with the need to act in a fiscally responsible manner, the state was not prepared to make the financial sacrifice it had imposed on Lucas. See R.S. Radford, Land Use Regulation and Legal Rhetoric: Broadening the Terms of Debate, 21 FORDHAM URB. L.J. 413, 421-22 (1994) (book review).
250. 112 S. Ct. at 2901 (quoting Webb’s Fabulous Pharmacies v Beckwith, 449 U.S. 78, 86 (1911)). Two problems remain after the Lucas decision. First, in order to find a “total taking,” it is necessary to identify “the ‘property interest’ against which the loss of value is to be measured.” Id. at 2894 n.7. For example, the Court observed that if a regulation requires a developer to leave 90% of a rural tract undeveloped, “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,
Two recent decisions indicate the diverse impacts of *Lucas*. In *Loveladies Harbor, Inc. v. United States*, a developer began with a 250-acre parcel. By 1982, 199 acres had been developed and 193 acres sold. Development of the remaining fifty-one acres was challenged by the State of New Jersey because of impingement on wetlands. In a settlement with the State, permission was granted to develop 12.5 acres on condition that 38.5 acres be subjected to a deed restriction barring fill or use for any non-water dependent activity. The settlement was not accepted by the Army Corps of Engineers, which denied a fill permit for the 12.5 acres. The Federal Circuit found a taking under *Lucas*.

On the question of the land affected, the Court ruled that both the previously developed land (199 acres) and the land subject to the deed restriction (38.5 acres) should be excluded from consideration. This left the 12.5 acres in issue, which declined in value from $2,658,000 to $12,500 in consequence of denial of the fill permit. This was sufficient to trigger *Lucas*; the remaining value was characterized as *de minimus*. The Court then turned to the question of whether the denial of use could be justified under common law nuisance principles and concluded in the negative. The relevant nuisance law was that of New Jersey and New Jersey had granted its approval to development of the

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or as one in which the owner has suffered a mere diminution in value of the tract as a whole."

The issue was not presented in *Lucas*, and the Court speculated that the answer "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."

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Second, the “total taking” rule appears to make an arbitrary distinction between a landowner sustaining a 95% loss and one sustaining a 100% loss. The Court responded that a “landowner whose deprivation is one step short of complete,” may seek compensation under multi-factor test of *Penn Central*, under which “[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. *Lucas*, 112 S. Ct. at 2895 n.8 (alteration in original) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978)).

Neither of these issues is critical under the analysis developed in this Article, which calls for an evaluation of any significant impairment of value in light of the just compensation objectives of insurance, economic development, and fiscal responsibility. But the extent of loss—which is relevant to the insurance objective—may require some appraisal of the totality against which the loss is to be reckoned. The need to identify an appropriate “property interest” cannot be avoided entirely, and the *Lucas* suggestion—the owner’s reasonable expectations shaped by applicable state law—may be a workable point of departure.

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251. 28 F.3d 1171 (Fed. Cir. 1994).
252. *Id.* at 1182-83.
253. *Id.* at 1178.
12.5 acres. The court emphasized that Loveladies had "purchased the property with the intent to develop it long before these particular state and federal programs came into effect. . . . Nor did Loveladies have the opportunity to decide, at the beginning, whether its investment backed expectations could be realized under the regulatory environment the state later attempted to impose." 254

A contrasting case is *Hunziker v. State*, 255 in which an Indian burial ground was found on one of fifty-nine lots under development. The burial ground was so located that construction on Lot 15 was rendered infeasible. That lot had been purchased from the developer by a Mr. Rogers for $50,000, but, following the discovery of the burial ground, the developer refunded the purchase price to Rogers. The Iowa court found no taking. It observed that the Iowa statutes protecting Indian burial grounds had been in existence some ten years before the plaintiffs had purchased the land. "The plaintiffs took title to the land in question subject to the provisions of these sections. . . . [They] ran—so to speak—with the land." 256 In *Lucas*, the regulations in question had been passed after the plaintiffs acquired title. "Here, at the time plaintiffs acquired title, the State, under existing state law, could have prevented disinterment. This limitation or restriction on the use of the land inhered in the plaintiffs' title." 257

Although not mentioned in the majority opinion, the dissent observed that the State had urged that plaintiffs were undeserving of compensation because they had made "so much money selling other lots in the fifty-nine acre tract that their loss of Lot 15 is but a fraction of their investment and therefore 'de minimus.'" 258 In other words, if the 59-acre tract were considered the relevant parcel of property, the loss of Lot 15 was but a partial taking.

*Hunziker* nicely illustrates two troubling problems in seeking to apply *Lucas* in accordance with its terms: (1) if the state statute is applied to the developer, the loss of Lot 15 is a partial taking; but if Mr. 


256. *Id.* at 371.

257. *Id.*

258. *Id.* at 372 (Snell, J., dissenting).
Rogers cannot obtain a refund of his $50,000 purchase price, the loss, as to him, results in a "total taking;" (2) to accept the majority's approach in Hunziker is to place a cloud on the title of every parcel of Iowa real estate changing hands after 1978, the date of the enactment of the legislation on Indian burial grounds. How many other "imperfections" in title might be found by searching for a pretransfer statute or regulation or precedent that arguably bars present plans to develop the land? 259

Other decisions have read Lucas in a similar way, holding that the present owner is subject to the adverse consequences of statutes in effect at the time of taking title. 260 Under such reasoning, the predecessor in title may have a claim 261—but one that would be difficult to assert because of the hypothetical nature of the question posed: What was the loss of value inflicted at some time in the past when the legislative restriction was imposed but no land transfers were taking place? Moreover, in order to assert the claim, the prior owner would have to allege a taking prior to transfer and thus prior to planned development—an approach almost surely foreclosed by the Supreme Court’s resistance to "facial" challenges of land use restrictions. 262

259. For earlier decisions giving similar effect to reservations of state control, see Kirk v. Maumee Valley Elec. Co., 279 U.S. 797, 803-04 (1929); Fox v. Cincinnati, 104 U.S. 783, 786 (1881). For a recent case rejecting a takings claim because the right in issue was qualified, see Bamford v. Upper Republican Natural Resources Dist., 512 N.W.2d 642, 652 (Neb.), cert. denied, 115 S. Ct. 201 (1994).


261. This issue is analyzed, and previous discussions reviewed, in Fischel & Shapiro, supra note 16, at 287-91. See also Bowles v. United States, 31 Cl. Ct. 37, 51 (1994). For a contrary view, see Note, supra note 223, at 921 n.44 (arguing that the prior owner could not have a claim because land was never exempt from regulation).

262. Claims of taking were rejected as premature in MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348 (1986) ("[A]n essential prerequisite to . . . [a regulatory takings claim] is a final and authoritative determination of the type and intensity of development legally permitted on the subject property."). In another case, the Court held that respondent's claim is not ripe because it "has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property" and thus "it is impossible to tell whether the land retained
To protect the constitutional claim of the original owner will require some astute lawyering. A, the owner of undeveloped land, is confronted with a new statute seriously impeding residential construction. If A is frustrated in its own effort to build, it can seek redress under Lucas. But if A transfers the property to B and B’s construction efforts are barred, B has no claim under Lucas because the land came subject to the newly enacted servitude. A also is disabled from challenging the restriction because A no longer has an interest in the land (and any pretransfer challenge by A would have been rejected as not ripe for adjudication). The solution is for A to transfer the land to B subject to a condition providing that the land will automatically revert to A if B’s construction plans are frustrated by regulatory refusal. If the regulatory ban is challenged by both A and B, the government cannot escape the need to justify the refusal under the standards articulated in Lucas. Whether such transactions are commercially feasible is subject to question. But it seems unlikely that any other procedure will preserve the constitutional question when land is transferred subsequent to a newly imposed restriction.

