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Restoring Reputational Rights Through a Government Publication of a Declaration of Innocence

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The Year of the Taking Issue

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SUMMARY OF CONTENTS

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I. INTRODUCTION

The U.S. Supreme Court has given itself the opportunity to make major pronouncements about the taking and just compensation provisions of the fifth amendment in 1987.[1] Three cases involving different aspects of the taking issue have appeared before the court this Term.

In *Keystone Bituminous Coal Association v. DeBenedictis,*[2] the Court recently rejected a facial challenge to a Pennsylvania statute which requires coal mining companies to leave large quantities of coal in the ground in order to support overlying land.[3] The Court held that the statute was not invalid as a taking of property without compensation. The case, in many ways, was a replay of the Supreme Court's

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1. For the author's earlier views on these issues, see Berger & Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A.L. REV. 685 (1986); Berger, *Anarchy Reigns Supreme*, 29 J. URB. & CONTEMP. L. 39 (1985); Berger, *The State's Police Power Is Not (Yet) The Power of a Police State: A Reply to Professor Girard*, 35 LAND USE L. & ZONING DIG. 4 (May 1983); Berger, *To Regulate, or Not to Regulate — Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights*, 8 LOY. L.A.L. REV. 253 (1975).

2. 55 U.S.L.W. 4326 (U.S. Mar. 9, 1987)(No. 85-1092).

3. Pennsylvania law recognizes three distinct estates in land: the surface, the mineral, and the right of surface support, *e.g.*, Captline v. County of Allegheny, 74 Pa. Comm. 85, 459 A.2d 1298, 1301 (1983), each of which may be separately owned, *e.g.*, Charnetski v. Miners Mills Coal Mining Co., 270 Pa. 459, 463, 113 A. 683, (1921). The coal companies in the *Keystone* case had purchased both the mineral estate and the support estate from the surface owners or their predecessors. Appendix to Petition for Certiorari, Keystone Bituminous Coal Ass'n. v. Debenedictis, 55 U.S.L.W. 4326 (U.S. Mar. 9, 1987)(No. 85-1092).

seminal decision in *Pennsylvania Coal Co. v. Mahon.*[4] In *First English Evangelical Lutheran Church v. County of Los Angeles,*[5] the issue, (which the Court has been unable to decide on four previous occasions[6]), is whether a property owner whose property is alleged to be rendered useless by a land use regulation is entitled to just compensation. In *Nollan v. California Coastal Commission,*[7] the issue is whether a condition attached to the issuance of a land use permit is invalid if it bears no rational relationship to problems created by the proposed use of the property.

The related issues in these cases cover a broad spectrum[8] and give the Court an unprecedented opportunity to make a comprehensive statement on the regulatory taking issue.

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4. 260 U.S. 393 (1922).

5. No. 85-1199 (U.S. argued Jan. 14, 1987).

6. MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561 (1986); Williamson County Reg. Plan. Comm. v. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980).

7. No. 86-133 (U.S. argued March 30, 1987).

8. The Court has also granted plenary review in three other cases which touch on the takings issue to a greater or lesser extent. Three have already been decided. On February 25, 1987, the Court decided FCC v. Florida Power Corp., 55 U.S.L.W. 4236 (U.S. Feb. 25, 1987)(No. 85-1658). At the circuit court level, the case had been treated as a replay of Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). The lower court reasoned that the two cases were identical because the FCC determined the rate which utilities could charge cable TV companies to attach cables to their poles. *See* Florida Power Corp. v. FCC, 771 F.2d 1537 (11 Cir. 1985). The Supreme Court, in a brief opinion, held that the two cases were not alike. *Florida Power* was distinguished from *Loretto* on the ground that since the utility companies in *Florida Power* were not required to accept the cables, there was no taking.

On March 31, 1987, the Court decided United States v. Cherokee Nation, 55 U.S.L.W. 4403 (U.S. Mar. 31, 1987)(No. 85-1940). Applying law uniquely designed for cases involving the so-called paramount navigational servitude of the United States, the Court concluded that no taking occurred when the government engaged in acts to improve navigation on the Arkansas River, which passes through the Cherokee reservation in Oklahoma, even though the Cherokee Nation owned fee title to the river bed.

On May 18, 1987, the Court decided Hodel v. Irving, ___ U.S. ___, 55 U.S.L.W. ___. The case nominally holds, unanimously, that legislation which cut off the inheritability of small Indian estates was unconstitutional. However, while all nine of the Justices agreed on the "bottom line," the judicial line-up was somewhat chaotic: *all eight* of the other Justices who concurred in Justice O'Connor's opinion for the Court, signed one of three separate concurring opinions. Most intriguing for Court watchers is the apparent liberal/conservative dispute over the meaning and continuing vitality of *Andrus v. Allard*, 444 U.S. 51 (1979). *Andrus* refused to award compensation for the effects of a statute which prohibited the sale of eagle feathers. It is an opinion which is often cited by regulators whose actions destroy the value of property while leaving ownership unchanged. Justices Brennan, Marshall and Blackmun said they joined the *Hodel* opinion because it does *not* limit *Andrus*. On the other hand, Justices Scalia and Powell and the Chief Justice said they joined the *Hodel* opinion because its logic *must* limit *Andrus*. Stay tuned folks. There will be plenty of taking issue litigation in the future.

II. The Problem

Simply stated, the root of the increasing taking litigation is the desire by federal, state, and local government agencies to accomplish two inconsistent goals: regulate more and spend less. The governmental solution to the dilemma, highlighted in widely varying ways by the three taking cases which have appeared before the U.S. Supreme Court in the October 1986 term, is to have someone other than the government pick up the tab.

In *Keystone,* the State of Pennsylvania wanted to provide security from surface subsidence even though the owners of the surface (or their predecessors) had sold their right to that security to coal mining companies. The coal companies owned the support estate as well as the mineral rights. The State's solution to the subsidence problem was to enact a statute requiring the coal companies to leave enough coal in the ground to support the surface.

In *Lutheran Church,* the County of Los Angeles wanted to keep a substantial amount of land surrounding a natural drainage channel free of structures so that the channel could smoothly collect surface waters and convey them to a County reservoir. The County's solution was to declare the area surrounding the channel a flood hazard and to prohibit owners of the land from building on it.

In *Nollan,* the California Coastal Commission wanted to create a public right of way along a privately owned beach. The Coastal Commission's solution was to require, as a condition to *any* development permit, the "donation" by the property owners of a public easement over the beach front of their property.

In each case, the government agency performed what it viewed as a public service. In each case, the cost of achieving the public good fell upon the specific property owners.

III. The State of the Law

The proper legal solution to the above cases varies among current legal authorities. Some authorities firmly believe that government's power is virtually unlimited. Those who agree that there are limits, disagree markedly on the appropriate remedy to apply when government oversteps the boundary.[9] The differences range from the philo-

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9. For direct clashes on these issues, *compare, e.g.*, Girard, *Constitutional "Takings Clauses" and the Regulation of Private Land Use*, 34 Land Use L. & Zoning Dig. No. 10 at 4 and No. 11 at 4 (November 1982) *with* Berger, *The State's Police Power is Not (Yet) The Power of a Police State: A Reply to Professor Girard*, 35 Land Use L. & Zoning Dig. No. 5 at 4 (1983); and *compare* Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 Vt. L. Rev. 193 (1984) *with* Berger & Kanner, *Thoughts on the White River Junction*

sophical to the practical. In order to better understand the underlying issues involved in the current Supreme Court cases, the following overview is provided to highlight the arguments for and against the payment of compensation for alleged regulatory takings of private property.

A. *The "Metaphorical" Taking*

Pennsylvania Coal Co. v. Mahon[10] is, in many ways, the fountainhead of taking jurisprudence.[11] It was there that Justice Holmes, writing for a majority of eight, announced that a regulation which goes "too far" is a taking within the meaning of the fifth amendment.[12] And there matters lay for half a century. Then, in order to protect New York City from the consequences of its own actions (leading to potential bankruptcy), the New York Court of Appeals (through Chief Judge Breitel) opined that the use of the word "taking" in *Pennsylvania Coal* was not to be read literally, but metaphorically.[13] The California Supreme Court latched onto this concept,[14] as did several commentators.[15]

The metaphorical taking theory was that a regulation which goes "too far" is not *really* a taking; rather it is invalid. The theory presumes that *Pennsylvania Coal* merely used the shorthand description "taking" to denote that governmental action could not be upheld without compensation. Thus, if a government did not offer compensa-

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Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property, 19 LOY. L.A.L. REV. 685 (1986).

10. 260 U.S. 393 (1922).

11. The case is cited in virtually every U.S. Supreme Court decision dealing with fifth amendment property rights since 1922. *E.g.*, MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561, 2566 (1986); Williamson County Reg. Plan. Comm. v. Hamilton Bank, 473 U.S. 172, 180 (1985); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 83 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979); Andrus v. Allard, 444 U.S. 51, 65-66 (1979); Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978); Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962); United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958).

12. 260 U.S. at 415.

13. Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 594, 350 N.E.2d 381, 385, 385 N.Y.S.2d 5, 9 (1976). For further discussion of the economic sleight-of-hand thus practiced, *see* Berger & Kanner, *Thoughts on The White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A.L. REV. 685, 726, n. 185 (1986); Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 177, 193, n. 50 (S.W. Legal Foundation 1980).

14. *See* Agins v. City of Tiburon, 24 Cal. 3d 266, 274, 598 P.2d 25, 29, 157 Cal. Rptr. 372, 376 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

15. *E.g.*, Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193, 210 (1984).

tion and a court subsequently found the underlying statute or regulation to go "too far," the court could invalidate the statute but could not require that compensation be paid.

This theory has not survived. Nothing in either *Pennsylvania Coal* or any U.S. Supreme Court decision following it gave any hint that Justice Holmes and the seven other members of the *Pennsylvania Coal* majority meant other than what they said. In recent years, a clear majority of the U.S. Supreme Court has rejected the "metaphor" idea.[16]

B. Is the Just Compensation Clause "Self-Executing"?

The fifth amendment[17] states, in simple terms, "nor shall private property be taken for public use without just compensation."[18] Recently, a philosophical dispute has arisen over the question whether just compensation is a condition *precedent* to a taking or a condition *subsequent.* Those who urge the former argue that a taking *cannot occur* unless just compensation is paid. Thus, the argument goes, if a governmental activity occurs which would have the effect of taking property, but no compensation is provided, the condition precedent to taking has not been met and (by definition) there has not been a taking. Instead, the action is invalid. Those who hold the contrary view (including the author of this article), believe that when government activities take private property, compensation *must* be paid, regardless of the time or mode of payment.

The most forceful argument in favor of the condition precedent position was made recently by the Solicitor General in an amicus curiae brief in the *Lutheran Church* case.

1. The condition precedent argument

The argument begins with the text of the fifth amendment, which, on its face, is said to be merely prohibitory. It forbids certain governmental action unless a condition (i.e., compensation) is met. "Thus, the

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16. *See* MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561 (White, J., dissenting, joined by Burger, C.J., and Rehnquist and Powell, J.); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 636 (1981) (Brennan, J., dissenting, joined by Stewart, Powell, and Marshall J.).

17. The just compensation guarantee of the fifth amendment was long ago held to be incorporated into the due process guarantee of the 14th amendment, making it applicable to state and local government agencies. Chicago B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897). Indeed, it was the first part of the Bill of Rights to be so incorporated. Walz v. Tax Commn. 397 U.S. 664, 701-72 (1970). Thus, even though the cases before the U.S. Supreme Court this Term deal with state and local government agencies, the operative language is that of the fifth amendment.

18. U.S. CONST., amend. V.

Clause imposes a limitation on the exercise of power by the government of the United States. It does not address the question of the appropriate remedy when the government has exceeded that limitation, except, perhaps, by implication that courts will not tolerate a continuing violation."[19] This same interpretation is said to apply to *all* the clauses of the fifth amendment, none of which (according to the Solicitor General) has been interpreted as requiring a compensatory remedy.[20]

Three items are said to indicate the intent of the fifth amendment's draftsmen that "there is no self-effectuating damages remedy."[21] First, the United States is immune from suit without explicit congressional waiver.[22] Second, the Constitution bars a court from ordering payment from the federal treasury without express Congressional authorization.[23] Third, when a citizen is deprived of liberty without due process of law, his remedy is habeas corpus, not damages. By parity of reasoning, when a citizen is deprived of property without compensation, his remedy should be injunctive relief.[24]

Finally, the Solicitor General collected nineteenth century decisions of state courts[25] and the U.S. Supreme Court[26] which held that an

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19. Brief for the United States as Amicus Curiae at 14, First English Evangelical Lutheran Church v. County of Los Angeles, No. 85-1199 (U.S. argued Jan. 14, 1987).

20. *Id.* at 15-16. As noted later, text accompanying notes 26-30, *infra*, this assertion is simply erroneous. *See also* Davis v. Passman, 442 U.S. 228 (1979).

21. Brief for the United States as Amicus Curiae at 16, *Lutheran Church.*

22. Citing Library of Congress v. Shaw, 106 S. Ct. 2957 (1986); California v. Arizona, 440 U.S. 59 (1979); and Kansas v. United States, 204 U.S. 331 (1907).

23. Citing U.S. CONST., Art. 1, § 9, cl. 7, and Reeside v. Walker, 52 U.S. (11 How.) 272 (1850).

24. Citing Larson v. Domestic & Foreign Commerce Corp. 337 U.S. 682 (1949) and United States v. Lee, 106 U.S. 196 (1882). In *Larson*, the Court was outspoken in its preference for compensation rather than invalidation:

> [I]t is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the *strongest reasons of public policy* for the rule that such relief cannot be had against the sovereign. *The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right.* As was early recognized, the interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief.

Larson, 337 U.S. at 704. (Emphasis added).

In *Lee*, the plaintiff sought only possession. Just compensation was not raised as an issue by any party.

25. Ex parte Martin, 13 Ark. 198 (1853); Parham v. The Justices, 9 Ga. 341 (1851); Callender v. Marsh, 18 Mass. 418 (1823); Petition of Mount Washington Rd. Co., 35 N.H. 134 (1857); Picatagua Bridge v. New Hampshire Bridge, 7 N.H. 35 (1834); Sinnickson v. Johnson, 17 N.J.L. 129 (1839); Bradshaw v. Rodgers, 20 Johns. Rep. 103 (N.Y. 1822).

26. Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897); Searl v. School Dist., 133 U.S. 553 (1890); Sweet v. Rechel, 159 U.S. 380 (1895); Barron v. Mayor of Baltimore, 32 U.S. (7

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attempted taking without compensation would be void and concluded that invalidation, rather than compensation, was the proper remedy.