As discussed in connection with zoning, land speculators merit little protection under the just compensation provision. Their claims are weak in terms of both the insurance and development objectives, and here the fiscal responsibility objective is clouded by ambiguities attached to “harm” and “benefit.” But their claims are not negligible. Unlike zoning, there is no prospect in this instance of mutually beneficial gains; the land is being zoned into idleness. Further, state purchase of the property is not precluded by any administrative complexities. Accordingly, the objectives of just compensation call for a higher measure of protection in these types of cases. As to land speculators, claims of taking should be denied only if, at the time of land acquisition, the proposed development was subject to challenge under existing state or federal law.


263. See supra text accompanying notes 225-30.

264. State law includes not only statutes and regulations, but common law restraints reflected in the law of nuisance or the law of property, including the public trust doctrine. On the latter, see supra note 229. See also Stevens, 854 P.2d at 456 (reliance on custom as antecedent state law); Paul Sarahan, Wetlands Protection Post-Lucas: Implications of the Public Trust Doctrine on Takings
particularly by a residential owner or by a business or builder, the government’s burden should be more substantial. To defeat a claim based on substantial impairment of value, the government should have to establish that the new owner knew, or should have known, that the development in question was prohibited or was subject to searching administrative review. At this stage, the insurance and economic development objectives assume even greater importance and should not lightly be overridden. Moreover, the totality of the taking should not be critical; a substantial impairment of value should suffice.

Consider, for example, *Florida Game & Fresh Water Fish Commission v. Flotilla.* The state restricted development on 48 acres of a 173-acre parcel to protect the habitat of bald eagles. The court refused to find a taking because the owner had not shown that the project as a whole had been rendered economically unviable. But the forty-eight acres were clearly “taken”—as much as if they had been incorporated into a public park or a public game preserve. Why should it matter whether the developer retained 125 acres or twenty-five acres or no acres? The case is not far removed from a physical occupation and


265. See Bowles v. United States, 31 Cl. Ct. 37 (1994) (holding that a planned private residence was protected against subsequent unanticipated change in government regulations); Gil v. Inland Wetlands & Watercourses Agency, 593 A.2d 1368, 1373 (Conn. 1991) (same). On the significance of anticipation in negating a need for compensation, see Wittman, supra note 219, at 66, 77-79.

266. In early 1995, the House of Representatives passed the Private Property Protection Act, later incorporated into the Job Creation and Wage Enhancement Act (§§ 201-10), H.R. REP. No. 9, 104th Cong., 1st Sess. (1995). For details and related developments, see Casenote, 47 ME. L. REV. 501, 519 (1995). Subject to a number of qualifications, the proposed law provides that a 20% reduction in market value triggers a takings claim. See also Treanor II, supra note 4, at 879.

By contrast, judicial determinations continue to sanction severe destructions of private property values. For example, in Dodd v. Hood River County, 855 P.2d 608 (Or. 1993), plaintiffs were denied permission to build a home, on acreage purchased for the purpose, because the site was within a “forestry zone.” A taking claim was rejected because: (1) the land retained some value as a source of timber, and (2) plaintiffs at the time of purchase, by some unspecified means, “had constructive notice as to the pending zoning limitations.” Id. at 616. Neither ground would suffice under the approach suggested in this Article.

267. 636 So. 2d 761 (Fla. Dist. Ct. App.), review denied, 645 So. 2d 452 (Fla. 1994); accord Seven Islands Land Co. v. Maine Land Use Regulation Comm’n, 450 A.2d 475 (Me. 1982) (holding temporary curtailment of timber operations not compensable).

should be treated as a classic taking.  

F. Approving Development on Compliance with Conditions

Zoning and other land use controls are typically stated in broad prohibitory terms. But they are administered with some flexibility to permit property owners to engage in development consistent with the spirit of the controls, though possibly at variance with the letter. For example, a homeowner seeking to add a new room may exceed the bulk limitation applicable to her parcel; but a zoning agency may be persuaded to permit the construction if trees and shrubs are employed to screen the new addition. Several recent Supreme Court cases have been concerned with possible abuses of the power to impose conditions.

In Nollan v. California Coastal Commission, permission was sought to build a beachfront house exceeding the size limitation applicable to the property. The Commission granted approval on condition that the Nollans allow bathers at nearby public beaches to traverse their private beach in walking from one public beach to another. The Supreme Court struck down the condition as an uncompensated taking because it required an easement that “utterly fails to further the end advanced as the justification for the” size restriction; there was an absence of an “essential nexus.” The Court observed that the purpose of the size restriction was to protect “the public’s ability to see the beach notwithstanding construction of the new house.” The Commission could legitimately impose a height limitation, a width restriction, or a ban on fences. It could even impose a “requirement that the Nollans provide a viewing spot on their property for passersby

269. See supra part III.A. In Babbitt v. Sweet Home Chapter, 115 S. Ct. 2407 (1995), the Supreme Court expanded the scope of the Endangered Species Act, 16 U.S.C. § 1531 (1988 & Supp. V 1993), to preclude any modification of an animal’s habitat that results in the killing or injuring of protected wildlife. No takings issue was discussed by the Court, but the dissent protested that preserving habitats on private lands “imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use.” Id. at 2421 (Scalia, J., dissenting).

270. 483 U.S. 825 (1987), rev’g 223 Cal. Rptr. 28 (Ct. App. 1986). The Nollan house was classified as a “new development,” requiring regulatory approval, because it exceeded the size of the prior structure by more than 10% (and also because the site of the house had been altered). See 223 Cal. Rptr. at 31.

271. Nollan, 483 U.S. at 837.

272. Id.

273. Id. at 836.

274. Id. at 836.
with whose sighting of the ocean their new house would interfere."\textsuperscript{275}
But absent a relation to protecting the public's view, the purpose of the condition becomes "the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation."\textsuperscript{276}

One wonders what would have happened if the California Commission had sought to achieve its objective in two steps rather than one. First, the Nollans are permitted to build their house on condition that they supply a viewing spot of the type described by the Supreme Court and pronounced by it to be legitimate. Then the Commission (or the Nollans) initiates negotiations for a trade. The viewing spot does the public little good, absent related parking facilities and beach access; but its occasional use is highly intrusive on the Nollans' privacy; viewers wander past the ground floor windows of the Nollan house at all hours of the day and night. On the other hand, lateral access across the Nollan beach would be highly valued by bathers at adjacent public beaches, and traversals by them along the beach would be largely invisible from the Nollan house, because the beach in issue was only about ten feet wide and there was a seawall eight feet high between the beach and the house. It is hard to imagine that the Supreme Court would interpose its authority to block the second step, an exchange advantageous to both the Nollans and the public. If this analysis is correct, then the victory of the Nollans cannot be attributed to any sturdy constitutional safeguard. The California Commission had insufficiently prescient lawyers.

In \textit{Dolan v. City of Tigard},\textsuperscript{277} the issue was revisited. Dolan wished to expand her hardware store and adjacent parking lot. The City granted a permit conditional on the dedication to the City of a strip of land to be used as a greenway and bicycle/pedestrian path. The Supreme Court ruled that, since Dolan's expanded facilities would increase both traffic and the flow of surface waters, the condition met the "essential nexus" requirement of \textit{Nollan}.\textsuperscript{278} But the Court added a further requirement of "rough proportionality," i.e., "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."\textsuperscript{279} The dedication of the greenway was held to be unsupported because "[t]he city has never said why a public greenway, as opposed to a private

\begin{itemize}
\item \textsuperscript{275} Id.
\item \textsuperscript{276} Id. at 837.
\item \textsuperscript{277} 114 S. Ct. 2309 (1994).
\item \textsuperscript{278} Id. at 2318-20.
\item \textsuperscript{279} Id. at 2319-20.
\end{itemize}
one, was required in the interest of flood control."\textsuperscript{280} (Independently of the proposed expansion, Dolan was precluded from developing the greenway in issue.) As to the bicycle/pedestrian path, the Court ruled that "the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement."\textsuperscript{281}

On its face, the Court's demands appear to be excessive. Concerning the public dedication of the greenway, the dissent noted that "[t]he record does not tell us the dollar value of petitioner Florence Dolan's interest in excluding the public from the greenway adjacent to her hardware business."\textsuperscript{282} On this point, the analysis of Dolan parallels the discussion of Loretto and Pruneyard earlier in this Article; it is difficult to develop enthusiasm for a constitutional question that has no substantive consequences. Under preexisting limitations, the greenway in issue could not be used by Dolan for commercial purposes. What is the loss in value incident to preventing Dolan from excluding the public from a greenway that adjoins publicly accessible stores and publicly accessible parking areas? Why not take the greenway formally and pay Ms. Dolan one dollar? As to the traffic studies, it boggles the mind to believe that the Supreme Court is going to pass on how extensive a pedestrian/bicycle pathway is appropriate for a store expansion that is expected to generate 435 additional trips per day (a figure that the Court did not challenge). By its nature, the question does not lend itself to a precise answer and it is unclear how close an approximation is required.

In cases like Nollan and Dolan, the concern of the courts is understandable. State and local land control agencies administer regulations of broad scope that require administrative approval for almost any change of consequence. The agencies can, as a condition for approval, exact concessions from the property owner. The process results in the creation of a bogus currency (the tighter the restrictions, the greater the currency) and the land control agency can use this "currency" (their approval for desired projects) as a means of obtaining money or property from owners seeking such approval. The courts can do either of two things: (1) strike down the broad restrictions and require land control agencies to come back with more specific limitations, each of which they

\textsuperscript{280} Id. at 2320.
\textsuperscript{281} Id. at 2321.
\textsuperscript{282} Id. at 2322 (Stevens, J., dissenting).
would have to justify; or (2) review every challenge to exacted concessions to guard against overreaching by the land control agencies. The first course of action is seemingly barred by *Euclid* and its progeny and, in any event, is almost surely impracticable. This leaves the second course, which often will require courts to make highly specific determinations in cases in which such determinations are inherently problematic for the reasons given in connection with *Nollan* and *Dolan*.

These decisions, moreover, do not address a deeper problem. If a court overturns a conditional approval, the property-owner is not necessarily a winner. The regulatory agency may decide to withhold its approval altogether. If the general regulatory standard is lawful, and if its application to the particular property is not barred by some other constraint—such as economic unviability absent approval—the agency may choose outright denial despite the prospect for a mutually acceptable settlement with conditions. The message of *Nollan* and *Dolan* could be read as "Just Say No."

Even so, the two cases share a feature that may distinguish them from more routine exactions of concessions from developers. In each, the government had a plan traversing numerous properties: an extended right of passage along California beaches in *Nollan*; an extended bicycle/pedestrian path in *Dolan*. These plans had nothing to do with development of particular properties. Had no construction occurred, the governments would have had to resort to formal condemnation proceedings in order to complete their planned passage and pathway. Development was a fortuitous occurrence that enabled the governments to expropriate land on pretexts that were disingenuous. The sole purpose of the conditions in issue was to obtain private property without making payment, the very conduct the takings clause was intended to interdict. Viewed in this light, the Supreme Court decisions are correct; but their scope is narrow.


V. REGULATIONS AFFECTING PERSONAL PROPERTY AND FINANCIAL LIABILITIES

Personal property may be regulated because its use offends general social norms; or because it poses a danger to other personal property (analogous to incompatible adjacencies in real estate); or because other significant public policies will be advanced by regulation.

A. Uses Contravening General Social Norms

Statutes proscribing the production of alcoholic beverages also proscribe the sale of such beverages. Persons holding stocks at the effective date of the enactments sustain losses in the value of their inventories. The Supreme Court has held that such losses do not constitute a taking under the Fifth Amendment.286 Mugler was cited and followed; 287 prior discussion of that decision applies in this context as well. 288 supporting the result reached by the Court. Other Supreme Court decisions have upheld the summary destruction of proscribed fishing nets, 289 untested milk, 290 and unwholesome food. 291 A more complex issue was addressed in Andrus v. Allard. 292 Federal legislation proscribed the killing of eagles and other designated birds. 293 In implementing the statutes, the Secretary of the Interior

286. See James Everard's Breweries v. Day, 265 U.S. 545, 563 (1924) (statute was made effective immediately); Jacob Rupert v. Caffey, 251 U.S. 264, 301-02 (1920) (statute was made effective immediately); Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 158 (1919) (seven month grace period allowed for disposition of stocks); see also Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311, 320 (1917) (upholding prohibition against transportation of alcohol over due process challenge).
287. See Jacob Rupert, 251 U.S. at 302-03; Hamilton, 251 U.S. at 157-58.
288. See supra part IV.A.
prohibited commercial transactions in feathers or other parts of birds killed before statutory protection was extended to the creatures. Plaintiffs, engaged in the sale of Indian artifacts, challenged the regulations on the ground that they deprived plaintiffs of the opportunity to realize gains on the sale of avian artifacts derived from birds lawfully killed prior to the enactment of the protective legislation.\textsuperscript{294} The Supreme Court held that the regulations were not a taking violative of the Fifth Amendment.\textsuperscript{295}

The Court observed that the regulations served a valid purpose in protecting the designated birds. Congress could have concluded that “the possibility of commercial gain presents a special threat to the preservation of the eagles because that prospect creates a powerful incentive both to evade statutory prohibitions against taking birds and to take a large volume of birds.”\textsuperscript{296} Evasion might have been viewed “as a serious danger because there is no sure means by which to determine the age of bird feathers; feathers recently taken can easily be passed off as having been obtained long ago.”\textsuperscript{297}

With respect to the Fifth Amendment, the Court observed that the regulations “do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them.”\textsuperscript{298} Plaintiffs “retain the rights to possess and transport their property, and to donate or devise the protected birds.”\textsuperscript{299} The Court conceded that the regulations prevented the most profitable use of the property, but concluded that plaintiffs may be able “to derive economic benefit from the artifacts; for example, they might exhibit the artifacts for an admissions charge.”\textsuperscript{300} That plaintiffs lost one “strand” of their “bundle” of property rights and would sustain a “loss of future profits” was held not to be dispositive under the ad hoc evaluation premised on the reasoning of \textit{Penn Central}.\textsuperscript{301}

The decision is unsound. First, there was no evidence of any causal relation between the killing of eagles (or other birds) and the sale of Indian artifacts containing bird feathers. The Government was compelled to rely on the proposition that the regulation should be sustained if supported by “any state of facts either known or which could reasonably

\textsuperscript{294} \textit{Andrus}, 444 U.S. at 54-55.
\textsuperscript{295} \textit{Id.} at 67-68.
\textsuperscript{296} \textit{Id.} at 58.
\textsuperscript{297} \textit{Id.}
\textsuperscript{298} \textit{Id.} at 65.
\textsuperscript{299} \textit{Id.} at 66.
\textsuperscript{300} \textit{Id.}
\textsuperscript{301} \textit{Id.} at 65-66.
be assumed." Second, despite the unavailability of scientific dating techniques, other means existed to determine the age of artifacts. Plaintiffs produced evidence of such techniques, the evidence was not contested by the Government, and the District Court found that the statutes in issue could be "enforced by less drastic regulatory procedures, including affidavits of acquisition, registration by business records or markings, and expert examination. The [Government] failed to show any efforts to establish such a registration system." Finally, the availability of profits from display was a fiction fabricated by the Government; all the evidence of record established that the artifacts were without value absent the ability to sell.

Avian artifacts antedating the protective legislation were not contraband, akin to alcoholic beverages following prohibition legislation; the continued possession, display, and transfer of such artifacts contravened no social norm, old or new. Further, the regulations at issue completely destroyed the commercial value of such artifacts. What cannot be sold cannot possess a market value; there is no market. The Court's suggestion about exhibiting the artifacts for a fee was a judicial invention unsupported by the record.