2. *The invalidity of the condition precedent approach*

The following arguments challenge the Solicitor General's assertion that compensation is a condition precedent to fifth amendment takings: 1) the text of the fifth amendment plainly indicates that compensation shall be paid for governmental takings of private property; 2) governments are not immune from suit for constitutional violation; 3) the argument that the takings clause does not require monetary compensation because none of the other clauses in the fifth amendment require it is based on a faulty premise; and 4) early cases which held that just compensation is a condition precedent do not control present day takings cases.

a. The text of the fifth amendment. Nothing put forth by the supporters of the condition precedent argument is sufficient to gainsay the common sense notion that, when the fifth amendment says that property shall not be taken for public use without just compensation, it plainly means that when *property has in fact been taken*, compensation is due.[27]

Takings occur before the filing of the suit.[28] In our American litigational system, the rendering of an advisory opinion before the existence of an actual case or controversy is generally prohibited. Thus, by definition, a taking—i.e., depriving the property owner of reasonable and economically viable use of his property—has already taken place, at least for a temporary period. If the words of the just compensation clause are to be given meaning, compensation must be paid when a taking is on-going or has already occurred.

Peters) 243 (1833).

27. The Supreme Court has repeatedly held that the fifth amendment does not require payment in advance of the taking, but merely requires a mechanism (such as inverse condemnation) to assure that compensation is paid. *See, e.g.*, Williamson County Regional Planning Comm'n. v. Hamilton Bank, 473 U.S. 172 (1985). If that is so, just compensation is not a condition *precedent* to a taking. Plainly, the Court has treated it as a condition which may be satisfied subsequently.

28. Issues could arise as to the precise date when the taking occurred. Does the taking occur, for example, when the ordinance or regulation is first introduced, or finally adopted, or on some other statutory effective date, or does the taking occur when the property owner seeks to use the property and is turned down? Which of these dates (or others) is applicable may depend on the facts of the case. There is no reason why the date of a regulatory taking should be treated as other than a fact question, as it is in physical taking cases. *E.g.*, United States v. Dickinson, 331 U.S. 745, 748-49 (1947). For a discussion of the timing problem and suggestions for reciprocal duties of notice required of property owners (that a taking is occurring) and government regulators (to specify what uses will be permitted), *see* KAYDEN, *When Is a Regulatory Taking Effective: The Timing Issue*, Monograph no. ___, LINCOLN INST. OF LAND POLICY (forthcoming 1987).

Moreover, the Solicitor General's assertion that *other* clauses of the fifth amendment have *not* been held to give rise to a self-effectuating compensatory remedy is incorrect. In *Davis v. Passman,*[29] the gravemen of the cause of action was that Mrs. Davis had been fired by Congressman Passman because she was a woman. This was a violation of the fourteenth amendment's equal protection guarantee which is safeguarded for federal purposes by the fifth amendment's due process clause.[30] The Court concluded that the issue was plainly justiciable:

> [W]e presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.[31]

The Court then held that not only was a cause of action stated for purposes of a fifth amendment violation, but that "[Mrs. Davis'] injury may be redressed by a damages remedy."[32]

Thus, the obverse of the Solicitor General's analysis seems in order: if monetary compensation *is* an appropriate remedy for the violation of a clause of the fifth amendment which merely guarantees due process, compensation must be an appropriate remedy for a clause of the fifth amendment which guarantees compensation.

b. Immunity from suit without congressional waiver. While it is generally true that the Supreme Court has held the United States immune from suit without the express consent of Congress,[33] there is an important limitation on that immunity: the Constitution. The Supreme Court most recently considered this issue in *Library of Congress v. Shaw.*[34] There, the question was whether Congress' consent to liability for attorney's fees in employment cases[35] also granted jurisdiction to award interest to compensate for a delay in payment. The Court concluded that it did not, as there was no express mention of interest in the statute. However, in so ruling the Court was careful to distinguish *statutory* causes of action from *constitutional* ones: "*Apart from constitutional requirement,* in the absence of specific provision by contract or

29. 442 U.S. 228 (1979).
30. *Id.* at 234.
31. *Id.* at 242.
32. *Id.* at 249.
33. *See, e.g.,* cases cited *supra* note 22.
34. 106 S. Ct. 2957 (1986).
35. 42 U.S.C. § 2000e-5(k) (1982).

statute, or 'express consent . . . by Congress,' interest does not run on a claim against the United States."[36]

What the Court meant by "[a]part from constitutional requirement" was made clear in a footnote: "The 'constitutional requirement' arises in a taking under the Fifth Amendment. To satisfy the constitutional mandate, 'just compensation' includes a payment for interest."[37]

Indeed, in suits arising under the Constitution, the Court has *transposed* the formulation of the rule regarding congressional action. Whereas, with *statutory* rights, the rule is *no liability* without congressional *approval;* with *constitutional* rights, the rule is *no immunity* without congressional prohibition—and the prohibition must be accompanied by congressional provision of an alternate and equally effective remedy.[38] Congressional action or inaction cannot impede the protection of rights guaranteed by the Constitution.[39]

c. The propriety of injunctive relief. This argument is premised on the supposition that *none* of the other clauses of the fifth amendment have been held to require a compensatory remedy. Because the remedies for deprivations of liberty and due process are essentially injunctive in nature, parity of reasoning is said to require the same sort of relief for regulatory takings.

However, as noted earlier, the premise of this argument is erroneous. Deprivation of due process *has* been held to require a compensatory remedy.[40] Without its premise, the argument fails.

d. The nineteenth century cases. This argument relies on early decisions in Massachusetts, New York, New Jersey, Georgia, Arkansas, New Hampshire and the U.S. Supreme Court.[41] The cases in effect held that an attempted taking of property without compensation is void because compensation is a condition precedent to taking property. There are two responses to this argument.

First, in *none* of those cases was compensation *sought* by the property owner. This is not an insignificant fact. Courts tend to deal with the issues presented to them, rather than roaming afield in order to

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36. 106 S. Ct. 2957, 2963; (emphasis added) (quoting with approval United States v. Louisiana, 446 U.S. 253, 264-265 (1980)).

37. *Id.* at 2963, n. 5 (citations omitted).

38. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 397 (1971); Davis v. Passman, 442 U.S. 228, 246-47 (1979).

39. The same analysis would seem to apply to the argument that only Congress can appropriate funds. If the Constitution requires the payment of compensation for a taking, then Congress cannot prevent it. Moreover, the supposedly exclusive appropriation power of Congress was no barrier to Constitutional damage actions in *Bivens,* note 38 *supra,* and *Davis,* note 38 *supra.* It can be no more of a barrier in property cases.

40. Davis v. Passman, 442 U.S. 228 (1979).

41. *See* notes 25-26, *supra.*

decide issues not raised. These cases were decided at a point in our history when at least three factors were substantially different (from a regulatory viewpoint) than they are now:

(1) if land use permits were required, one permit was generally all that was needed;

(2) litigation was swift; and

(3) land was plentiful.

Thus, if there was any question about one's ability to make profitable use of his land, it was a question which could be answered quickly and cheaply. If the property owner didn't like the answer, he could simply heed Horace Greely's advice to follow the sun.

It is obvious that many things have changed with the passage of time.[42] If nothing, else, the proliferation of permit wielding agencies with overlapping authority has created what two noted commentators call "a synergistic nightmare, a paralyzing mishmash" whose result is a "bubbling cacophony of multitudinous edicts."[43] Merely working one's way through this jungle may consume more time and effort than the ordinary mortal can manage.[44] The prospect of litigation after "exhausting" (in more ways than one) the administrative avenues is less than appetizing, as all that can be assured is more years of conflict and turmoil.[45]

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42. The adaptability of the law to changing times has long been established. *See, e.g.,* Keystone Bituminous Coal Ass'n. v. DeBenedictis, 55 U.S.L.W. 4326, 4331 (U.S. Mar. 9, 1987)(No. 85-1092); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1966); Brown v. Board of Education, 347 U.S. 483, 492-93 (1954).

For more extensive discussion and citations regarding land use, *see* Berger & Kanner, *Thoughts on The White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property,* 19 LOY. L.A.L. REV. 685, 696-703 (1986).

43. Hagman & Misczynski, *The Quiet Federalization of Land Use Controls: Disquietude in the Land Markets,* 40 THE REAL ESTATE APPRAISER 5, 7 (1974).

44. Note the following observation:

> City planners also act irresponsibly, if not unethically, when they recommend legislation or base city planning decisions on ordinances which they favor, but which they know will likely be overturned if appealed to the courts. It is not uncommon for city and county planners, with characteristic certainty that their ends justify the means, to take advantage of the fact that it is almost always too time-consuming and expensive for private land developers to challenge laws and administrative decisions in court, even if they are of dubious legality.

Branch, *Sins of City Planners,* 42 PUB. ADMIN. REV. 1, 4 (1982).

45. As noted in one recent case:

> The suit has already outlived the original plaintiff, Paul Kollsman. The Kollsman estate will be most fortunate indeed if it is able to resolve even the simple and unimportant state law aspect of this litigation by 1987—ten years after the time the original application was filed. The case will then return to the federal courts for resolution of the federal issues unless by that time the plaintiffs have abandoned their rights in despair.

Kollsman v. City of Los Angeles, 737 F.2d 830, 844 (9th Cir. 1984) (Reinhardt, J., dissenting),

Thus, the relevance of cases based on facts arising at a time so far removed and under circumstances so radically different seems scant. All that can be learned from those cases is that nineteenth century property owners were satisfied with specific relief and the courts were willing to provide it.

Second, the cited jurisdictions (along with many others) have issued more recent decisions holding that when a taking occurs, just compensation is constitutionally mandated. Take the U.S. Supreme Court as an example. After purportedly reviewing all of the Court's just compensation cases, the Solicitor General concluded: "In no case has this Court ever expressly held that the Fifth Amendment, standing alone and without further congressional action, mandates a damage remedy against the United States."[46]

The Solicitor General's opinion, however, does not take account of the Court's 1933 decision in *Jacobs v. United States.*[47] In that case the Court plainly held:

> The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. *That right was guaranteed by the Constitution.* The fact that condemnation proceedings were not instituted and the right was asserted in suits by the Owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. *It rested upon the Fifth Amendment.* Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of *the duty to pay imposed by the Amendment.*[48]

The Supreme Court plainly said in a later opinion that *Jacobs* "*held* that a plaintiff who alleged that his property had been taken by the United States for public use without just compensation could bring *suit directly under the Fifth Amendment.*"[49]

The Solicitor General evaded the plain meaning of *Jacobs* by arguing that *Jacobs* (and similar cases) were brought under the jurisdiction granted by the Tucker Act[50] and thus did not arise directly under the fifth amendment but under a statute enacted by Congress. However, this argument was rejected by the Supreme Court four decades ago:

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cert. denied 105 S. Ct. 1179 (1985).

46. Brief for the United States as Amicus Curiae at 21, *Lutheran Church.*

47. 290 U.S. 13 (1933).

48. *Id.* at 16 (Emphasis added.).

49. Davis v. Passman, 442 U.S. 228, 242, n. 20 (1979).

50. 29 U.S.C. § 1491. The Tucker Act vests the Claims Court with jurisdiction over cases against the United States based on the Constitution or contract.

> But whether the theory . . . be that there was a taking under the Fifth Amendment, and that therefore *the Tucker Act* be invoked because it is a claim founded upon the Constitution, or that there was an implied promise by the Government to pay for it, *is immaterial.* In either event, *the claim traces back to the prohibition of the Fifth Amendment, nor shall private property be taken for public use, without just compensation.*' The Constitution is intended to preserve practical and substantial rights, not to maintain theories.[51]

That common sense conclusion has neither been questioned nor abandoned by the Court. It is thus clear that, in its twentieth century cases, the Supreme Court has adapted its view to the reality of the times.[52]

C. If There is a Remedy Under the Civil Rights Act, Does That Preclude a Constitutional Remedy?

Another argument which has been raised in opposition to applying a compensatory remedy directly under the Constitution is that in cases against local government agencies (by far the largest number of regulatory taking cases), the fourteenth amendment's incorporation of the fifth amendment's just compensation guarantee is said to be enforceable only by Congress, not by the courts.[53]

1. The basic premise

The basic premise for this argument is that Congress is the branch of government which is empowered to enforce the fourteenth amendment, rather than the judiciary. A number of Supreme Court cases are cited in support of this proposition. Their essence is that the primary purpose of the fourteenth amendment was to augment the power of Congress to enforce the goals of equal protection and due process.[54] Also said to support this premise is the Supreme Court's "reluctan[ce]

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51. United States v. Dickinson, 331 U.S. 745, 748 (1947). (Emphasis added.)

52. For cases more recent than the state court decisions relied on by the Solicitor General in *Lutheran Church, see* J.W. Black Lumber Co., Inc. v. Arkansas Dept. of Pollution Control & Ecology, 290 Ark. 170, 717 S.W.2d 807 (1986); Clifton v. Berry, 244 Ga. 78, 259 S.E.2d 35 (1979); Hamilton v. Conservation Comm., 425 N.E.2d 358 (Mass. App. 1981); Sheerr v. Township of Evesham, 184 N.J. Super. 11, 445 A.2d 46 (1982).

53. Brief of the United States as Amicus Curiae at 27, *Lutheran Church.* Section five of the 14th amendment gives Congress the power to enact "appropriate legislation" to enforce the substantive provisions of the amendment.

54. *See* Katzenbach v. Morgan, 384 U.S. 641, 653-56 (1966); Harper v. Virginia Board of Elections, 383 U.S. 663, 678-80 (1966) (Black J., dissenting); United States v. Guest, 383 U.S. 745, 783 n. 4 (1966) (Brennan, J., concurring in part and dissenting in part); Ex parte Virginia, 100 U.S. 339, 345-46 (1879); The Slaughter House Cases, 83 U.S. (16 Wall.) 36, 81 (1872).

to permit a cause of action in federal court directly under the Fourteenth Amendment, unaided by congressional legislation."[55]

2. *The basic premise is flawed*

The problems with the basic premise are manifold. First, accepting the cited cases at their face value, the most that they hold is that the *primary* purpose of the fourteenth amendment was to augment the power of Congress. There is no reason given which would preclude courts from exercising their normal function of enforcing express constitutional provisions.[56]

Second, with respect to the rights actually guaranteed by the plain words of the fourteenth amendment, the Supreme Court said shortly after adoption of that amendment that its terms were "self-executing."[57]

Third, as a matter of public policy, the premise lacks a logical basis. If the courts cannot enforce the amendment without express congressional action, one is left with the ludicrous proposition that the framers of the fourteenth amendment intended its substantive terms to be horatory statements which Congress could enliven or repeal. Aside from the obvious fact that the drafters and ratifiers of the triumvirate of post-Civil War amendments intended them to have clear impact, the idea that Congress can control the effect given by the judiciary to the Constitution has been moribund at least since *Marbury v. Madison*.[58]

Building directly on the foundations laid by Chief Justice Marshall and James Madison, the Supreme Court recently summed up its philosophy:

> The Constitution, on the other hand, does not partake of the prolixity of a legal code.' *McCulloch v. Maryland*, 4 Wheat 316, 407 L Ed 579 (1819). It speaks instead with a majestic simplicity. One of its important objects,' ibid., is the designation of rights. And in its great outlines,' ibid., the judiciary is clearly discernible as the primary

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55. Brief of the United States as Amicus Curiae at 30, *Lutheran Church* (citing Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 398-400 (1979); Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 277-78 (1977); Aldinger v. Howard, 427 U.S. 1, 4 n. 3 (1976)). These cases are not as clear as the Solicitor General implies. The only "reluctance" I see in them is a reluctance to rule on issues either not raised in the lower courts or not preserved for Supreme Court review.