Considered in the light of the objectives of just compensation, Andrus was wrongly decided. The insurance objective is defeated by the total destruction of market value. The objective of economic progress is disserved by the devaluation of the efforts of those who lawfully created the artifacts. The objective of fiscal responsibility is contravened by the government's refusal to shoulder the burden of effectuating its policies, imposing the whole cost on lawful businesses in possession of antecedent artifacts.

Perhaps the plaintiffs in Andrus were not successful because of the

302. Reply Brief for the Appellants, Andrus (No. 78-740) at 2 n.1 (citing United States v. Carolene Products Co., 304 U.S. 144, 154 (1938)). The Government itself claimed ignorance as to any such relationship. Brief for Appellees, Andrus (No. 78-740) at 8 n.15.


304. Jurisdictional Statement, Andrus (No. 78-740) at 5a. The Court's response was that "even if there were alternative ways to insure against statutory evasion, Congress was free to choose the method it found most efficacious and convenient." Andrus, 444 U.S. at 58-59. This summary dismissal of alternatives, an issue hotly contested in briefs before the Court, contrasts with the Court's decision in Hodel v. Irving, 481 U.S. 704 (1987), in which a finding of confiscation was buttressed by the Court's conclusion that total abrogation of devise and descent of Indian properties was more extreme than necessary to meet the problem at hand. Id. at 716-18.

305. See Reply Brief for the Appellants, Andrus (No. 78-740) at 33 (no record support cited).

306. Appendix, Andrus (No. 78-740) at 51, 53, 56, 59; see also Brief for Appellees, Andrus (No. 78-740) at 31 n.53.
marginal character of their enterprises: small specialized operations, few
in number. To test this hypothesis, suppose that Congress is concerned
about the forgery of Old Masters. Since most such forgeries are produced
with an eye to sale, Congress prohibits American residents from selling
Old Masters (or exporting them for sale). Would the owners of Old
Masters, and art galleries and dealers stocking and selling such paintings,
be without remedy under the Fifth Amendment? The logic of Andrus also
could be applied to ban the sale of antiques and other collectibles and,
indeed, to ban the sale of used cars; all such prohibitions could be said
to advance policies against fraud and theft.\textsuperscript{307}

\textbf{B. Preventing Incompatible Adjacencies}

In the case of personal property, the problem of incompatible
adjacencies is limited to quarantines of livestock and other agricultural
products to prevent the spread of infectious disease. It has long been
accepted that such quarantines are appropriate, and provide no basis for
compensation, when the claimant’s animals or products are infected.\textsuperscript{308}
Several recent cases have considered instances in which quarantines were
imposed on healthy animals.

In Empire Kosher Poultry, Inc. \textit{v.} Hallowell,\textsuperscript{309} a quarantine was
imposed on plaintiff’s healthy chickens, raised in accordance with the
strictures applicable to Kosher products. Plaintiff’s taking claim was
rejected. The court relied in part on Miller \textit{v.} Schoene,\textsuperscript{310} the cedar rust
case, and in part on Keystone Bituminous Coal Association \textit{v.}
DeBenedictis,\textsuperscript{311} the court questioning the extent of losses sustained by
plaintiff and whether plaintiff could have avoided the losses. (After the
imposition of the quarantine, plaintiff closed a processing plant within
the boundaries of the quarantine zone; since processed chickens were not
subject to quarantine, plaintiff could have minimized losses by processing
its live chickens in the now-defunct plant).\textsuperscript{312}

A contrary result was reached in Yancey \textit{v.} United States,\textsuperscript{313}

\begin{thebibliography}{9}
\item\footnotesize \textsuperscript{307} \textit{Andrus} is criticized in Susan Rose-Ackerman, \textit{Inalienability and the Theory of Property Rights}, 85 COLUM. L. REV. 931, 944-45 (1985), and defended in FISCHER, \textit{REGULATORY TAKINGS}, \textit{supra} note 129, at 162-64. Neither considered the inadequate empirical foundation of the decision.
\item\footnotesize \textsuperscript{308} \textit{See} Lawton \textit{v.} Steele, 152 U.S. 133, 136 (1894) (referring to “the slaughter of diseased cattle”); \textit{cf.} Miller \textit{v.} Schoene, 276 U.S. 272 (1928); \textit{supra} text accompanying notes 160-62.
\item\footnotesize \textsuperscript{309} 816 F.2d 907 (3d Cir. 1987).
\item\footnotesize \textsuperscript{310} \textit{Id.} at 915; \textit{see supra} text at notes 160-62.
\item\footnotesize \textsuperscript{311} 816 F.2d at 915-16; \textit{see supra} text accompanying notes 154-59.
\item\footnotesize \textsuperscript{312} \textit{See} 816 F.2d at 910, 916.
\item\footnotesize \textsuperscript{313} 915 F.2d 1534, 1536 (Fed. Cir. 1990).
\end{thebibliography}
another case involving healthy poultry subject to quarantine. This time the owners sold their flock to mitigate damages, sustaining a loss of 77%. The extent of the loss was held to be large enough to support recovery under the *Penn Central* factors: "[T]he Yanceys suffered severe economic impact and had no way of anticipating the interference with their investment backed interest. . . . [T]he Yanceys' turkey business was wiped out through no fault of their own."

*Empire* seems an easy case on its particular facts. *Yancey* is almost certainly wrong. Surely livestock breeders are aware of the perils of infectious disease and the quarantines imposed to prevent the spread of infection. Whether particular animals are infected or diseased, the risk of quarantine and concomitant loss is one seemingly borne by all breeders. If true, the compensation awarded the Yanceys is a windfall; the risks of harm had been assumed.

As in *Miller v. Schoene*, there is no "right" answer for a case of first impression. But once a practice has developed—either supporting or disallowing compensation—that practice should be followed uniformly. To invoke *Penn Central*, and to enter upon a case-by-case inquiry into the extent of the loss and its avoidability, is to institute a regime of uncertainty in which claimants will be visited with windfall gains and capricious losses.

C. Advancing Other Public Policies

Government policies effectuating a wide range of objectives have been challenged as takings contravening the Fifth Amendment.

1. Compulsory Disclosure of Trade Secrets

In *Corn Products Refining Co. v. Eddy*, the Supreme Court sustained a state regulation that required a syrup manufacturer to disclose on its label the percentage of each ingredient in the syrup. The manufacturer had argued that such disclosure would lead to loss of its trade

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314. *Id. at 1543; accord Department of Agric. & Consumer Servs. v. Mid-Florida Growers, Inc.*, 521 So. 2d 101 (Fla.) (destruction of healthy trees to prevent spread of disease is a compensable taking), cert. denied, 488 U.S. 870 (1988).


316. See supra text accompanying notes 160-62.

secret. The Court upheld the power of the state “in promotion of fair dealing, to require that the nature of the product be fairly set forth.”\cite{318}

In a more recent trade secret case, \textit{Ruckelshaus v. Monsanto Co.},\cite{319} the Supreme Court upheld disclosure of trade secrets by the government incident to licensing a manufacturer to sell its products in the United States. The manufacturer was held to be entitled to compensation for disclosures made in a six-year period during which the pertinent statute had provided for compensation.\cite{320} Absent such a commitment by the government, the Court ruled that the manufacturer had no “reasonable, investment-backed expectations” that disclosures would not be made.\cite{321}

In both \textit{Corn Products} and \textit{Monsanto}, the manufacturer was viewed as having a choice: it could maintain its trade secret and withdraw its product from the pertinent market (the state in \textit{Corn Products}, the nation in \textit{Monsanto}), or it could comply with the challenged government regulation and risk loss of its trade secret.\cite{322} Whether such a choice should be required, in view of the objectives of the takings clause, is a close question. On the one hand, the provision of compensation provides an inducement to economic progress and a measure of insurance against economic loss. On the other hand, several factors, in combination, militated against compensation. First, the government’s programs served legitimate public objectives in each case (prevention of consumer fraud in \textit{Corn Products}, protection of public safety in \textit{Monsanto}). Further, government policies protecting intellectual property (patents, copyrights, trade secrets, and trade names) are more complex and malleable than policies underlying protection of more conventional forms of property—raising questions as to how firmly based any owner’s expectations might be. Finally, and most importantly, it proved to be administratively infeasible to provide the compensation specified by statute for the six-year period in \textit{Monsanto}; the system, despite reliance on arbitration, had broken down and created a major obstacle to government licensing procedures; the statute was repealed.\cite{323} Administrative infeasibility is a strong reason for excluding compensation for government disclosures.

\begin{itemize}
\item \cite{318} \textit{Id.} at 432.
\item \cite{319} 467 U.S. 986 (1984).
\item \cite{320} \textit{Id.} at 1010-12.
\item \cite{321} \textit{Id.} at 1005-08.
\item \cite{322} \textit{Id.} at 1007; \textit{Corn Prods.}, 249 U.S. at 431-32.
\item \cite{323} See \textit{Thomas v. Union Carbide Agric. Prods. Co.}, 473 U.S. 568, 572-73 (1985) (describing the administrative problems that led to abandonment of the compensation scheme).
\end{itemize}
of trade secrets, at least in the context of *Monsanto*.