56. Indeed, in one of the cases relied on by the Solicitor General, the Court made this express: "[W]e may safely leave that matter until Congress shall have exercised its power, *or some case of state oppression*, by denial of equal justice in its courts, *shall have claimed a decision at our hands*." The Slaughter House cases, 83 U.S. (16 Wall.) 36, 81 (1872). (Emphasis added).

57. Civil Rights Cases, 109 U.S. 3, 20 (1883).

58. 5 U.S. (1 Cranch) 137, 177 (1803).

> means through which these rights may be enforced. As James Madison stated when he presented the Bill of Rights to the Congress: 'If [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislature or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.' I Annals of Congress 439 (1789).
>
> At least in the absence of 'a textually demonstrable constitutional commitment of [an] issue to a coordinate political department,' we presume that justicible constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their right. 'The very essence of civil liberty,' wrote Mr. Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch 137, 163, 2 L Ed 60 (1803), 'certainly consists in the right of every individual to claim the protection of the law, whenever he receives an injury. One of the first duties of government is to afford that protection.' Traditionally, therefore, 'it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the State to do.'[59]

The Court has also made it clear that this theory is not limited to injunctive relief. In a case dealing with unreasonable searches and seizures under the fourth amendment, the Court responded to the government's argument that monetary damages could not be awarded for a fourth amendment violation:

> That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty. Of course the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But 'it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.'[60]

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59. Davis v. Passman, 442 U.S. 228, 241-42 (1979)(some citations omitted).

60. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 395-96 (1971)(citations omitted).

Clearly, the Supreme Court treats constitutional provisions as judicially enforceable.[61]

Finally, the Supreme Court's decisions plainly show that the fourteenth amendment is enforceable notwithstanding the absence of congressional action. Two illustrations should suffice. In *Yick Wo v. Hopkins,*[62] the Court was faced with a San Francisco ordinance which prohibited the maintenance of laundries in wooden buildings without the express consent of the Board of Supervisors. Most of San Francisco's buildings at that time were made of wood. All applications for permits by Chinese were denied, while all applications but one by non-Chinese were granted. The Court lost little time in concluding that the actions of San Francisco violated the equal protection clause of the fourteenth amendment.[63]

In *Brown v. Board of Education,*[64] the Court reconsidered the "separate but equal" doctrine of *Plessy v. Ferguson*[65] in the context of segregated elementary and high schools, and concluded that the doctrine violated the equal protection clause of the fourteenth amendment.[66] No Congressional enactment lay behind either decision. In each, the fourteenth amendment was directly enforced.

3. The secondary premise

Building on the flawed basic premise, a secondary premise behind the argument that only Congress can enforce the fifth amendment takings clause is urged: Because Congress exercised its authority under Section 5 of the fourteenth amendment by enacting 42 U.S.C. section 1983 (the Civil Rights Act), there is no need to imply a remedy directly under the fourteenth amendment.[67]

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61. It is one thing to favor benefical land use controls and environmental protection. It is, however, another matter to categorically deny any compensation to landowners in the name of the public interest when their land is stripped of its value. This result is clearly inequitable and constitutionally impermissible. If the phrase 'eminent domain' has any meaning, that meaning is that property is protected by the judicial branch against the other branches of state and federal government. Awarding monetary compensation is an integral part of the pattern of protection, as is invalidation of excessive regulation. At times, however, invalidation provides inadequate protection.

Kratovil, *Eminent Domain Revisited and Some Land Use Problems,* 34 DE PAUL L. REV. 587, 589 (1985).

62. 118 U.S. 356 (1886).

63. *Id.* at 374.

64. 347 U.S. 483 (1954).

65. 163 U.S. 537 (1896).

66. Brown v. Board of Education, 347 U.S. 483, 495 (1954).

67. Brief of United States as Amicus Curiae at 31, *Lutheran Church.*

4. The secondary premise is flawed

The secondary premise is contradicted by recent Supreme Court decisions which have implied compensatory remedies for violations of various provisions of the Bill of Rights.[68] The key case is *Carlson v. Green*,[69] an eighth amendment case based on the infliction of injuries and failure to provide adequate medical attention to a prisoner who subsequently died. The issue of the availability of a direct constitutional cause of action when Congress has provided a statutory remedy was directly presented by the Solicitor General on behalf of the Director of the Federal Bureau of Prisons.[70] An action under the Federal Tort Claims Act was available. Nonetheless, the Court held that unless it could be clearly shown that Congress intended its statutory remedy to be exclusive *and* that the statutory remedy was equally effective, there was no bar to implying a remedy directly under the Constitution.[71]

The legislative history of the Civil Rights Act was exhaustively analyzed in *Monell v. New York City Dept. of Social Services*.[72] Nothing in that legislative history indicates any intention by Congress to forbid the availability of a remedy directly under the Constitution to citizens who are injured by violations of the fourteenth amendment.[73]

The judiciary remains free to perform its function of protecting the rights of individuals against the massed desires of society at large. Governmental status confers power. If wrongly used, much damage can be inflicted. As the Supreme Court insightfully noted: "[P]ower, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting, albeit unconstitutionally, in the name of the

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68. Carlson v. Green, 446 U.S. 24 (1980) (eighth amendment); Davis v. Passman, 442 U.S. 228 (1979) (fifth amendment); Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) (fourth amendment);.

69. 446 U.S. 14 (1980).

70. *Id.* at 17 n. 2 and accompanying text.

71. *Id.* at 18-19. *See also,* Davis v. Passman, 442 U.S. 228, 246-247 (1979); Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 397 (1971).

72. 436 U.S. 658, 665-95 (1978).

73. Quite the contrary. Representative Shellabarger, House Sponsor of the bill, noted that the courts historically had enforced general prohibitions upon actions of government agencies:

> Most of the provisions of the Constitution which restrain and directly relate to the States, such as those in [Art 1, § 10] relate to the divisions of the political powers of the State and General Governments
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> . . . . These prohibitions upon political powers of the states are all of such nature that they can be, and even have been enforced by the courts of the United States declaring void all State acts of encroachment of Federal powers. Thus, and thus sufficiently, has the United States enforced' these provisions of the Constitution.

Congressional Globe, 42d Congress, 1st Session, Appendix 69-70 (1871) *quoted in* Monell v. New York City Dept. of Social Services, 436 U.S. 658, 671 (1978).

United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own."[74]

D. Police Power or Eminent Domain?

When a government regulation is challenged by a property owner as violating the fifth amendment's just compensation clause, the government's normal first line of defense is to say that it was exercising the "police" power, not the "eminent domain" power, and thus the just compensation guarantee does not apply.[75] There are three lines of Supreme Court cases which delineate this battleground.

1. Old police power cases

The first line of cases involves uses of property which are injurious to others. This group includes the classic cases of *Mugler v. Kansas*,[76] *Hadacheck v. Sebastian*,[77] and *Reinman v. Little Rock*.[78] Plainly, the ordinances in these cases were upheld because specific uses being made *of the regulated property* were found to be injurious to others on other property.[79] As the Court put it in *Mugler*, the fountainhead of this line of cases:

> A prohibition simply upon *the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community*, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its *use by anyone, for certain forbidden purposes, is prejudicial to the public interests.* Nor can

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74. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 392 (1971).

75. For extended discussion of this issue, *see* Berger & Kanner, *Thoughts on The White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A.L. REV. 685, 696-703 (1986). While some commentators accept this distinction (*e.g.*, Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193, 209, 211 (1984)), others denigrate it. *See, e.g.*, Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1186 (1967)("wordplay"); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria* 44 S. CAL. L. REV. 1, 2 (1971)("circular reasoning, and empty rhetoric"); Waite, *Governmental Power and Private Property*, 16 CATH. U.L. REV. 283, 292 (1967)("illusory").

76. 123 U.S. 623 (1887)(prohibition of liquor business).

77. 239 U.S. 394 (1915)(prohibition of brickyard in residential neighborhood).

78. 237 U.S. 171 (1915)(prohibition of livery stable in downtown area).

79. *See generally*, E. FREUND, THE POLICE POWER § 511 (1904); Berger, *To Regulate, or Not to Regulate — Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights*, 8 LOY. L.A.L. REV. 253, 275-79 (1975); Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 39 (1964).

> legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well being but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not, and consistently with the existence and safety of organized society, cannot be burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, *by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.* The exercise of the police power by the destruction of property which is itself a *public nuisance*, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, *a nuisance only is abated*; in the other, unoffending property is taken away from an innocent owner.[80]

Thus, even though one may refrain from attaching moral blameworthiness to property owners or their land uses, if use of property causes injury to other property owners and the public, that use will be prohibited.[81] As the premier treatise on eminent domain concludes:

> The distinguishing characteristic between eminent domain and the police power is that the former involves the taking of property because of its need for the public use while the latter involves the regulation of such property to prevent the use thereof in a manner that is detrimental to the public interest.[82]

Curtin v. Benson,[83] another case decided in that same era, makes it clear that the *Mugler* line of cases does not grant carte blanche to government agencies to regulate private property into oblivion. *Curtin* states that:

> On the merits of the case we may concede, *arguendo*, as contended by the appellees and disputed by appellant, that the United States may exercise over the park not only rights of a proprietor, but the powers of a sovereign. There are limitations, however, upon both. *Neither can be exercised to destroy essential uses of private property.*

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80. Mugler v. Kansas, 123 U.S. 623, 668-69 (1887). (Emphasis added.)

81. In Keystone Bituminous Coal Ass'n. v. DeBenedictis, 55 U.S.L.W. 4326, 4331 (U.S. Mar. 9, 1987) (No. 85-1092), the Court confirmed that the *Mugler* line of cases applies to "activity akin to a public nuisance."

82. 1 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 1.42 at 1-127 (3d rev. ed. 1975). (Emphasis in the text).

83. 222 U.S. 78 (1911).

> The right of appellant to pasture his cattle upon his land, and the right of access to it, are of the very essence of his proprietorship. May conditions be put upon their exercise such as appellees put upon them? . . . [The government's] *order is not . . . a regulation of the use of the land, as an order to fence the lands might be, but is an absolute prohibition of use. It is not a prevention of a misuse or illegal use, but the prevention of a legal and essential use*,—an attribute of its ownership,—one which goes to make up its essence and value. To take it away is practically to take his property away, and to do that is beyond the power even of sovereignty, except by proper proceedings to that end.[84]

Thus, when the prevented use is not injurious to others, the *Mugler* line of cases supplies no authority to confiscate without compensation.[85]

2. Recent regulatory taking cases: distinction between ends and means

A legitimate governmental goal does not legitimize any solution chosen. Of course, there must be a legitimate goal; otherwise the action is void. But that is only half of the case. The means chosen to achieve the goal must be subjected to scrutiny to determine whether they are constitutional.[86] As pointedly noted in a recent Supreme Court opinion, "a municipality has no discretion to violate the Federal Constitution; its dictates are absolute and imperative."[87] The Supreme Court has emphasized the distinction between ends and means repeatedly in recent cases.[88]

Loretto v. Teleprompter Manhattan CATV Corp.,[89] involved a statute designed to provide apartment dwellers access to cable televison. Landlords were required to permit cable installation, and one dollar was the legislatively presumed just compensation for this invasion of the landlord's premises. The fact that a state's pursuit of a legitimate

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84. *Id.* at 86. (Emphasis added.)

85. *See* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978): "It is, of course, implicit in Goldblatt [v. Hempstead, 369 U.S. 590 (1962) (the latest in the Mugler line)] that a use restriction on real property may constitute a 'taking' . . . perhaps if it has an unduly harsh impact upon the owner's use of the property."

86. *See generally* SHONKWILER & MORGAN, LAND USE LITIGATION § 4, 5 (1986).

87. Owen v. City of Independence, 445 U.S. 622, 649 (1980).

88. This line of cases also has older antecedents. Delaware, L. & W. R. Co. v. Morristown, 276 U.S. 192, 193 (1928) stated: "[A]ssuming . . . a proper exertion of the police power, *it does not follow* that the due process clause of the 14th Amendment would not safeguard to the owner just compensation for the use of its property." [Citation omitted.] (Emphasis added.)

89. 458 U.S. 419 (1982).

goal is not enough to insulate its statute from the reach of the just compensation clause is shown by the following language from *Loretto*:

> The Court of Appeals determined that § 828 serves the legitimate public purpose of 'rapid development of and maximum penetration by a means of communication which has important educational and community aspects,' and thus is within the State's police power. We have no reason to question that determination. *It is a separate question*, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid.[90]

Kaiser Aetna v. United States[91] involved a private marina in Hawaii. After the marina was constructed (by dredging out ancient, shallow fish ponds and cutting an opening to the ocean), the Corps of Engineers ordered the owners to open the marina to the public. The Supreme Court decreed that this could not be done without compensation:

> In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a taking, however, is an entirely separate question.[92]

United States v. Security Industrial Bank[93] dealt with retroactive application of bankruptcy legislation. Debtors, supported by the United States as an intervenor, urged that retroactive application was "rational" and thus within the power of Congress. The Supreme Court disagreed, because of the impact of retroactivity on vested property rights of the lenders: "[H]owever 'rational' the exercise of the bankruptcy power may be, that iniquiry is *quite separate* from the question whether the enactment takes property within the prohibition of the Fifth Amendment."[94] This discussion could be extended much further,[95] but it seems unnecessary to belabor the point. The exercise of a

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90. *Id.* at 425. (Emphasis added; citations omitted.)

91. 444 U.S. 164 (1979).

92. *Id.* at 174. (Emphasis added; citations and footnote omitted.)

93. 459 U.S. 70 (1982).

94. *Id.* at 75. (Emphasis added.)

95. *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (registration of pesticides); Dames & Moore v. Regan, 453 U.S. 654 (1981) (settlement of the Carter era Iranian hostage incident); Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) (solving massive railroad bankruptcies). These cases all involved legitimate exercises of Congressional or Executive power to deal with major problems. In the process, private property rights may have been taken. In each case, the Court directed the property owners to the Claims Court to determine whether these legitimate actions required compensation.

legitimate function does not justify the government's choice of a mechanism which takes private property without compensation.

3. Are the eminent domain power and the police power separate?

A number of years ago, Professor Beuscher offered the following conclusion about the "police" power and the "eminent domain" power being separate: "The inverse condemnation cases should remind us that those writers who emphasize the separate air tight, non-overlapping character of the two basic powers, police power and eminent domain, have been too glib."[96]

Professor Beuscher's observation is as pertinent today as it was when originally written. A third line of Supreme Court cases makes it clear that the police power and the eminent domain power are not tightly sealed in vacuums, each untouched by the other. Instead, they are more properly viewed as overlapping segments on a spectrum of governmental power.[97] While there are certainly some regulations (at one end of the spectrum) which do not take private property, there are others (as the exercise moves further along the spectrum) which involve the Fifth Amendment's just compensation guarantee. And, indeed, that seems the clear message of *Pennsylvania Coal Co. v. Mahon*,[98] where it was held that a police power regulation which goes "too far" is, in fact, a taking.[99] This interpretation of *Pennsylvania Coal* seems to be the current view of the Supreme Court. It has been reaffirmed in at least five recent regulatory taking cases, most recently, in *Keystone*.

In *Williamson County Regional Planning Commission v. Hamilton Bank*,[100] the Court said that its inquiry in a regulatory taking case is designed "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property

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96. Beuscher, *Notes on the Integration of Police Power and Eminent Domain by the Courts: Inverse Condemnation*, in J. BEUSCHER & R. WRIGHT, LAND USE 724 (1969).

97. *See* 1 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 1.42[7] at 1-208 to 1-209 (3rd rev. ed 1975) ("the police power is but another name for the power of government.") For criticisms of the use of the "police power" label as being only a source of confusion, *see* Kratovil, *Eminent Domain Revisited and Some Land Use Problems*, 34 DE PAUL L. REV. 587, 608 (1985); Linde, *Without Due Process*, 49 OR. L. REV. 125, 147 (1970) (since writing this article, Professor Linde has become a Justice of the Oregon Supreme Court.)

98. 260 U.S. 393 (1922).

99. The Court noted one year before *Pennsylvania Coal* that "there comes a point at which the police power ceases and leaves only that of eminent domain." Block v. Hirsch, 256 U.S. 135, 156 (1921). *See also* Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 RUTGERS L. REV. 15, 38 (1983).

100. 473 U.S. 172 (1985).

through eminent domain or physical possession."[101] This same formulation was reiterated a year later in *MacDonald, Sommer & Frates v. County of Yolo*.[102]

In *Agins v. City of Tiburon*,[103] the first of the recent influx of compensation issue cases considered by the Supreme Court, a taking was said to occur *either* if the regulation fails to advance a legitimate state interest *or* if it denies the owner economically viable use of his property.[104] The point was reiterated five years later in *United States v. Riverside Bayview Homes, Inc.*,[105] and again this year in *Keystone*.[106] Under this formulation, a legitimate police power action can be a taking. The only question is the impact of the regulation on the property owner.[107]

Moreover, in other cases, the Court has emphasized the congruent, non-segregated nature of the police and eminent domain powers. In *Berman v. Parker*[108] the Court upheld the concept of urban renewal. In so doing, the Court relied on the government's police power as the source of the ability to beautify inner cities and the just compensation clause as the protection supplied to property owners affected by the project.[109] This thirty year old precedent was updated and twice reiterated in 1984 (in the context of both inverse[110] and direct[111] condemnation), the Court concluding that the public use requirement in eminent

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101. *Id.* at 199. Judging a taking by its impact on the property owner, rather than the government's intent or the particular means involved has long been standard takings jurisprudence. *See, e.g.*, San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 651-53 (1981) (Brennan, J., dissenting); Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979); Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910).

102. 106 S. Ct. 2561, 2566 (1986).

103. 447 U.S. 255 (1980).

104. *Id.* at 260.

105. 106 S. Ct. 455, 459 (1985).

106. *Keystone*, 55 U.S.L.W. at 4330 (1987).

107. If doubt existed whether noble regulatory goals could override constitutional guarantees, it should have been dispelled in 1977, when the Court expressed its views quite clearly:

> Mass transportation, energy conservation, and environmental protection are goals that are important and of legitimate public concern. Appellees contend that these goals are so important that any harm to bondholders from repeal of the 1962 covenant is greatly outweighed by the public benefit. We do not accept this invitation to engage in a utilitarian comparison of public benefit and private loss. . . . Thus, a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors.

United States Trust Co. v. New Jersey, 431 U.S. 1, 28-29 (1977).

108. 348 U.S. 26 (1954).

109. *Id.* at 32-33, 36.

110. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984).

111. Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 240 (1984).

domain is "coterminous with the scope of a sovereign's police powers."[112] This, position was reiterated this year in *Keystone*.[113]

There are not two independent powers. There is only the power of government. And that power is plainly circumscribed by the Constitution.

E. California as a Lab Experiment

Apart from the philosophical debates discussed in previous paragraphs is the highly unique approach to regulatory takings embraced by the State of California. It is acknowledged by lawyers and professors on both sides of the takings issue that California is virtually in a world of its own, seemingly oblivious to the rights of property owners.[114] Scholarly comments on this deference to government range from mild[115] to acerbic.[116] The following observation is typical:

> The *striking* feature of California zoning law is that the courts in that state have quite *consistently* been *far rougher* on the property rights of developers than those in *any other state*. In a fairly long series of cases, the California court has upheld restrictions on property rights which *would not be upheld in many other states, and (in some instances) probably not in any other*. Moreover, this group of decisions is not an isolated phenomenon, out of line with the rest; *the same spirit pervades the body of California zoning law generally*.[117]

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112. *Id.*

113. *Keystone,* 55 U.S.L.W. at 4332, n. 20 (1987).

114. Land use decisions in California have been based on citations to the works of such authorities as Malvina Reynolds (Novi v. City of Pacifica, 169 Cal. App. 3d 678, 682, 215 Cal. Rptr. 439, 441 (1985)) and Ogden Nash (Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 186, 610 P.2d 407 (1980), *rev'd in part,* 453 U.S. 490 (1981)). *Res* should *ipsa loquitur.*

115. "The California Courts have long been exceedingly deferential to land use controls adopted by local governments . . . ." R. ELLICKSON & D. TARLOCK, LAND USE CONTROLS 75 (1981).

116. California has always been notorious for being the first jurisdiction to sustain extreme municipal regulations. Practitioners in other states have joked about why a developer would sue a California community when it would cost a lot less and save much time if he simply slit his throat.

R. BABCOCK & C. SIEMON, THE ZONING GAME REVISITED 293 (1985).

Please note that the authors of this conclusion are not unsympathetic to government agencies. *See, e.g.,* their recently co-authored article arguing that compensation for regulatory takings would be a bad idea. Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto,* 9 VT. L. REV. 193 (1984).

117. 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 6.03 at 115-116 (1974). (Emphasis added.) *See also* 5 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 151.01 at 276, § 156.07 at 357 (rev. ed. 1985). Other commentators have expressed similar views. Consider the following: "In the wide spectrum of holdings reached [in land use cases] in other jurisdictions, one of the *more restrictive and extreme* applications of the tandem theories [of vested rights and estoppel] has been the California courts." Kudo, *Nukolii: Private Development Rights and the Public Interest,* 16 THE URBAN LAWYER 279, 287 (1984). (Emphasis added.)

In addition to the scholarly commentary on California takings jurisprudence, there is a revealing analysis from within the California system. An article co-authored by a career research attorney (since 1969) for the California Supreme Court, provides some insight into the thinking of those who are on that Court. The article notes (in an understatement) that "California law has taken a unique course, rendering decisions of other jurisdictions of little relevance to the California practitioner."[118] Later in the article, it is revealed that one of those "other jurisdictions" whose decisions are deemed "of little relevance" is the Federal judicial system:

> [Justice Brennan's] *San Diego* dissent strongly urged an application of the Holmes balancing of public need against private loss that more heavily favors the private landowner and focuses on the economic hardship caused by the *excessive* delay, *onerous* controls, and the *draconian* vested rights rules *prevailing in California*, where the case arose.
>
> . . . .
>
> Indeed, the Brennan *San Diego* dissent, in both tone and substance, can easily be read as a reaction against California's *strict* state and local land use regulations. It also may take into account the *inability* of private landowners to obtain *any sort of judicial relief* from instances of *undue* hardship, lengthy procedural delays, and California's *strict* vested property rights rules and virtual judicial dismissal of the Holmes opinion in *Pennsylvania Coal*.

Callies, *The Taking Issue Revisited*, 37 LAND USE L. & ZONING DIG. 6, 7 (July 1985). (Emphasis added.)

> [Justice Brennan's *San Diego* dissent] is a chilling premonition for local government while a relief to landowners who have often gone *wholly without remedy in California* and elsewhere when *highly restrictive* government regulations have virtually *destroyed* land values even when the regulation itself is deemed and is held to be *illegal*.

Callies, *Land Use Controls: An Eclectic Summary for 1980-1981*, 13 THE URBAN LAWYER 723, 725 (1981). (Emphasis added.)

> All these tests, *with the possible exception of those used in California*, attempt to examine the needs of the area being subdivided or the burdens it will place on public facilities and then determine whether the exaction in some way meets the need or offsets the burden. *The California court, while parroting constitutionally required reasonableness, states its rule in no-win language* and requires the developer to bear the burden of proving that there is no reasonable relationship between the dedication requirements and health, safety, and general welfare. Note, however, that *this test completely ignores the question of confiscation as though it never arises*.

Staples, *Exaction — Mandatory Dedications and Payments in Lieu of Dedication*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 111, 119 (S.W. Legal Foundation 1980). (Emphasis added.)

> [A]nyone who practices public law in California should know better than to expect the California courts to be sympathetic with procedural due process protests when they challenge governmental practices.
>
> . . . What *can* one say about the California courts other than that one has to be a madman to challenge a government regulation in that bizarre jurisdiction?"

R. Babcock & C. Siemon, THE ZONING GAME REVISITED 251, 257 (1985) (emphasis in original).

118. Willemsen & Phillips, *Down-Zoning and Exclusionary Zoning in California Law*, 31 HASTINGS L. J. 103, 104 (1979).

> In rejecting the remedy of damages for inverse condemnation, California courts have charted a unique course. Their decisions, although resting on principles of fiscal policy and flexibility in planning, put California at odds with some of the federal courts, particularly the Northern District of California. Consequently landowners are likely to file future inverse condemnation actions in federal instead of state courts, thus *forcing the federal courts to face the question of whether to follow HFH and Agins* [i.e., California law] *or to adhere to federal precedents.*[119]

As will be noted later in the discussions of *Lutheran Church* and *Nollan* (two of the cases before the Supreme Court this Term), this California philosophy has emboldened California government agencies to experiment with far-reaching regulatory actions of all types. They know that the odds are greatly in favor of the regulations being upheld. If they are not upheld, the only relief granted is to invalidate the regulation and return the matter to the regulating entity for further proceedings. This sort of wrist slap is no remedy at all. It provides neither relief to injured property owners nor incentive to constitutional conduct by regulators.

The extreme nature of what has been happening in California seems finally to have attracted the attention of the U.S. Supreme Court. This Term could provide a definitive response.

IV. The Current Cases

Having discussed some of the common underlying threads in the takings legal tapestry, it is appropriate to look closer at the three regulatory taking cases which have appeared before the Supreme Court this Term. For each case, the article gives a detailed factual summary, describes the issues presented and discusses the litigation in the lower courts and the Supreme Court.

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119. *Id.* at 121. (Emphasis added.). The idea of "forcing" a "choice" between decisions of a state court and decisions of the U.S. Supreme Court and other Federal courts on issues of Federal Constitutional law is preposterous. One would have thought the issue settled no later than Appomattox.

California's openly rebellious posture is of a type rarely seen in the U.S. Supreme Court since the demise of the "interposition" doctrine in Cooper v. Aaron, 358 U.S. 1, 18-19 (1958). This defiance of the Supremacy Clause (U.S. CONST., art. VI, cl. 2) is reminiscent of the famous "speech" by the trial judge in Estes v. Texas, 381 U.S. 532 (1965) (quoted in the Chief Justice's concurring opinion, 381 U.S. at 566) in which he proclaimed that his oath was to uphold the *state* constitution, rather than the *federal*.

A. Pennsylvania Coal *Revisited*

Keystone, the first of the three current takings cases to be argued and decided, presented the Court with the rare opportunity to re-examine a decision handed down many decades ago. For, in substance, aside from the fact that the statute in *Keystone* is directed at the mining of bituminous coal while the statute in *Pennsylvania Coal v. Mahon*[120] was directed at the mining of anthracite coal, the statutes are the same. A comparison of the statutes makes this clear:

Pennsylvania Coal	*Keystone*
[I]t is unlawful for any owner, operator, director, or general manager, superintendent, or other person in charge of, or having supervision over, any anthracite coal mine or mining operation, so to mine anthracite coal or so to conduct the operation of mining anthracite coal as to cause the caving-in, collapse or subsidence of . . . (d) Any dwelling or other structure used as a human habitation ....[121]	[N]o owner, operator, lessor, lessee, or general manager, superintendent or other person in charge of or having supervisioin over any bituminous coal mine shall mine bituminous coal so as to cause damage as a result of the caving-in, collapse or subsidence of . . . (2) Any dwelling used for human habitation ....[122]

This parallel should be kept in mind during the following review of the two cases.

1. Pennsylvania Coal

While generating much current controversy,[123] the opinion in *Pennsylvania Coal* was short, simple, and direct. Soon after Pennsylva-

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120. 260 U.S. 393 (1922).

121. Brief for Petitioners at 19, Keystone Bituminous Coal Ass'n. v. DeBenedictis, 55 U.S.L.W. 4326 (U.S. Mar. 9, 1987) (No. 85-1092).

122. *Id.*

123. *See, e.g.*, F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973); Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 RUTGERS L. J. 15 (1983); Blume & Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569 (1984); Damich, *Does 14=5? Overregulation and Compensable Taking*, 10 MEMPHIS ST. U.L. REV. 701 (1980); Kratovil, *Eminent Domain Revisited and Some Land Use Problems*, 34 DE PAUL L. REV. 587 (1985); Rose, *Mahon Reconsidered: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Siemon, *Of Regulatory Takings and Other Myths*, 1 J. LAND USE & ENV. L. 105 (1985); Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980); Wright, *Damages or Compensation for Unconstitutional Land Use Regula-*

nia adopted the Kohler Act (quoted above), the Pennsylvania Coal Co. gave notice to Mr. Mahon that it planned to conduct extensive mining activities in its coal field beneath his house. Mr. Mahon owned only the surface of the land. The coal company, under established Pennsylvania law,[124] owned both the mineral estate in the property and the support estate. Mr. Mahon reacted by filing suit in the Pennsylvania courts, seeking to enjoin mining operations pursuant to the Kohler Act. The trial court ruled in favor of the coal company and the Pennsylvania Supreme Court reversed, setting the stage for the landmark decision.

While the case itself involved only one home,[125] it was plainly treated as more important than that by all concerned. The Supreme Court noted:

> But the case has been treated as one in which the general validity of the act should be discussed. The Attorney General of the State, the City of Scranton, and the representatives of other extensive interests were allowed to take part in the argument below and have submitted their contentions here. It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain.[126]

So saying, the Court proceeded to analyze the right of the public to enact regulations which destroy recognized rights in property in order to accomplish some public good. In language which has been oft-quoted, the Court concluded that the Constitution precluded such uncompensated regulation:

> *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 shortsighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation.
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> The general rule, at least, is that while property may be regulated to a certain extent, *if regulation goes too far it will be recog-*

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tions, 37 ARK. L. REV. 612 (1983).