2. Recovery of Excess Profits

The Transportation Act of 1920 provided that excess earnings of stronger railroads would be “recaptured” by the government and distributed to weaker railroads in order to maintain a viable overall rail system. In *Dayton-Goose Creek Railway Co. v. United States*, the provision was upheld against Fifth Amendment attack. The Supreme Court relied on the antecedent declaration of the statute making it clear that the objecting railroad “never ha[d] such a title to the excess as to render the recapture of it by the Government a taking without due process.”

*Lichter v. United States* involved a Renegotiation Act of World War II vintage, which provided for recovery by the Government of “excessive profits” realized by subcontractors producing war-related products. The Supreme Court, relying on *Dayton-Goose*, found no taking under the Fifth Amendment. The statute was “in the nature of a regulation of maximum prices under war contracts or the collection of excess profits taxes, rather than a requisitioning or condemnation of private property for public use.” The Court also observed that “Congress limited the Renegotiation Act to future contracts and to contracts already existing but pursuant to which final payments had not been made prior to the date of enactment of the original Act.” Thus, there was no “issue as to the recovery of excessive profits on any . . . subcontract upon which final payment had been made” before the Act’s effective date.

Viewed as statutes prospective in nature, neither the Transportation Act nor the Renegotiation Act raises a serious takings problem. In each instance, the firms from which excess profits were recovered had prior

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326. 263 U.S. 456 (1924).
327. *Id.* at 484.
328. 334 U.S. 742 (1948).
329. *Id.* at 787. The statute and amendments are summarized at 745 n.1 and 793-802.
330. *Id.* at 788.
331. *Id.*
notice of the government’s claim to those profits. Further, there was no
evidence in either Dayton-Goose or Lichter that the recapture of excess
profits would have imposed undue burdens on the affected companies.
In each case, complainants had failed to pursue appropriate procedures
to challenge the propriety of the amounts to be recaptured.332

3. Reordering Tort Liability

In Usery v. Turner Elkhorn Mining Co.,333 the Supreme Court
sustained provisions of the Black Lung Benefits Act requiring an
employer to provide compensation for a former employee’s death or
disability due to black lung disease arising out of employment in the
operator’s mines, even if the former employee had terminated his
employment in the operator’s mines before the Act was passed. The
Court viewed retrospective application as a means of spreading the costs
of the disease in a rational manner by allocating to the employer-operator
an actual cost of business, the avoidance of which might have enlarged
the operator’s profits.334

In Duke Power Co. v. Carolina Environmental Study
Group,335 the Supreme Court rebuffed an attack on the Price-Anderson Act, which
imposed a limit on the liability of electric power companies in the event
of nuclear accidents. The Act provided benefits to victims not available
under common-law tort doctrines, and Congress had expressed a
willingness to make further relief available as needed. The Court
concluded that the Act provided “a reasonably just substitute for the
common-law or state tort law remedies it replaces.”336 Moreover, a
takings claim might be asserted at a later time if “property would be
destroyed without any assurance of just compensation.”337

Usery and Duke Power are modern examples of a continuing
process of revising tort liability, expanding or contracting prior remedies,
adding or subtracting causes of action. Usery is similar to developments
in common-law products liability, imposing liabilities retrospectively on
manufacturers of products subsequently found to be defective.338 Duke

332. Id. at 746-47; Dayton-Goose, 263 U.S. at 486-87.
334. Id. at 14-20.
336. Id. at 88.
337. Id. at 94 n.39.
338. See 1 MARSHALL S. SHAPO, THE LAW OF PRODUCTS LIABILITY ¶¶ 7.01-7.05 (2d ed. 1990)
describing the historical development of products liability doctrine. On the extent and propriety of
retrospective risk/benefit assessments, compare Guido Calabresi & Alvin K. Klevorick, Four Tests
Power is one of a long line of statutes and decisions contracting or abolishing erstwhile causes of action.\textsuperscript{339} In each instance, it is generally impracticable to compute offsetting costs and benefits and to provide compensation to losers (although the Court expressed a willingness to do so in Duke Power.)

Moreover, such developments have a random quality as regards investments in socially productive assets. USery and cases like it (including common-law products liability cases) may deter productive investments for fear of future liabilities of unknown dimensions; Duke Power, by contrast, concerned statutory restrictions on liability expressly intended to stimulate private investment in nuclear power. Either or both of these policies may be misguided, but it cannot be said that changes in tort law invariably impede economic progress. Finally, tort liabilities are typically insurable: in most instances, producers can obtain insurance for losses incident to liability (including future expansions in liability), and victims can obtain insurance against significant elements of loss. USery and Duke Power are not antithetical to the objectives of just compensation.

4. Reordering Contract Liability

The Multiple Employer Pension Plan Amendments Act ("MPPAA")\textsuperscript{340} imposed liability upon an employer withdrawing from a multiple employer pension plan. The Act was made retroactive, applicable to employers who withdrew prior to the enactment of the amendments. In Connolly v. Pension Benefit Guaranty Corp.,\textsuperscript{341} the Supreme Court sustained retroactive application of MPPAA to withdrawing employers. It relied on three factors derived from Penn Central. First, "the Government does not physically invade or permanently appropriate any of the employer's assets for its own use." Instead, the assets are used to fund the employer's "share of the plan obligations incurred during its


association with the plan." Second, as to severity of impact, there was "nothing to show that the withdrawal liability actually imposed on an employer will always be out of proportion to its experience with the plan."

Finally, the Court, looking to the "reasonable investment-backed expectations" of the employers, reviewed the history of federal pension plan legislation, dating back to 1974, and concluded: "Prudent employers then had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations." The Court further stated:

The employers in the present litigation voluntarily negotiated a pension plan [subject to federal regulation]. . . . Congress determined that unregulated withdrawals from multiemployer plans could endanger their financial vitality and deprive workers of the vested rights they were entitled to anticipate would be theirs upon retirement. For this reason, Congress imposed withdrawal liability as one part of an overall statutory scheme to safeguard the solvency of private pension plans.

In a later opinion dealing with the same issue, the Court rejected an argument that an employer had relied on an earlier legislative limit on liability. The reliance was "misplaced, there being no reasonable basis to expect that the legislative ceiling would never be lifted."

Connolly is close to the line. But as long as employer liabilities are not more extensive than needed to meet their respective shares of pension obligations, it cannot be said that their reasonable expectations have been defeated. In addition to the pension legislation upon which the Court relied, the common law of contracts, broadly applicable to all contractual undertakings, provides for the invalidation of unconscionable contract terms. The withdrawal liability provisions of MPPAA simply codify, in this context, a ban on employer limitations on liability that could be found to be unconscionable if pension plan commitments could not be

342. Connolly, 475 U.S. at 225.
343. Id. at 226.
344. Id. at 226-227.
345. Id. at 227-28.
347. See Farnsworth, supra note 116, at 323-39.