124. *See supra* note 3.

125. This fact would be seized upon by the lower courts in *Keystone* as a means of distinguishing *Pennsylvania Coal. See* Keystone Bituminous Coal Ass'n. v. DeBenedictis, 581 F. Supp. 511, 516 (W.D. Pa. 1984), *aff'd sub nom.* Keystone Bituminous Coal Assn. v. Duncan, 771 F.2d 707, 714 (3d Cir. 1985).

126. *Pennsylvania Coal*, 260 U.S. at 414 (1922).

> *nized as a taking.* . . . We are in danger of forgetting that a strong *public desire to improve the public condition* is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.
>
> We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that *an exigency exists that would warrant the exercise of eminent domain.* But the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.[127]

2. *Adoption of the new statute*

In 1965, forty-three years after the Supreme Court struck down the Kohler Act, the Pennsylvania legislature decided to try again. The new statute made its first appearance as House Bill 1915. There appears to have been no legislative hearings before the Pennsylvania House of Representatives unanimously passed the Bill without debate in less than two weeks.[128] The Pennsylvania Senate was somewhat more cautious. Based on a concern (which was contained in an opinion of the State's Attorney General) that the new law would not pass constitutional muster under *Pennsylvania Coal*,[129] the Senate adopted amendments. Chief among the amendments was a provision for compensating coal companies for the taking of their property.[130] When the House rejected these amendments,[131] the legislative session ended with no bill being enacted.

Early the next year, a special session of the legislature convened. The Bituminous Mine Subsidence and Land Conservation Act (the "Subsidence Act"), with few changes from its earlier version, was enacted without substantial debate.[132] The Subsidence Act prohibits the

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127. *Id.* at 415-16. (Emphasis added.) In light of the clarity of this expression, it is something of a mystery how anyone could classify this discussion as "metaphorical," rather than actual. *Compare supra* notes 10-16 and accompanying text.

128. *See* Pennsylvania General Assembly Legislative Journal House 1975-76 (HB 1915 introduced Sept. 1, 1965), 1979 (reported from Committee Sept. 1, 1965), 2002 (second reading, Sept. 8, 1965), 2064-65 (third reading and final passage, Sept. 13, 1965).

129. *See* Pennsylvania General Assembly Legislative Journal House 2947 (Rep. Dardanell, Dec. 20, 1965); *Id.* at Senate Special Session 10 (Sen. Stroup, March 2, 1966).

130. *Id.* at Senate 1473-74 (Dec. 13. 1965).

131. *Id.* at House 2877-78 (Dec. 17, 1965), 2946-53 (Dec. 20, 1965).

132. *Id.* at House Special Session 8 (Feb. 28, 1966), 29 (HB 13 introduced, referred to committee, reported out of committee, and first reading, April 12, 1966), 31 (second reading, April 13, 1966), 33-34 (third reading and passage April 18, 1966); *Id.* at Senate Special Session 43

mining of bituminous coal in a manner which causes damage from subsidence to any of the following types of surface structures in place on April 27, 1966: (1) public buildings or any noncommercial structures customarily used by the public, such as churches, schools, hospitals, and utilities; (2) dwellings; and (3) cemeteries.[133] Regulations were later adopted expanding the protected categories to include:(1) streams and impoundments with more than 20 acre feet of water; (2) aquifers; and (3) coal refuse.[134] In order to prevent subsidence, the statute requires mine operators to adopt measures to maximize stability and maintain the value and foreseeable uses of the surface,[135] including, at a *minimum*, leaving 50% of the coal in the ground as support.[136]

When it enacted this statute, the Pennsylvania legislature was aware of the *Pennsylvania Coal* decision. However, the legislature apparently chose not to follow it. Both House and Senate members acknowledged the similarity of the Bituminous Act to the Kohler act and recognized the fate of the Kohler act. However, the Pennsylvania legislators decided to adopt the new statute, despite its similarity with the Kohler act. They reasoned that since the membership of the Supreme Court had changed since *Pennsylvania Coal* a challenge to the new statute might produce a different result.[137]

3. Impact of the new statute

It is well known that the coal mining industry in Pennsylvania is extremely important. Thus, it should come as no surprise that the impact of a statute requiring 50% of the coal beneath dwellings and public buildings to be left in place was substantial.

Because of Pennsylvania's long-standing history of recognizing the support estate as a separate estate in land, coal mining companies have

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(referred to committee, April 18, 1966), 44 (first reading April 18, 1966), 45 (second reading, April 19, 1966), 47 (third reading April 20, 1966). The statute appears at 52 PA. CONS. STAT. ANN. § 1406.1 *et seq.*

133. 52 PA. CONS. STAT. ANN. § 1406.4 (Purdon 1987).

134. 25 PA. ADMIN. CODE § 89.143(b) (1985).

135. 52 PA. CONS. STAT. ANN. § 1406.5(e) (Purdon 1966).

136. 25 PA. ADMIN. CODE § 89.146(b)(3)(i) (1985).

137. *See* Pennsylvania General Assembly Legislative Journal House 2947 (Rep. Dardanell, Dec. 20, 1965); *id.* at Senate 10 (Sen. Weiner). Thus, in what has become a perverse reversal of the rule of Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), regarding the judiciary's role of determining the Constitutionality of statutes, the Pennsylvania legislature joined the growing ranks of lawmakers who refuse to consider the Constitutionality of statutes and ordinances placed before them. The attitude is, "Let's pass it and let the courts decide if it's valid." The success of this tactic is unfortunate. It will simply encourage legislative bodies to ignore the constitutional implications of their actions.

purchased a large number of these estates.[138] In fact, approximately 90% of the coal in western Pennsylvania at issue in *Keystone* was severed (along with the support estate) between 1890 and 1920.[139] Every mine operated by the *Keystone* petitioners had at least one structure over it which was protected by the statute.[140] The requirement that 50% of the coal be left in place[141] meant that some 27 million tons of coal owned by the coal companies could not be removed. There was no compensation provided.[142]

4. The litigation in the lower courts

Five coal mining and operating companies, along with an association of coal mining companies, filed suit in U.S. District Court under 42 U.S.C. section 1983, alleging that the Subsidence Act was an unconstitutional taking of their property without just compensation and an unconstitutional impairment of their contracts with surface owners regarding the support estate.[143] They sought an injunction restraining the enforcement of the statute and a declaration that the statutory scheme was unconstitutional.

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138. *See generally* Ingram, *Regulation of Mine Subsidence — Legal Issues Raised by Government Intervention in Historically Private Arrangements,* 5 EASTERN MIN. L. INST. 6.01 *et seq.* (1984).

139. Joint Appendix of Petitioner and Respondent at 93-94, *Keystone.* A typical severance deed reads as follows:

> [The owners] grant, bargain, sell, alien, enfeoff, release, convey and confirm unto [the buyer: ALL THE COAL of whatever kind lying or being in or upon that certain tract of land . . . described as follows. . . .
>
> TOGETHER with the right to mine and remove all of said coal, without being required to provide or leave support for the overlying strata or surface, and without being liable for any injury to the said overlying land or to the structures thereon, or the springs or water courses therein or thereon, by reason of the mining and removing of said coal or other coal on lands adjacent thereto. . . . .

Id. at 99, 101-02.

140. Brief for Petitioners at 7, *Keystone.* There are 3000 such structures over mines operated by the *Keystone* petitioners (Joint Appendix at 36-37, 41-43, *Keystone*) and 14,000 statewide (*id.* at 90, 145).

141. It is irrelevant that the regulation theoretically permits more coal to be mined if the coal companies can prove to the state authorities that leaving less support will not result in subsidence. 25 PA. ADMIN. CODE § 89.146. The parties agreed that no such showing could be made. *See* Joint Appendix at 28, 295.

142. Under 52 PA. CONS. STAT. ANN. § 1406.15, owners of a surface estate which was undeveloped on April 27, 1966 are not covered by the statute. However, they may compel the coal companies to sell the support estate. Such a purchase would thereafter render the coal companies liable for subsidence damage. That feature of the statute is not involved in the Supreme Court litigation. *See* Brief for Petitioners at 11, n. 17, *Keystone.*

143. The discussion in this article will focus on the taking issue, rather than the contract impairment issue.

The District Court opened its opinion by acknowledging the need to deal with the opinion in *Pennsylvania Coal.*

> In this case we are faced with a constitutional challenge to another Pennsylvania statute which seeks to prevent coal mining subsidence damage. However, the statute here differs from the enactment in *Pennsylvania Coal*; the parties are different; and, most importantly, the passage of time and subsequent decisions require that *Pennsylvania Coal* be placed in proper perspective.[144]

True to this introduction, the court found *Pennsylvania Coal* not to be controlling. Its ruling was said to be based on U.S. Supreme Court decisions after Pennsylvania Coal:

> Applying these rules, we conclude that the Bituminous Mine Subsidence and Land Conservation Act does not constitute a taking and is a legitimate exercise of the Commonwealth's police power. First, the statute and DER regulations do not result in a permanent, or even temporary, physical occupation of plaintiffs' real property. Plaintiffs retain title and possession of the mineral and support estates. The restrictions merely deal with plaintiffs' use of their properties to prevent harm to the public generally. Second, the statute and regulations do not vest in the public generally any right to an easement or other servitude in the mineral or support estates. And third, the restrictions can be upheld on the basis that the Commonwealth has determined that the health, safety and general welfare of the public are promoted by restricting such uses of land.[145]

This analysis, while technically correct, is based more on wordplay than reality. Four arguments challenge the district court's reasoning. First, the fact that no physical possession was taken should be irrelevant, as should be the fact that the coal companies retained title to and possession of the coal.[146] The Supreme Court has made it clear that the absence of physical possession does not mean there is no taking.[147] The premier text on eminent domain put it thus:

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144. Keystone Bituminous Coal Ass'n. v. DeBenedictis, 581 F. Supp. 511, 512 (W.D. Pa. 1984).

145. *Id.* at 518.

146. This precise issue was dealt with in *Pennsylvania Coal*:

> "For practical purposes, the right to coal consists in the right to mine it." [Citation omitted.] What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. (260 U.S. at 414.)

147. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 122, n. 25 (1978); Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 14 (1984). Scholars at both ends of the spectrum agree: "What stamps a government action as a taking simpliciter is what it does to the property rights of each individual who is subject to its actions: nothing more or less is relevant . . ." R.

> The modern, prevailing view is that any substantial interference with private property which destroys or lessens its value (or by which the owners' right to its use or enjoyment is in any substantial degree abridged or destroyed) is, in fact and in law, a "taking" in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remains undisturbed.[148]

Second, saying that the regulation prevents harm (rather than saying that it provides a public benefit) is mere tautology. It is a conclusion used to justify a result, or decision by label affixation.[149] Depending on one's predilection, either label could be applied to most regulations. The label answers nothing and no reasons are advanced in its support.

Third, it is not relevant that the statute grants no specific easement or servitude to the government. This is but another way of stating the first issue discussed above. There is no need to grant a specific easement if the same effect can be accomplished by a regulatory prohibition. The impact on the property owner is no different.[150]

Finally, to conclude that the just compensation guarantee does not apply if the government determines that the public health, safety, and welfare are promoted by the regulation allows the police power to eliminate the just compensation clause. *Every* police power enactment must be based on a determination that it will enhance the public health, safety, and welfare. If it does not, then the enactment is void.

EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 94 (1986).

> Forcing someone to stop doing things with his property—telling him you can keep it, but you can't use it—is indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else. Thus, a taking occurs in this ordinary sense when government controls a person's use of property so tightly that, although some uses remain to the owner, the property's value has been virtually destroyed.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW 460 (1978) (footnotes omitted).

148. 2 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 6.09 at 6-55 (3d rev. ed 1975) (Footnote omitted). *See also* Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 2, n. 5 (1970).

149. To be fair, this District Court did not invent the concept. For years, it has seemed endemic to the field of government regulation. Professor Van Alstyne characterized decisions in this field as consisting of "conclusionary terminology, circular reasoning and empty rhetoric." Van Alstyne, 44 S. CAL. L. REV. at 2. Professor Sax called them "a welter of confusing and apparently incompatible results." Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964). Professor Dunham, limiting his review to decisions of one court, the U.S. Supreme Court, found a "crazy-guilt pattern." Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 63. Professor Kratovil concluded that "the courts are adrift in a sea of confusion." Kratovil, *Eminent Domain and Some Land Use Problems*, 34 DE PAUL L. REV. 587, 593, n. 38 (1985).

150. *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting, joined by Stewart, Marshall, and Powell, JJ.); MacDonald Sommer & Frates v. County of Yolo, 106 S. Ct. 2561, 2572-2573 (1986) (White, J., dissenting, joined by Burger, C.J., and Rehnquist and Powell, JJ.).

Thus, the end result of the District Court's theory is that *no* police power action could ever require compensation. That conclusion is plainly contrary to numerous statements of the Supreme Court.[151] Indeed, the same conclusion (i.e., that the regulation is based upon the public health, safety, and welfare) is also the basis for the exercise of eminent domain (which includes compensation). The Supreme Court has held in two recent cases that the scope of the police power and the concept of public use in eminent domain are "coterminous."[152] Thus, the public health, safety, and welfare finding is determinative of nothing: it is a precondition to *both* uncompensated regulation and compensated taking.

The district court also found support for its conclusion in certain Supreme Court decisions which equate property ownership with a bundle of sticks, an analogy used by professors teaching property law to first year law students.[153] While this mode of analysis is often useful, the Supreme Court's recent decisions have created some confusion.[154] In *Andrus. v. Allard*[155] the Court sliced the interests in the bundle a little too finely. Not content with dealing with the bundle as a whole or individual sticks in the bundle, the Court, without any clarification, denied relief because the regulation destroyed only one "strand" in the bundle.[156] No one really knows what a "strand" is, or how it differs from a "stick" (the taking of which cannot be done without compensation). Seizing on this term, the district court concluded that the Pennsylvania statute took only a strand from the coal companies' bundle of rights and thus did not rise to the level of a taking.[157]

The Third Circuit Court of Appeals affirmed the district court's holding, utilizing essentially the same analysis as the lower court had used.[158] However, on appeal one added piece of analysis appeared. The appellate court addressed the concept of "reasonable investment-backed expectations":

> With respect to interference with reasonable investment-backed

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151. *See* notes 88-95 *supra* and accompanying text.

152. Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 240 (1984); Ruckelshaus v. Monsanto Co. 467 U.S. 986, 1014 (1984).

153. For recent Supreme Court decisions adopting this analogy *see* Ruckelshaus v. Monsanto Co. 467 U.S. 986, 1011 (1984); United States v. Security Indus. Bank, 459 U.S. 70, 76 (1982); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982); Andrus v. Allard, 444 U.S. 51, 66 (1979).

154. *See* Berger, *Anarchy Reigns Supreme,* 29 J. URB. & CONTEMP. L. 39, 48-49 (1985).

155. 444 U.S. 51 (1979).

156. *Id.* at 66.

157. Keystone Bituminous Coal Ass'n. v. DeBenedictis, 581 F. Supp. 511, 518-19 (W.D. Pa. 1984).

158. Keystone Bituminous Coal Ass'n. v. Duncan, 771 F.2d 707 (3d Cir. 1985).

expectations, the support requirements do not appear to work so substantial an interference as to result in a taking. In *Penn Central*, the Court applied this test to the divided property context. It read *Mahon* as stating that a statute may "frustrate distinct investment-backed expectations" when it has "nearly the same effect as the complete destruction of rights [a party] had reserved from the owners of the surface land." *Penn Central,* 438 U.S. at 127, 98 S.Ct. at 2661. The Court thus stressed that the coal owners in *Mahon* had expressly contracted with individual surface owners for the waiver of any claim of damages due to subsidence. It was reasonable for them to have distinct expectations, grounded upon those waivers, to be free to mine coal without liability for damage caused to the surface owners' estates. The Kohler Act thwarted those expectations by shifting the burden contractually imposed upon the surface owners to the mine operators. In so doing the Act appeared to affect private interests.

In the present appeal, however, the statute at issue is clearly designed to serve broad and legitimate *public* interests. The ownership of the support estate does not afford a mine operator a reasonable expectation to profit at the expense of the public at large, but only at the expense of the surface owner with whom it contracted.[159]

A number of flaws appear in the Third Circuit's analysis. First, while the court correctly analyzed *Pennsylvania Coal* in terms of the effect of the statute on the rights of the regulated property owner, in dealing with the Subsidence Act it reversed course and analyzed the new statute in terms of its effect on the public. The latter analysis is erroneous, because the question whether a taking has occurred is determined by examining the impact of the government's action on the property owner.[160] Moreover, the members of the Court that decided *Pennsylvania Coal* as well as more recent members of the Court have interpreted *Pennsylvania Coal* to mean that the public's interest was examined and found insufficient to override the fifth amendment.[161] The opinion itself stated: "We are in danger of forgetting that a strong *public* desire to improve the public condition is not enough to warrant

159. *Id.* at 716. (Emphasis is the court's.)

160. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979); Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). As the Court expressed it long ago in Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 195 (1910), "[T]he question is, What has the owner lost?, not What has the taker gained?"

Recent decisions confirm this focus on the property owner by requiring an analysis of the owner's reasonable "profit" expectations (Williamson County Reg. Plan. Comm. v. Hamilton Bank, 473 U.S. 172 [1985]), and the owner's " 'reasonable return' on its investment" Penn Central, *supra,* 438 U.S. at 136.

161. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

achieving the desire by a shorter cut than the constitutional way of paying for the change."[162]

Emphasis on public interest relates to a second weakness in the third circuit's analysis. The public's interest in a regulation tells us nothing about the *property owner's* reasonable, investment-backed expectations. If that concept means anything, it has to be related to actions of the property owners and government agencies *before* the enactment of the regulation being litigated. Plainly, the government's intent in enacting a new statute tells us nothing about the reasonable, investment-backed expectations of the property owners *before* the statute interdicted them.

Finally, the third circuit's opinion ignores a simple theory of property rights. At the most basic level, when one buys property, it is his to use or sell. The coal companies bought property from the surface owners. The statute took it from the coal companies without compensation and gave it back to the surface owners. The words of *Pennsylvania Coal* with regard to property rights are as applicable today as they were in 1922:

> We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.[163]

5. *The statute is upheld in a squeaker*

On March 9, 1987, the Supreme Court upheld the Pennsylvania Subsidence Act by a vote of 5-4.[164] Justice Stevens opened his majority opinion[165] with the premise that *Pennsylvania Coal* had been decided on its "particular facts," and this case must be decided in the same manner.[166] Early in the substantive part of the opinion, the Court made

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162. Pennsylvania Coal Co. v. Mahon, 260 U.S. at 416 (Emphasis added.)

163. *Id.*

164. Keystone Bituminous Coal Ass'n. v. DeBenedictis, 55 U.S.L.W. 4326 (U.S. Mar. 9, 1987) (No. 85-1092).

165. The majority consisted of Justices Stevens, Brennan, White, Marshall and Blackmun. The dissent was authored by Chief Justice Rehnquist and joined in by Justices Powell, O'Connor, and Scalia.

166. 55 U.S.L.W. at 4327. That much was hardly news, as the Court has repeatedly said that regulatory taking cases always turn on "ad hoc" factual investigations. *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005, (1984); Kaiser Aetna v. United States, 444 U.S. 164, 175

it clear that it had no intention of overruling *Pennsylvania Coal*. Indeed, the majority noted that "[t]he two factors that the [*Pennsylvania Coal*] Court considered relevant, have become integral parts of our takings analysis."[167]

However, it was plain that the majority intended to downplay certain aspects of *Pennsylvania Coal*. The tension within the majority opinion is apparent. The opinion's initial focus is on the strict holding of *Pennsylvania Coal*, which was only one paragraph long.[168] The remainder of *Pennsylvania Coal*,—i.e., the part of the opinion which has been repeatedly cited and quoted in the past six and a half decades—is termed "advisory."[169] Because of that conspicuous use of the "advisory" part of the opinion, the major precepts of *Pennsylvania Coal*—whether legitimate state interests are substantially advanced and whether the property owner is denied economically viable use of his land—were analyzed. The majority and dissent clashed on both.[170]

a. Legitimate state interests

The first clash was a straightforward factual one: Was the state interest behind the Kohler Act (struck down in *Pennsylvania Coal*) different from the one advanced in the Subsidence Act. The majority, by viewing the Kohler Act very narrowly, held that there was a difference. The Kohler Act, said the majority, "merely involve[d] a balancing of the *private* economic interests of the coal companies against the *private* interests of the surface owners."[171] With regard to the private property owners involved in *Pennsylvania Coal*, the *Keystone* majority said "that if the private individuals needed support for their structure, they should not have take[n] the risk of acquiring only surface rights.' "[172] By contrast, the majority held that the Subsidence Act was based on concerns which were far more public in nature.[173]

(1979); Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).)

167. 55 U.S.L.W. at 4330. The dissent went further, terming *Pennsylvania Coal* "the foundation of our regulatory takings jurisprudence" and "a cornerstone of the jurisprudence of the Fifth Amendment's Just Compensation Clause." 55 U.S.L.W. at 4336 (Rehnquist, C.J., dissenting). This seemingly minor difference in wording apparently denoted a deep division on the Court over how much weight to give *Pennsylvania Coal*.

168. 55 U.S.L.W. at 4330.

169. *Id.* This apparent *lese majeste* troubled the dissenters, who "approach[ed] this case with greater deference to the language as well as the holding of *Pennsylvania Coal* . . ." 55 U.S.L.W. at 4336 (Rehnquist, C.J., dissenting).

170. For example, where the majority found that "the Subsidence Act differs from the Kohler Act in critical and dispositive respects," 55 U.S.L.W. at 4331, the dissenters concluded "the difference between [the relevant factors here] and those in *Pennsylvania Coal* verge on the trivial." 55 U.S.L.W. at 4336 (Rehnquist, C.J., dissenting).

171. 55 U.S.L.W. at 4330 (Emphasis added).

172. *Id.* at 4331.

173. *Id.* at 4330.

The majority severely understated the similarity of purpose between the Subsidence Act and the Kohler Act. A comparison of the stated purposes of the two statutes demonstrates that any differences between the two are trivial.

Kohler Act	*Subsidence Act*
"[The statute was enacted] 'as remedial legislation, designed to cure existing evils and abuses . . .' [including] 'wrecked and dangerous streets and highways, collapsed public buildings, churches, schools, factories, streets, and private dwellings, broken gas, water and sewer systems, the loss of human life ....'"[174]	"[T]o aid in the protection of the safety of the public, to enhance the value of [surface area] lands for taxation, to aid in the preservation of surface water drainage and public water supplies and generally to improve the use and enjoyment of such lands ...."[175]

Moreover, as noted above, at the urging of the Pennsylvania Attorney General (among others), the Court, in *Pennsylvania Coal* had examined the constitutionality of the Kohler Act as a whole. Its conclusion seems not to have been fairly represented by the *Keystone* majority. The *complete* quote (which the *Keystone* majority truncated, as noted above)[176] reads as follows: "So far as private persons *or communities* have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that this risk has become a danger warrants the giving to them greater rights than they bought."[177] It would seem that the better reading of the Kohler Act is that the act was designed to address public problems and that the Supreme Court viewed it that way when it ruled in *Pennsylvania Coal*.[178]

The next clash between the majority and the dissent was over the *nature* of the significant public purpose, and the *consequences* of that finding. The majority viewed the public purpose as being the exercise

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174. Mahon v. Pennsylvania Coal Co., 274 Pa. 489, 495, 496 118 A. 491, 493 (1922). (Quoting the statute.)

175. 52 PA. CONS. STAT. § 1406.2 (Purdon 1987).

176. *Supra* text accompanying note 172.

177. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922). (Emphasis added.)

178. Indeed, unless there was some *public* purpose behind the act, the Court could not have concluded that "the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain." *Id.* Unless a public purpose is present, there is no justification for "the exercise of eminent domain."

of the "public power to abate activity akin to a public nuisance."[179] With that as its premise, the majority invoked the *Mugler* line of cases,[180] concluding that the Court has been "hesitan[t] to find a taking when the state merely restrains uses of property that are tantamount to public nuisances . . . ."[181]

The dissenters were in substantive agreement with the majority on the underlying law. They acknowledged "that a taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others . . ."[182] Where the dissent parted company with the majority was over the range of activities which can be called nuisances. "The ease with which the Court moves from the recognition of public interests to the assertion that the activity here regulated is 'akin to a public nuisance' suggests an exception [for nuisance abatement] far wider than recognized in our previous cases."[183]

But the majority did not rest its decision solely on the nuisance doctrine;[184] it also focused on the issues of diminution in value and interference with investment backed expectations. The dissent's primary disagreement with the majority opinion was over the degree of harm suffered by the property owners as a result of the statutory controls.[185] Thus, we will turn our attention to that issue.

b. Reasonable, investment-backed, profit expectations

The first thing to note (as the majority appropriately did) is the procedural posture of the case. While the complaint had challenged the Subsidence Act *both* on its face and as applied, the trial had dealt only with the facial challenge. After the district court upheld the statute against the facial attack, it certified that portion of the judgment for appeal. Thus, no evidence was presented concerning the actual impact of the Subsidence Act on the coal companies, and they remain free to pursue that issue in the lower courts.[186]

The major dispute between the majority and the dissent was over

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179. 55 U.S.L.W. at 4331.

180. Mugler v. Kansas, 123 U.S. 623 (1887). *See supra* notes 76-85 and accompanying text.

181. 55 U.S.L.W. at 4332.

182. *Id.* at 4337 (Rehnquist, C.J., dissenting) (citing the same line of cases).

183. *Id.*

184. *Id.* at 4332.

185. *Id.* at 4338 (Rehnquist, C.J., dissenting).

186. *Id.* at 4332. This was important, if not critical. The Court has, in the last several years, made clear its disinclination to deal with takings attacks that are purely facial, with no proof of specific impact. *See, e.g.*, California Coastal Comm'n v. Granite Rock Co., 55 U.S.L.W. 4366 (U.S. Mar. 24, 1987)(No. 85-1200); MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561 (1986); Agins v. City of Tiburon, 447 U.S. 255 (1980); Hodel v. Virginia Surface Min. & Recl. Assn. Inc., 452 U.S. 264 (1981).

the definition of the "property" alleged to have been taken by the statutory action. The dissent was willing to accept the unique Pennsylvania rule that the support estate was a separate estate in property,[187] and examine the impact of the statute on that estate, while the majority was not.

This dispute harks back nine years to *Penn Central*.[188] There, New York City's Landmarks Preservation Law was the basis for refusing to permit the owner of Grand Central Terminal from constructing an office tower over the famed railroad station. In rejecting the owner's claim that it had been subjected to a taking because it was forbidden to make any use of the air rights on its property, the Court concluded:

> 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole — here, the city tax block designated as the landmark site.[189]

As it would in *Keystone*, the *Penn Central* Court concluded that—on the record then before the Court—there was no taking.[190] The *Keystone* majority applied *Penn Central* as written, refusing to separately examine either the 27 million tons of coal required to be left in the ground[191] or the support estate.[192] The majority's position with

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187. 55 U.S.L.W. at 4339 (Rehnquist, C.J., dissenting). This is in keeping with the settled rule that state law determines what property is. *See, e.g.,* Ruckelshaus v. Monsanto Co. 467 U.S. 986, 1003 (1984); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980); Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

188. Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

189. *Id.* at 130-31. To have held otherwise (in the context of a facial attack) would have resulted in a wholesale review of zoning law going back at least as far as Gorieb v. Fox, 274 U.S. 603 (1927), a case in which building setbacks were approved. In such cases, a part of the property is plainly forbidden to be used, but no constitutional "taking" occurs.

On the other hand, where local zoning ordinances have zoned different parts of a single ownership for different uses, courts have examined the impact of regulations on the individually-zoned segments. *See, e.g.,* American Sav. & Loan Assn. v. County of Marin, 653 F.2d 364 (9th Cir. 1981); Fifth Ave. Corp. v. Washington County, 282 Or. 591, 581 P.2d 50 (1978).)

190. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 136-37 (1978). If circumstances changed, the property owner was free to return to court. *Id.* at 138, n.36.

191. 55 U.S.L.W. at 4334.

192. Some shift in opinion on the Court may be taking place with respect to *Penn Central*. *Penn Central* was a 6-3 decision, with the majority consisting of Justices Brennan, Stewart, White, Marshall, Blackmun, and Powell. The dissenters were Justices Rehnquist and Stevens and Chief Justice Burger. With two retirements intervening (Chief Justice Burger and Justice Stewart), *Keystone* was decided 5-4, with the majority consisting of Justices Stevens, Brennan, White, Marshall, and Blackmun. The dissenters were Chief Justice Rehnquist and Justices Powell, O'Connor, and Scalia. Justices Brennan, White, Marshall, and Blackmun remained constant in

respect to the 27 million tons of unusable coal was tied to the Court's physical invasion cases:

> We do not suggest that the State may physically appropriate relatively small amounts of private property for its own use without paying just compensation. The question here is whether there has been any taking at all when no coal has been physically appropriated, and the regulatory program places a burden on the use of only a small fraction of the property that is subjected to regulation.[193]

Thus, because the Subsidence Act was merely a regulation, and because there was no claim "that the Act [on its face] makes it commercially impracticable for them [the coal companies] to continue mining their bituminous coal interests . . ."[194] the majority concluded that the inability to mine this 27 million tons was not a taking.