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met as a result of underfinancing triggered by employer withdrawals.  

5. Extinguishment of Government "Entitlements"

In *Lynch v. United States*, suit was brought by beneficiaries of policies of War Risk Insurance, issued by the United States incident to World War I. In 1933, as a response to the Great Depression, Congress passed an economy measure repudiating liability under these policies. The Supreme Court found a taking violative of the Fifth Amendment: "War Risk policies, being contracts, are property and create vested rights." Further: "Rights against the United States arising out of a contract with it are protected by the Fifth Amendment." The Court observed that the government had been given power to prescribe the form of policies and to make regulations. The prescribed form provided that the policy "should be subject to all amendments to the original Act, to all regulations then in force or thereafter adopted." Many changes had been made since the initial enactment of the legislation and the issuance of policies thereunder. But the Court concluded that "no power to curtail the amount of the benefits which Congress contracted to pay was reserved to Congress."

The Supreme Court reached a contrary conclusion in *Flemming v. Nestor*. Nestor migrated to the United States in 1913, and from 1936 to 1955 he and his employers made payments to Social Security. In 1956, Nestor, not a citizen, was deported for having been a member of the Communist Party from 1933 to 1939. Pursuant to Congressional legislation enacted in 1954, the government refused to pay Social Security benefits to Nestor or his wife (who continued to reside in the

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349. 292 U.S. 571 (1934).
350. *Id.* at 577.
351. *Id.* at 579.
352. *Id.* at 577.
353. *Id.* at 577-79.
354. *Id.* at 578.
The Court conceded that, to some extent, "[t]he 'right' to Social Security benefits is in one sense 'earned,' for the entire scheme rests on the legislative judgment that those who in their productive years were functioning members of the economy may justly call upon that economy, in their later years, for protection" against poverty. But the Court refused to find that a Social Security beneficiary has "such a right... as would make every defeasance of 'accrued' interests violative of the Due Process Clause." For the Court to: "engraft upon the Social Security system a concept of 'accrued property rights' would deprive it of the flexibility and boldness in adjustment to ever-changing conditions...." Of particular importance, the Act expressly reserved to Congress "'the right to alter, amend, or repeal any provision' of the Act." The Court then went on to rule that the statute terminating Nestor's benefits was not "lacking in rational justification" because recipients living abroad would not spend their benefits in the United States, supporting economic activity in this country.

It is disquieting to realize that Social Security benefits, a central income stream for millions of Americans, receives no protection from the Constitution's ban against uncompensated takings. If the flimsy rationale in Flemming will sustain termination, then no benefit is safe from arbitrary government withdrawal. It may be conceded here, as in Lynch, that the government has rightly retained a fair measure of flexibility. But such flexibility should not extend to outright terminations of benefits already earned, though some adjustments may be needed to maintain the economic viability of the system.

At present, however, the Fifth Amendment appears to provide no protection from deprivations of newly evolving property interests as to which the government has expressly maintained powers to alter or repeal.

356. Id. at 610.
357. Id. at 611.
358. Id. at 610.
359. Id. at 611 (alteration in original) (quoting 42 U.S.C. § 1304).
360. Id. at 611-12.
6. Harms Inflicted by Governmentally Protected Wildlife

In *Christy v. Hodel*, a herder sustained losses when a grizzly bear, a protected species, preyed upon the herder's sheep. Appeals for government assistance were unavailing, and as a last resort the herder shot the grizzly to protect his sheep. The government successfully prosecuted and fined the herder for harming a protected species, and the federal Court of Appeals rejected the herder's claim that the actions of the government, in protecting but not controlling the predator, resulted in an uncompensated taking of the herder's sheep. Similar claims for damage to real or personal property by governmentally protected wildlife have been rejected by a majority of the state and federal courts that have passed on the issue.

*Christy* is clearly wrong. The government took the herder's sheep just as surely as if the sheep had been carted away to be fed to grizzlies in a zoo or a game preserve. The protection of endangered species is a public objective and should be supported by public funds, not private livestock. Justice White wrote a stinging dissent to the Supreme Court's denial of certiorari in *Christy* and the decision has been sharply criticized. Provision of compensation in *Christy* and in similar cases is called for by the objectives of insurance, economic progress and fiscal responsibility. What sane person could imagine that the government would prevent a herder from protecting his sheep from a ravaging grizzly?

D. The Special Vulnerability of Personal Property

In the *Lucas* opinion, the Supreme Court distinguished between real

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363. *Id.* at 1331.
367. Losses of livestock to predators are not insurable. *See supra* note 315.
and personal property:

[In the case of personal property, by reason of the State’s traditionally high degree of control over commercial dealings, [the property owner] ought to be aware of the possibility that new regulation might . . . render his property economically worthless (at least if the property’s only economically productive use is sale or manufacture for sale).]

Whether so drastic a line should be drawn is unclear. As noted above, Andrus appears to be an incorrect decision. But other decisions suggest that, in many cases, traditional takings doctrine, considered in conjunction with background principles of contract and tort law, may afford the government substantially more latitude for regulation of personal property than the Court would be prepared to concede in the case of real property. Christy, the most bizarre decision of all, is applicable to harms to both real and personal property.

VI. RENT CONTROL AS A TAKING

One of the most intensely debated issues, particularly in recent years, is the legitimacy of rent control. Is rent control a taking of the landlord’s property?

In Block v. Hirsh, the Supreme Court upheld the “Rent Law” of the District of Columbia over an attempt by a landlord to obtain possession of the leased premises at the expiration of the lease term. The statute provided for continued occupancy, under the terms of the lease, unless the rent was adjusted by a commission. The legislation was a response to a housing emergency created by World War I and was to expire in two years unless earlier repealed. In upholding the legislation, the Court observed:

Congress has stated the unquestionable embarrassment of Government and danger to the public health in the existing condition of things. The space in Washington is necessarily monopolized in comparatively few

Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present.\(^{372}\)

The reasoning is baffling. Granted that housing is a necessity, rent control does nothing to augment the supply. Nor can public health be protected by a blind adherence to the status quo. The most needy family can be excluded by the least needy if the latter has the advantage of incumbency. The reference to monopoly is surely fanciful; landlords may be less numerous than tenants, but they are more numerous, in any substantial city, than the purveyors of almost every other service or good.\(^{373}\)

The Court did cite the temporary nature of the legislation and the ability of the landlord to obtain judicial review to assure a reasonable return on his investment.\(^{374}\) It also analogized rent controls to those traditional in public utility regulation.\(^{375}\) But in the end the landlord is barred from regaining control of his property—an obvious physical occupation.

World War II brought new rent controls and new supporting rationalizations. In Bowles v. Willingham,\(^{376}\) the Supreme Court upheld a maximum rent order against a “taking” challenge on the ground that “[t]here is no requirement that the apartments in question be used for the purposes which bring them under the Act.”\(^{377}\) This being so, there was no need that the maximum rent, fixed for a class of apartments, provide a reasonable return for the individual owner. “A nation which can demand the lives of its men and women in the waging of . . . war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a ‘fair return’ on his property.”\(^{378}\)

\(^{372}\) Block, 256 U.S. at 156.

\(^{373}\) Id. at 161 (McKenna, J., dissenting).

\(^{374}\) Id. at 157-58. That the validity of the statute depended on its status as an emergency measure was affirmed in Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924) (remanding rent control case for findings as to whether the emergency continued to exist).

\(^{375}\) Block, 256 U.S. at 157.

\(^{376}\) 321 U.S. 503 (1944); see also Yakus v. United States, 321 U.S. 414, 431, 437-40 (1944) (upholding meat price regulation on similar grounds).

\(^{377}\) Bowles, 321 U.S. at 517.