The dissent accused the majority of playing a "label" game.[195] The dissenters opted, instead, for a more pragmatic view of the regulation's impact:

> Physical appropriation by the government leaves no doubt that it has in fact deprived the owner of all uses of the land. Similarly, there is no need for further analysis where the government by regulation extinguishes the whole bundle of rights in an identifiable segment of property, for the effect of this action on the holder of the property is indistinguishable from the effect of a physical taking.[196]

With respect to the separate support estate, the majority joined with the court of appeals in essentially construing this estate out of existence. Notwithstanding its concession that Pennsylvania (uniquely among the states) recognizes the support estate as a separate property interest,[197] the majority concluded that "[i]n practical terms, the support estate has value only insofar as it protects or enhances the value of the estate with which it is associated. Its value is merely a part of the entire bundle of rights possessed by the owner of either the coal or the

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the majority, while Chief Justice Rehnquist dissented both times. Justice Powell switched from the majority in *Penn Central* to the dissent in *Keystone,* while Justice Stevens did the opposite. One of the retired Justices was in the majority and the other in the dissent in *Penn Central.* Both of the new Justices dissented in *Keystone.* What this bodes for the future is open to speculation.

193. 55 U.S.L.W. at 4334, n. 27. This distinction was essential to the holding for, as the Court had said unmistakably in Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419, 438, n. 16 (1982), the question whether a physical occupation "is a taking does not depend on whether the volume of space . . . occupie[d] is bigger than a breadbox."

194. 55 U.S.L.W. at 4333. *See also* California Coastal Comm'n v. Granite Rock Co., 55 U.S.L.W. 4366 (U.S. Mar. 24, 1987)(No. 85-1200).

195. 55 U.S.L.W. at 4338 (Rehnquist, C.J., dissenting).

196. *Id.* at 4339.

197. 55 U.S.L.W. at 4334.

surface."[198] That definitional conclusion, of course, ended the matter. For, if the support estate is merely part of the bundle of rights associated with the coal estate, and the part taken can be minimized as being merely a "strand," then no taking occurs.[199]

The dissent would have given credence to Pennsylvania's recognition of a separate support estate. The Subsidence Act places the risk of subsidence on the coal owner even though he also owns the support estate. The dissenters would have found that a taking had occurred because "operation of this provision extinguishes the petitioner's interests in their support estates, making worthless what they purchased as a separate right under Pennsylvania law."[200]

c. Some observations

A survey of the *Keystone* opinions reveals several important points. First, the substantive legal discussions in the case were not that divergent and slight shifts in viewpoint could easily have made *Keystone* a unanimous decision either way. The only real disputes were over the degree of "public" interest underlying the statutes at issue in *Pennsylvania Coal* and *Keystone* and the level of deference to be accorded the Pennsylvania support estate. These differences hardly signal a drastic split on the Court over basic takings doctrine.

A second observation about the *Keystone* opinion is that it did not overrule *Pennsylvania Coal*. Not one of the heavily quoted (and eminently quotable) portions of that opinion was disapproved. Additionally, *Keystone* reaffirm's the general understanding that a regulation which deprives a property owner of viable economic use is a taking.

A final point garnered from the *Keystone* holding is that the day of the facial challenge is essentially over. The court again noted its preference for dealing with facts which directly affect the property owner. Thus, except in the rare case in which the regulation plainly leaves no use and/or the regulators have plainly indicated that no use will be permitted, it seems prudent to avoid facial challenges in preference to actual examination of the impact of the regulation on some individual.

Thus, the first of the Court's three major takings decisions was less than a blockbuster. It made no apparent major changes in the law and essentially ducked the substantive issue. By remanding the case to the district court for a trial on the statute as applied the Court confirmed its distaste for facial challenges. And, by reason of its 5-4 split,

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198. *Id.* at 4334, 4335.

199. The majority left open to later proof (on a challenge to the statute "as applied") the injury inflicted because either the percentage of the support estate (as part of the whole) is high, or because other rights associated with the support estate are of no value. *Id.*

200. 55 U.S.L.W. at 4340 (Rehnquist, C.J., dissenting).

the opinion gave no indication that the Court has clearly and firmly decided on a regulatory taking policy. The remaining cases may clarify that issue.

B. Church v. State

The second case argued this term represents the Court's fifth attempt in the 1980's to find the right case in which to clearly determine whether just compensation is an appropriate remedy in a regulatory taking case.[201] In the four earlier cases, the Court felt that it was unable to reach the issue because the procedural posture of each case left preliminary questions unanswered or because the judgment was not deemed final.

In *Agins v. City of Tiburon*,[202] the uses permitted "on paper" were facially reasonable and it was not known what would eventually be permitted.[203] In *San Diego Gas & Elec. Co. v. City of San Diego*,[204] the judgment between the parties was not deemed sufficiently "final" for Supreme Court review. In *Williamson County Regional Planning Commission v. Hamilton Bank*,[205] it was not clear what variances might be granted under local law to make the subdivision viable. Moreover, an existing state inverse condemnation remedy had not been utilized. In *MacDonald, Sommer & Frates v. County of Yolo*,[206] it was not clear whether less intense development might be permitted.

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201. The Court has expressly acknowledged "the importance of the question whether a monetary remedy in inverse condemnation is constitutionally required in appropriate cases involving regulatory takings." MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561, 2565-66 (1986). Scholars agree:

> The Supreme Court's decision in *Hamilton Bank* evidences its desire to avoid addressing the taking issue squarely. Unfortunately, the Court's erection of procedural road-blocks hinders the determination of substantive legal issues. Whether the Brennan formula [in *San Diego Gas*] is the proper means for determining damages in instances of governmental takings is a matter of enormous import and should be addressed by the Court.

Kratovil, *Eminent Domain Revisited and Some Land Use Problems*, 34 DE PAUL L. REV. 587, 600 (1985).

202. 447 U.S. 255 (1980).

203. Seven years later, Mr. and Mrs. Agins are no better off. They filed an *amicus curiae* brief in *Lutheran Church* to vividly illustrate the pragmatic problems facing property owners in California. Their five acre parcel was zoned to permit from one to five dwellings. Following the U.S. Supreme Court's decision, Mr. and Mrs. Agins were given permission to build three homes, subject to expensive pre-conditions. After spending more than *half a million dollars* to draw plans for the houses, obtain the permits, and install improvements to comply with the city's conditions, the city enacted a moratorium (of indefinite duration) on further construction. Agins Amicus Curiae Brief at 5-6, *Lutheran Church*. Thus Mr. and Mrs. Agins remain without either use of their property or compensation.

204. 450 U.S. 621 (1981).

205. 473 U.S. 172 (1985).

206. 106 S. Ct. 2561 (1986).

Such non-decisions are unfortunate. They fortify the resolve of those who would deny the constitutional remedy of just compensation. Indeed, it is not amiss to say that the average person on the street (not to mention the average government official) often mistakes a ruling on procedural grounds for approval of the underlying activity, or views it as *de facto* the same in terms of results. The following comments concerning the related field of exclusionary zoning are just as applicable to regulatory taking cases:

> When courts are reluctant to reach the merits of alleged exclusion, exclusion is thereby encouraged. If an act is challenged unsuccessfully due to the absence of standing, the general public, and often municipal officials, interpret the outcome as an approval of the act itself. The subtleties of judicial restraint, of merits not having been reached, of questions remaining open, are not grasped. More importantly, if the questioned action really is impermissible, the adverse consequences of exclusion are perpetuated still longer.[207]

The nation's need for certainty has become acute. Uniformity of protection of federal constitutional rights of citizens of all states, as well as respect for the judicial system's ability to provide equal protection, are parts of that need.[208] Further delay in deciding the issue will only increase the number of individuals injured by denial of their constitutional rights.

Into this lion's den, which had already dispatched a bank and a major public utility, strode the First English Evangelical Lutheran Church of Glendale, California ("the church").

1. The facts

The case involves what at one time was a camp called Lutherglen. The church had maintained the camp for more than two decades on 21 acres of land in the mountains of the Angeles National Forest north of the City of Los Angeles. The camp was developed as a place for retreats and for recreation by church members and handicapped children of all denominations.

In the winter of 1977-78, a forest fire denuded the hills around Lutherglen. Subsequent extraordinary storms falling on the barren wa-

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207. Delogu, *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 ME. L. REV. 29, 70 (1980).

208. In light of the Court's determination that these issues need to be first presented to the state courts (Williamson County Reg. Plan. Comm. v. Hamilton Bank, 473 U.S. 172 (1985)), it is imperative that those fifty courts have a clear, uniform standard to apply in the protection of fifth amendment rights.

tershed caused a flood which destroyed the camp.[209] After the storms, the County adopted an ordinance which temporarily prohibited any construction in the area.[210] Three years later, after study, the prohibition was made permanent.[211]

2. *The litigation*

The effect of the ordinance was to make Lutherglen part of the channel which collects mountain runoff and transports the waters to a down stream County reservoir for storage. The church filed a complaint in state court, alleging that the ordinance prohibited all use of Lutherglen (even reconstruction of the buildings lost in the flood). The church sought just compensation for the loss of its property.[212]

The County attacked the regulatory taking allegations of the complaint on only one ground: the California Supreme Court's then-recent decision in *Agins* made inverse condemnation a non-available remedy.[213] The trial court agreed and struck all references to the ordinance from the complaint.

On appeal, the church asked the California Court of Appeals to reverse on the ground that post-*Agins* decisions of the U.S. Supreme Court[214] and the Ninth Circuit Court of Appeals[215] showed that *Agins*

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209. Lutherglen was a victim of what expert witnesses (at the trial of issues not involved in the Supreme Court appeal) called the "fire-flood phenomenon." Ordinarily (without a fire), rain falling in a forest is slowed by vegetation. Much of it percolates into the soil. Some is carried away by streams. However, when a watershed has been burned, there is no vegetation to slow the flow. Additionally, the intense heat of the fire creates a crust on the ground which prevents percolation into the soil. Finally, the voluminous ash and partly burned debris from the fire is carried by the water, increasing the bulk of the flow. As the water gathers speed down naked hillsides, it erodes the soil and adds to the flow large quantities of suspended soil and rock. Thus, if a heavy rain follows a forest fire, severe flooding can be expected.

210. LOS ANGELES COUNTY ORD. No. 11855.

211. LOS ANGELES COUNTY CODE § 22.44.220, 22.44.230.

212. In light of California's firm position that just compensation is not an available remedy for a regulatory taking (Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980)), one might wonder why the complaint was filed in state court. The answer is simple. The complaint was filed Feb. 21, 1979, three weeks *before* the California Supreme Court decided *Agins*. At that time, the law in California was that a stringent land use regulation *could* result in a compensable taking. Eldridge v. City of Palo Alto, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976) (disapproved in *Agins*).

213. As one noted commentator was to conclude, the California Supreme Court has "read inverse condemnation out of California jurisprudence, as a remedy for disappointed developers in land use cases." 5 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 158.12 at 412 (1985).

214. Primarily San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981). In *San Diego*, four Justices (led by Justice Brennan) dissented from the procedural dismissal, urging that the *Agins* rule was incorrect in light of U.S. Supreme Court decisions. Justice Rehnquist filed a concurring opinion, in which he agreed that the case ought to be dismissed, but said that if it had been procedurally "final," he would have had little difficulty agreeing with the dissent. It took no more than simple arithmetic to count the votes. For extended discussion, *see* Bauman, *The*

was improper as a matter of federal constitutional law. The court of appeal, however, affirmed. It held that until the U.S. Supreme Court expressly overruled the California Supreme Court's decision in *Agins*, lower California courts were compelled to follow *Agins*: "We conclude that *because the United States Supreme Court has not yet ruled* on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief, this court is obligated to follow *Agins*."[216] The California Supreme Court denied review, declining the church's plea that it re-examine the constitutionality of *Agins* in light of more recent decisions of the U.S. Supreme Court and the federal courts of appeals.[217] The appeal to the United States Supreme Court followed.

What the issues are in *Lutheran Church* depends on whose brief one reads.[218] The church briefed the case narrowly, focusing on the

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Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls, 15 RUTGERS L. J. 15 (1983), which concludes:

> When the best, most liberal Justice of the Burger Court's *San Diego* panel, joined on the substantive issue by the Court's most conservative member, derides the California Supreme Court for its parochial, muddled views on takings, inverse condemnation and the Constitution, more is at work than a mere dissertation on private property rights.

Id. at 94-95.

For an article viewing Justice Brennan's *San Diego* dissent with alarm and for one defending that dissent as a principled analysis of Constitutional law, *compare* Williams, Smith, Siemon, Mendelker & Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193 (1984) *with* Berger & Kanner, *Thoughts on The White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Takings of Property*, 19 LOY. L.A.L. REV. 685 (1986).

215. Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141, 1148 (9th Cir. 1983); In re Aircrash in Bali, 684 F.2d 1301, 1311, n. 7 (9th Cir. 1982).

216. Jurisdictional Statement, Appendix A at A416, First English Evangelical Lutheran Church v. County of Los Angeles, No. 85-1199 (U.S. argued Jan. 14, 1987). The issue was considered so well-settled as a matter of California law that it was discussed only briefly by the Court of Appeal and the opinion was not deemed important enough to certify for publication. *See* Rule 977, Cal. Rules of Ct., under which an opinion which simply reiterates settled law is not to be published.

217. Because of the five concurring and dissenting votes in San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (*see supra* note 169), seven U.S. Courts of Appeals (the 5th, 6th, 7th, 8th, 9th, 11th, and Federal) as well as the Claims Court, have adopted the reasoning and analysis of Justice Brennan's *San Diego* dissent: Florida Rock Indus., Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986); Bank of America v. Summerland County Water Dist., 767 F.2d 544 (9th Cir. 1985); Nemmers v. City of Dubuque, 764 F.2d 502 (8th Cir. 1985); United States v. Riverside Bayview Homes, Inc. 729 F.2d 391 (6th Cir. 1984), *rev'd on other grounds* 473 U.S. 172 (1985); Hamilton Bank v. Williamson County Reg. Plan. Comm'n, 729 F.2d 402 (6th Cir. 1984), *rev'd on other grounds* 473 U.S. 172 (1984); Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141 (9th Cir. 1983); Barbian v. Panagis, 694 F.2d 476 (7th Cir. 1982); In re Aircrash in Bali, 684 F.2d 1301 (9th Cir. 1982); Fountain v. Metro Atlanta Rapid Transit Auth., 678 F.2d 1038 (11th Cir. 1982); Jentgen v. United States, 657 F.2d 1210 (Ct. Cl. 1981). Hernandez v. Lafayette, 643 F.2d 1188 (5th Cir. 1981).

218. In each of the five cases dealing with the compensatory remedy, the Court was blessed with a host of friends offering advice. There were slight variations, but the group in *Lutheran Church* is typical. Briefs were filed in support of the church by the California Building Industry

only issue litigated in the California courts: if there is a regulatory taking, does the Constitution mandate just compensation as a remedy?[219] The County, on the other hand, raised a smorgasbord of issues designed to convince the court once again not to reach the compensation issue. Each of these will be briefly discussed. The compensation issue raised by the church has already received much discussion in the literature.

The first issue the County raised was that the church's claim was said not to be ripe.[220] As this was the basis for the Court's failure to reach the merits in the earlier cases, the presentation of a ripeness argument was not unexpected. Two reasons were advanced: (1) on its face, the permanent ordinance permits *some* use; and (2) the church never applied for *any* use.