\(^{378}\) Id. at 519. A similar approach was adopted in United States v. Central Eureka Mining Co., 357 U.S. 155 (1958), where the United States ordered certain gold mines to close down in order to achieve the release of machinery and personnel for employment in essential copper and other nonferrous metal mines. Said the Court: “[W]ar makes demands which otherwise would be insufferable. But wartime economic restrictions, temporary in character, are insignificant when compared to the widespread uncompensated loss of life and freedom of action which war
Again, the reasoning is wide of the mark. A major impetus for the Constitutional guarantee of just compensation was government seizure of property with which to wage war. It is clear beyond doubt that the government cannot appropriate commercial properties for the war effort, even for a limited time, without paying just compensation. But under Bowles, it is free to conscript residential landlords into the war effort on the same basis as “men and women [engaged] in the waging of... war.” The rejoinder that the apartments can be withdrawn from their intended use is disingenuous; in most cases, absent the prospect of conversion to condominiums, apartments have no use except for rentals to residential tenants.

More recent decisions have relied increasingly on a theory of consent. In FCC v. Florida Power Corp., the Court upheld legislation controlling the rates charged by utility companies for pole attachments by cable television systems, observing that the utility companies were not obliged to rent space to cable operators. The utilities had contended that it was a taking “for a tenant invited to lease at a rent of $7.15 to remain at the regulated rate of $1.79. But it is the invitation, not the rent, that makes the difference.”

A similar theme pervades Yee v. City of Escondido, upholding a rent control ordinance as applied to a trailer park.

Petitioners voluntarily rented their land to mobile home owners. At least on the face of the regulatory scheme, neither the City nor the State compels petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, the [law] provides that a park owner who wishes to change the use of his land may evict his tenants, albeit with six or twelve months notice. . . . Put bluntly, no government has required any physical invasion of petitioners’ property.

traditionally demands.” Id. at 168. Central Eureka is a troublesome case, but perhaps justifiable in the context of wartime management of the economy—governmental directives affected an extensive range of economic activities, imposing restrictions on numerous enterprises in order to give priority to war-related production.


380. Bowles, 321 U.S. at 519. In Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948), the Court upheld a rent control measure addressing the housing shortage that was an after-effect of World War II. However, the Court observed that the war power could not be used to justify war-time controls indefinitely. Id. at 143-44.

382. Id. at 252.
Petitioners’ tenants were invited by petitioners, not forced upon them by the government.384

There are two problems with this approach. First, the Supreme Court has declined to confront the very real problems to be surmounted by a landlord seeking to exit the regulated arena.385 Rent control authorities have strong incentives to preclude removals of regulated housing and they have acted to impose obstacles often impossible to surmount.386

Second, it is unclear why the initial “invitation” should be controlling. It seems unlikely that this is a principle of general applicability. If an owner of unused open land were to permit the government to quarter its troops there for an interim period, is this an “invitation” that can be extended in perpetuity over the objection of the property owner? Can the government require that its forces remain, without paying just compensation, unless the owner withdraws its land for use for some other purpose? But what is “some other purpose”? To build a residential subdivision on the open land is to provide quarters for people—arguably the same purpose as the military encampment. The whole argument is a sham—rejected by the Supreme Court as recently as Loretto. The Loretto Court expressly rejected the argument that the landlady could not object

384. Id. at 1528 (citation omitted). For an endorsement of the theory of consent, see Rubenfeld, supra note 4, at 1153-55.
385. See, e.g., Fresh Pond Shopping Ctr. v. Callahan, 464 U.S. 875 (1983). The Supreme Court refused to hear a case in which a landlord was prevented from demolishing a building as long as a single tenant remained. Id. at 877-78 (Rehnquist, J., dissenting).
to the cable wires because she could rid herself of the wires by ceasing to rent her building to residential tenants.\textsuperscript{387}

Turning to the objectives of the just compensation requirement, rent control is an obvious taking. As regards insurance, rent control visits substantial losses upon the owners of residential rental property. That is the point of the regulation: to depress rents, which inevitably will depress property values. That the rents are depressed below market is made clear by the policy of exempting new multifamily buildings from the regulatory regime. Absent the exemption, no new structures would be built because rent levels imposed by rent control are confiscatory.\textsuperscript{388} In contrast, price controls imposed on public utilities are intended to attract and retain capital, a function they have successfully fulfilled for most of their history.\textsuperscript{389}

From the perspective of economic development, rent controls are a disaster.\textsuperscript{390} They penalize the persons who have done the most to meet the needs of tenants—existing landlords—while imposing no burdens on the far more numerous members of the population who have done nothing at all to provide rental housing. The problem, after all, is that there is insufficient rental housing on the market. Looking ahead, it is hard to imagine great enthusiasm in the private sector for building rental housing where rent control is a possibility. Apart from other obstacles, the prospective investor is not likely to expose his property to the threat of confiscation.

\begin{itemize}
\item \textsuperscript{387} Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439 n.17 (1982).
\item \textsuperscript{388} On the confiscatory level of rents under rent control, see Lawrence, \textit{supra} note 386, at 646-47, 650-51.
\item \textsuperscript{389} For a recent statement, see Duquesne Light Co. v. Barasch, 488 U.S. 299, 307-12 (1989) (citing cases). To apply the analysis of this Article to public utility operations generally would take the discussion too far afield. Most such operations are distinguishable, in part because of the nature and application of controls. One important exception is the regulation of prices of natural gas producers. As to them, the arguments pertaining to rent control apply with full force. Such regulation should be held to be a taking; its exercise has had negative consequences not unlike rent control. For a summary of the literature on natural gas regulation, see William K. Jones, \textit{Government Price Controls and Inflation: A Prognosis Based on the Impact of Controls in the Regulated Industries}, 65 \textit{CORNELL L. REV.} 303, 318 n.40 (1980).
\end{itemize}
Finally, the adoption of rent control is an act of fiscal irresponsibility. The needs of low-income tenants are a matter of public concern. There are many ways in which the public treasury could respond, from housing built and maintained at public expense to the issuance of housing vouchers to tenants, redeemable in the same manner as food stamps. But rent control obviates the need to put public money behind public measures. In the end, the response is inadequate and destined to remain inadequate. Without public funding, the supply of low-income housing will not be augmented. In fact, the supply of rent-controlled housing will decline if withdrawals from the market are not matched by replacements. The shortage will continue and grow worse; all that happens is that some tenants (the incumbents) exclude other possible tenants, perhaps more needy. The government, in evading its fiscal responsibilities, also evades a solution to the problem that triggered the regulatory controls in the first place.

Rent control obviously antedates the landmark preservation measure at issue in *Penn Central*. But both share the same infirmities: inflicting large losses on discrete entities; penalizing the very conduct that any sane society would seek to encourage; and evading fiscal responsibility by appropriating private values for public purposes without payment of compensation.

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391. For a parallel line of reasoning, see Pennell v. City of San Jose, 485 U.S. 1, 21-23 (1988). One commentator objects to these approaches because they compensate landlords for profits that are somehow tainted. See Margaret J. Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350, 351-36 (1986). Radin suggests two possibilities: (1) monopoly profits; and (2) economic rents. As to the first point, Radin’s position is as fanciful as the Court’s in Block v. Hirsch, 256 U.S. 135 (1921). Landlords are too numerous to form an effective cartel; they certainly lack oligopoly power. Absent any prospect for tacit collusion, landlords must subject themselves to the very real threat of criminal sanctions if they engage in explicit price-fixing violative of the antitrust laws. Radin, supra, at 353. I know of no empirical support for Radin’s fancies. As to the second point, economic rents are commonplace in competitive markets. Market prices are determined by the marginal seller (and buyer); that seller’s costs are, by hypothesis, higher than all the rest; otherwise, he would not be marginal. The remaining sellers in the market derive economic rents, measured by the difference between their (lower) costs and the market price. To extract economic rents in any systematic fashion is to penalize advantages derived from efficiency and foresight (and perhaps good luck); moreover, to attempt to achieve such extraction by price controls is particularly treacherous, since the marginal seller cannot, as a matter of practical administration, be insulated from attacks on the economic rents of the inframarginal sellers. In any case, there is nothing that distinguishes inframarginal landlords from inframarginal sellers of all other goods and services. *Id.* at 354-56.

392. Compare Louisville Bank v. Radford, 295 U.S. 555 (1935), where the Supreme Court invalidated the Frazier-Lemke Act, Pub. L. 72-420, ch. 204, § 75, 47 Stat. 1470 (1933), because it destroyed the security interests of mortgages on farm property. “If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of
Yet even if the Supreme Court were to reverse itself and rule that rent control is an unconstitutional taking, that is not the end of the matter. It could be argued that existing controlled properties, having been purchased by landlords under a regime of rent control, came subject to a servitude embedded in antecedent state law. Under *Lucas* and its progeny, the only landlords with standing to challenge rent control would be those who owned a property prior to the inception of the controls in issue (including heirs, donees, and the like). Someone purchasing a rent-controlled building after controls had been in place presumably paid a reduced price reflecting existing and expected diminution in market value. They could be viewed as similar to speculators in unimproved land, in this case betting that future developments—in particular, the inability of the government to police wayward landlords—would permit them to earn extra profits before they were called to account. By that time, they would hope to have unloaded the property to yet another speculator. Indeed, one of the evils of rent control is that it has attracted to the rental housing market many landlords with few scruples—who hope to turn a seemingly unprofitable venture into a profit-making enterprise by cutting corners on maintenance, security, and the like.

But a ruling of unconstitutionality would redound to the benefit of long-time owners, family-owned properties, and properties retained for the duration of controls by the same corporate entity. More importantly, such a ruling would bar future rent control measures and, perhaps, significant additional burdens under existing rent control statutes. Another possibility is to give the new dispensation a broader application, striking down rent control root and branch, recognizing the windfall conferred upon many existing landlords but simultaneously purging the law of a particularly harmful blight. It is not clear that *Lucas* should apply where the servitude itself was imposed in violation of the Fifth Amendment. In any event, if no new structures can be brought under rent control, the old structures, under the governance of speculator-landlords,

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will eventually become uninhabitable and cease to exist. They might stand for a longer period if rent control were abolished forthwith.

VII. CONCLUSION

In a recent opinion, the Supreme Court identified three factors that have particular significance in determining whether government action constitutes a taking under the Fifth Amendment: (1) “the economic impact of the regulation on the claimant;” (2) “the extent to which the regulation has interfered with distinct investment-backed expectations;” and (3) “the character of the governmental action.” While these factors are unquestionably pertinent to a takings inquiry, they provide guidance that is incomplete and in some cases misleading.

The character of the governmental action. This factor is employed to distinguish instances of government seizure or occupation from instances in which the government acts in a regulatory capacity. At least in the case of real property, any permanent physical intrusion is a taking. While this factor may be useful as a rule of administrative convenience—distinguishing “clear” takings from others—it has two shortcomings. First, in the great majority of cases in which no governmentally sponsored intrusion has occurred, the factor is of no help: it appears and then disappears without a trace. Second, in one important instance of governmentally mandated occupation—rent control—the factor is discarded by reliance on a judicially fabricated concept of consent.

The economic impact of the regulation upon the claimant. Given the severe impacts condoned by the Supreme Court, it is doubtful that this factor is of great decisional importance. Lucas purports to make this factor critical in cases in which real property is zoned into idleness, but the protection afforded is illusory if the government can point to some legal basis for its action that antedates the claimant’s acquisition of the property in question. Moreover, if Lucas is otherwise applicable, it is unclear why a “total taking” is required. Any significant impairment

395. See supra text accompanying notes 68-76.
396. See supra text accompanying notes 370-87.
398. See supra text accompanying notes 231-50.
399. See supra text accompanying notes 250-66.
of value should suffice.\textsuperscript{400}

In one class of cases, the extent of impact should receive special emphasis: If the government’s actions result in an interference with the use and enjoyment of land sufficient to constitute a nuisance under prevailing common law doctrines, the government should be held to have taken a servitude.\textsuperscript{401} On this, the magnitude of the adverse impact is significant under takings law because it is significant under nuisance law, which reaches objectionable conduct only if the interference with use and enjoyment is substantial. On this point, state court cases generally ask the right questions and get the right answers.\textsuperscript{402} Federal cases such as \textit{Batten} are seriously deficient.\textsuperscript{403}

\textit{The extent to which the regulation has interfered with distinct investment-backed expectations.} In a sense, this factor is the most critical in cases not involving physical occupation or seizure. But it is poorly formulated. Clearly, expectations need not be honored when they run counter to legal standards antedating the ownership in issue: e.g., nuisance law embodied in the “coming to the nuisance” cases;\textsuperscript{404} regulatory regimes that foreshadow the recapture of excess profits\textsuperscript{405} or the reordering of private pension plan obligations;\textsuperscript{406} or explicit retentions of control to alter or revoke government entitlements as in \textit{Flemming v. Nestor}.\textsuperscript{407}

But there are other classes of cases that cannot be explained in terms of “investment-backed expectations.” Whatever the expectations of an owner as regards the zoning of undeveloped land,\textsuperscript{408} or an innovator as regards trade secrets involved in a licensing process,\textsuperscript{409} or a firm confronting major modifications of tort law,\textsuperscript{410} compensation almost certainly will be denied, mainly because compensation for individual losses is impracticable in the context of the government’s regulatory regime. But some decisions cannot be defended on this basis. \textit{Penn

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\textsuperscript{400.} See supra text accompanying notes 266-69.  \\
\textsuperscript{401.} See supra text accompanying notes 81-101.  \\
\textsuperscript{402.} See supra text accompanying notes 92-101.  \\
\textsuperscript{403.} See supra text accompanying notes 93-98.  \\
\textsuperscript{404.} See supra text accompanying notes 137-44; see also the “quarantine” cases, supra text accompanying notes 309-16.  \\
\textsuperscript{405.} See supra text accompanying notes 325-32.  \\
\textsuperscript{406.} See supra text accompanying notes 340-48.  \\
\textsuperscript{407.} See supra text accompanying notes 349-61.  \\
\textsuperscript{408.} See supra text accompanying notes 349-61.  \\
\textsuperscript{409.} See supra text accompanying notes 317-24.  \\
\textsuperscript{410.} See supra text accompanying notes 333-39.  \\
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Central's landmark designation\textsuperscript{411} and the subsidence ban upheld in \textit{Keystone Bituminous Coal}\textsuperscript{412} both involved rejections of legitimate expectations in circumstances in which compensation would have been practicable. And in \textit{Andrus} it was not shown that an alternative regulatory regime—protective of legitimate proprietary expectations—was inadequate to effectuate the government’s policies.\textsuperscript{413}

Finally, society maintains unfettered control over its general normative structure. No compensation is required for infringements on property interests that respond to a widely held and generally applicable norm, such as the prohibition statute at issue in \textit{Mugler}\textsuperscript{414} and the many more numerous restrictions intended to protect public health and safety.\textsuperscript{415} These are risks shared by all members of society and are not grounded in the ownership of property.

The general body of takings law—and the few departures in need of correction—are explicable in terms of the three objectives of just compensation: insurance, economic progress, and fiscal responsibility. With these objectives in view, the takings clause provides meaningful guidance for a vast array of very different kinds of cases. It is not necessary to resort to an amorphous standard of “fairness;” nor to continue an agnostic process of ad hoc adjudications that preclude predictability. The scope of the takings clause is rooted in history and logic; the constitutional guarantee is not a mystery beyond the comprehension of the judiciary and the legal profession.

\begin{footnotesize}
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\item \textsuperscript{411} See supra text accompanying notes 203-24.
\item \textsuperscript{412} See supra text accompanying notes 154-59.
\item \textsuperscript{413} See supra text accompanying notes 292-307. Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988), \textit{cert. denied}, 490 U.S. 1114 (1989), was another unjustified expropriation. See supra text accompanying notes 362-67.
\item \textsuperscript{414} See supra text accompanying notes 119-25.
\item \textsuperscript{415} See supra text accompanying notes 126-36.
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