The major difficulty with the County's ripeness issues is that they were never raised in the state court proceedings. Having been no part of the lower court deliberations, it is hard to see how they could suddenly make an appearance in the U.S. Supreme Court.[221] Moreover, on

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Association, the American College of Real Estate Lawyers, the National Association of Home Builders, the Pacific Legal Foundation (along with Donald and Bonnie Agins), the California Association of Realtors, and the National Association of Realtors.

Briefs were filed in support of the County by the United States, a consortium of environmental groups led by the Conservation Foundation, a consortium of groups of governmental agencies brought together by the State and Local Legal Center, a group of 24 states led by California's Attorney General, and a group of 16 California cities led by the City of Los Angeles.

219. The Complaint alleged that the ordinance "[D]enies First Church all use of Lutherglen." Joint Appendix of Petitioner and Respondent 12, *Lutheran Church.* The trial court treated the ordinance as one which "deprives a person of the total use of his land" (Jurisdictional Statement, Appendix D at A26, *Lutheran Church*) and dealt only with the question of what remedy the Constitution requires. The Court of Appeal likewise accepted the complaint's allegation of a "taking of all use of Lutherglen" and dealt only with the Constitutionality of the non-compensatory remedy required by the California Supreme Court in *Agins. Id.* at A14-A16.

At the U.S. Supreme Court oral argument, counsel for the County conceded that this was the only issue litigated and that the County had chosen this battleground:

> QUESTION [by Justice White]: Why would they go to the trouble of deciding the remedy issue? "MR. WHITE [counsel for the County]: Why would who go to the trouble of deciding the remedy issue?
>
> QUESTION [by Justice White]: The Court of Appeals.
>
> MR. WHITE: Because that was the only issue in front of them. . . .
>
> . . . .
>
> . . . The County filed a motion to strike based on the grounds that the allegations were irrelevant. They were irrelevant based on the Agins decision, which had been decided just a matter matter of months before the motion was filed.
>
> The Agins decision said in essence, if you have a regulatory taking claim, the proper remedy is declaratory relief, not inverse [condemnation].
>
> QUESTION [by Justice White]: You led the Court of Appeals into it?
>
> MR. WHITE: We led the Court of Appeals into it . . . ."

Transcript of oral argument before the U.S. Supreme Court at 39-40, *Lutheran Church.*

220. Brief of Appellee at 18, *Lutheran Church.*

221. *See* Youakim v. Miller, 425 U.S. 231, 234 (1976).

their face, these arguments are not persuasive. Under the "temporary" ordinance, which was in effect for three years, *no* use was permitted.[222] The uses permitted under the permanent ordinance were three in number: accessory buildings, automobile parking facilities, and flood control structures.[223] But an "accessory" building requires a main building for it to be an accessory to.[224] If the term were interpreted broadly, the exception would swallow the general prohibition of structures. As there were (and could be) no main buildings, there could be no accessories. Parking facilities are of no use to a property owner who is forbidden to make other use of his land. Lutherglen is not located in an urban setting, where a parking lot might be a meaningful use by itself. It is located in a remote mountain area where parking, by itself, is useless. The same goes for flood control structures. While such structures might make sense to a government agency, or even a private property owner with other buildings to protect, the "use" was worthless at Lutherglen.

As for applying for a permit, there was nothing for which to apply. The county had just adopted a building prohibition and had made it clear to church members that the prohibition would be enforced.[225] Any application would have been futile.[226]

The county's second argument was that, before reaching the compensation issue, the Court had to determine whether the complaint sufficiently alleged a taking, even though the state courts did not reach that issue. Aside from the elementary proposition that the County's acceptance of the facts in the lower courts (by arguing *only* the remedy issue) was a waiver of any factual defect in the allegations,[227] the reaction to this idea by several members of the Court at oral argument speaks eloquently:

> QUESTION [by Chief Justice Rehnquist]:
> But doesn't that go beyond the ruling of the Court of Appeals, Mr. White? I thought that they had assumed for purposes of decision that there was a taking and they said under California law, even if there was a taking here, you're not entitled to damages by reason of temporary deprivation. I don't think they really decided the question of whether there was a taking. They assumed there was one. Now, do

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222. Jurisdictional Statement, Appendix F at A31, *Lutheran Church.*

223. *Id.* at A32-A33.

224. LOS ANGELES COUNTY CODE § 22.08.010.

225. *See* Appellant's Reply Brief, App. 1-3, *Lutheran Church.* Moreover, no variance could have been granted which was not in harmony with the ordinance. *See, e.g.,* Cow Hollow Imp. Club. v. DiBene, 245 Cal. App. 2d 160, 53 Cal. Rptr. 610 (1966).

226. For a discussion of the futility doctrine, *see, e.g.,* D. KMIEC, ZONING AND PLANNING DESKBOOK § 7.01 (1986); 3 A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 35.02 (4th ed. 1986).

227. *Cf.* Weinberger v. Salfi, 422 U.S. 749 (1975).

> you want us to look into that and say, well, no matter what California law is, we don't think there was a taking here?
> MR. WHITE [counsel for the County]: Yes, Your Honor, I do. Let me explain why.
> QUESTION [by Chief Justice Rehnquist]: That's a very strange procedure.
> MR. WHITE: Let me explain —
> QUESTION [by Justice White]: We have to decide, do we want to avoid one constitutional question in order to get to another . . . [?][228]
> QUESTION [by Justice Scalia] But that's not part of the case, Mr. White. I really don't understand this argument.
> You want us to review the federal issue that was not decided below in order not to review the federal issue that was decided below.[229]

The County's third argument was that it was only exercising its police power to regulate a hazardous activity and thus there could be no compensable taking.[230] This argument was based on the line of cases headed by *Mugler v. Kansas*,[231] which was discussed earlier.[232]

The County's next argument came as something of a shock to California land use lawyers. Eschewing a host of California cases, the County argued that "*AGINS I* does not bar just compensation as a remedy for a taking . . . ."[233] That statement would surely come as a surprise not only to the California Supreme Court, but to all other California courts which have dealt with this issue.[234] Without benefit of any citation to *Agins* or any other authority, the County argued that

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228. Transcript of oral argument before the U.S. Supreme Court 32-33, *Lutheran Church.*

229. *Id.* at 35, 37.

230. Brief for Appellee at 29, *Lutheran Church.*

231. 123 U.S. 623 (1887).

232. *Supra* notes 75-112 and accompanying text.

233. Brief for Appellee at 38, *Lutheran Church.* The appellation "Agins I" was used by all participants to distinguish the Agins decision of the California Supreme Court (*Agins I*) from that of the U.S. Supreme court (*Agins II*).

234. That the California Supreme Court's decision in *Agins does* bar just compensation as a remedy for a regulatory taking in California is born out by each of the following cases (in addition, of course, to *Lutheran Church*): Baker v. Burbank-Glendale-Pasadena Airport Auth., 39 Cal. 3d 862, 867, n. 4, 705 P.2d 866 (1985); Furey v. City of Sacramento, 24 Cal. 3d 862, 871, 598 P.2d 844, 849 (1979); Palmer v. City of Ojai, 178 Cal. App. 3d 280, 294-95, 223 Cal. Rptr. 542, 551 (1986); Walter H. Leimert Co. v. California Coastal Comm., 149 Cal. App. 3d 222, 234, 196 Cal. Rptr. 739, 745-746 (1983); Aptos Seascape Corp. v. County of Santa Cruz, 138 Cal. App. 3d 484, 492-94, 188 Cal. Rptr. 191, 194-196 (1982); Taper v. City of Long Beach, 129 Cal. App. 3d 590, 611, 181 Cal. Rptr. 169, 181 (1982); Gilliland v. County of Los Angeles, 126 Cal. App. 3d 610, 615-16, 179 Cal. Rptr. 73, 77 (1981); Liberty v. California Coastal Comm., 113 Cal. App. 3d 491, 498, 170 Cal. Rptr. 247, 251 (1980); Rancho La Costa v. County of San Diego, 111 Cal. App. 3d 54, 65, 168 Cal. Rptr. 491, 497 (1980); Toso v. City of Santa Barbara, 101 Cal. App. 3d 934, 948, 162 Cal.Rptr. 210, 217 (1980); Briggs v. State, 98 Cal. App. 3d 190, 202, 159 Cal. Rptr 390, 396 (1979); Viso v. State, 92 Cal. App. 3d 15, 21, n. 2, 154 Cal. Rptr. 580, 584 (1979).

Agins' flat prohibition of compensation for a regulatory taking merely limited the *time* when compensation is due.[235] According to the County, *Agins* establishes "a two-tiered process" in which a property owner first obtains a declaratory judgment that the regulation is invalid, and then—if the government decides to keep the regulation anyway—an action for compensation.[236]

The County's theory, unsupported by any authority, is clearly unfounded. *Agins* is what it is. Neither *Agins* nor any other California authority permits compensation after an ordinance has been invalidated.[237]

The County's final argument was aimed at the concept of temporary takings. While temporary takings have been part of our legal system for some time,[238] the concept has gained currency due to Justice Brennan's dissent in *San Diego Gas & Elec. Co. v. City of San Diego*.[239] Justice Brennan began his dissenting opinion in that case by noting that a government agency may abandon a condemnation action.[240] He saw no reason why a government agency—if it so chose—could not likewise repeal a regulation which effected a taking.[241] Thus, he concluded:

> The constitutional rule I propose requires that, once a court finds that a police power regulation has effected a 'taking' the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking' and ending on the date the government entity chooses to rescind or otherwise amend the regulation.[242]

This idea has caused consternation in some quarters,[243] and came

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235. Brief of Appellee at 39, *Lutheran Church.*

236. *Id.*

237. *See* HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 518, 542 P.2d 237, 244, 125 Cal. Rptr. 365, 372 (1975). Federal cases are to the contrary. *See infra* note 260.

238. There are a host of cases, particularly during World War II, in which the government condemned property for a temporary period. *See, e.g.,* Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. General Motors Corp., 323 U.S. 373 (1945).

239. 450 U.S. 621 (1981).

240. *E.g.,* United States v. Dow, 357 U.S. 17, 26 (1958); Danforth v. United States, 308 U.S. 271, 284 (1939).

241. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 657 (1981) (Brennan, J., dissenting).

242. *Id.* at 658. (Footnote omitted.) Of course, if not repealed, the taking is permanent. *See id.* at 659-60.

243. *See* Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto,* 9 VT. L. REV. 193 (1984). *But see* Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls,* 15 RUTGERS L. J. 15 (1983); Berger & Kanner, *Thoughts on The White River Junction Manifesto: A reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property,*

under direct assault by the County in *Lutheran Church*. The County first attacked the entire concept of temporary takings. "The phrase 'temporary taking' is a misnomer; a taking is by definition more than a temporary loss of use."[244]

The concept of a "taking", however, has never been limited to permanent dispossession of property. As Justice Brennan cogently noted, "[n]othing in the Just Compensation Clause suggests that takings' must be permanent and irrevocable."[245] He also observed that the Court had already held temporary takings to be compensable.[246] Professor Tribe has commented on Justice Brennan's conclusion that the concept of temporary takings is constitutionally and theoretically sound:

> On the merits, *Justice Brennan concluded quite reasonably* that, although nothing in the Compensation Clause empowers a court to compel the government to exercise its power of eminent domain where the regulatory 'taking' is temporary and reversible and the government would rather end the 'taking' than purchase the property, *the government must compensate* the property owner for whatever taking occurred between the enactment and the repeal of the offending regulation.[247]

The County's next argument was that a taking cannot occur unless the government *intends* for there to be a taking.[248] Three responses can be raised to this argument. First, the Constitution says nothing of *intent*. It says only that private property shall not be taken for public use without just compensation. Second, the Supreme Court has long demonstrated its adherence to the equitable preference for substance over form.[249] Third, even the California Supreme Court treats "intent"

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19 LOY. L.A.L. REV. 685 (1986).

244. Brief of Appellee at 43, *Lutheran Church*.

245. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 657 (1981) (Brennan, J., dissenting).

246. *E.g.*, United States v. Causby, 328 U.S. 256 (1946) (inverse condemnation); *See also* cases cited note 238 *supra* (direct condemnation).

247. L. TRIBE, CONSTITUTIONAL CHOICES 385-86, n. 23 (1985). (Emphasis added.) *See also* Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 888 (Fed. Cir. 1983); SHONKWILER & MORGAN, LAND USE LITIGATION § 1.02 at 24 (1986); WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION 296-97 (D. Hagman & D. Misczynski eds. 1978); Damich, *Does 14=5? Overregulation and Compensable Taking*, 10 MEMPHIS ST. U.L. REV. 701 (1980); Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 507-11 (1977); Wright, *Damages or Compensation for Unconstitutional Land Use Regulations*, 37 ARK. L. REV. 612 (1983).

248. Brief of Appellee at 43, *Lutheran Church*.

249. *E.g.*, Hughes v. Washington, 389 U.S. 290, 298 (1967) (Stewart, J., concurring) ("[T]he Constitution measures a taking of property not by what a state says, or by what it intends, but by what it *does*.") (Emphasis in original.); Davis v. Newton Coal Co., 367 U.S. 292, 301 (1925) ("The incantation pronounced at the time is not of controlling importance; our primary concern is with the accomplishment."); Pumpelly v. Green Bay Co., 13 Wall. (80 U.S.) 166, 177-

in inverse condemnation cases (based on physical damage) the way that general tort law does: one is presumed to intend the natural consequences of his acts.[250]

Next, the County argued that a taking does not occur without loss of all economically viable use.[251] This proposition is somewhat questionable for the following reasons. First, it is clear that the Supreme Court cases do not all say this. For example, in *United States v. Causby*[252] the Court said:

> There is no material difference between the supposed case and the present one, except that here enjoyment and use of the land are not completely destroyed. But that does not seem to us to be controlling. The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value.[253]

Second, the issue is largely irrelevant. *During* the period the regulation is in force, the prohibition is generally absolute. Most of the litigation in this field involves regulations whose thrust is to convert private property into open space or, in some other way, to preclude development.[254]

The County next argued that it would be against public policy to "intimidate" regulators with fears of compensatory liability if their acts are held to "go too far."[255] However, as one seasoned observer of land use litigation aptly noted:

> The planner's argument is really no different from President Nixon's claim of privilege during the Watergate political scandal, or Norman Mailer's excusing of a murderer because he is a talented writer, or Congress' exemption of itself in the passage of employee protection statutes. What marks a democracy is that people and institutions

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78 (1871); *see also* Hall v. City of Santa Barbara, 797 F.2d 1493, 1503, n. 25, where the court described an inverse condemnation as one in which the government "may have stumbled into exercising [the power of eminent domain] through actions that incidentally result in a taking."

250. *E.g.*, Albers v. County of Los Angeles, 62 Cal. 2d 250, 263-64, 398 P.2d 129, 137, 42 Cal. Rptr. 89, 97 (1965) ("[A]ny actual physical injury to real property proximately caused by the improvement as deliberately designed and constructed is compensable . . . whether foreseeable or not.")

251. Brief of Appellee at 44, *Lutheran Church.*

252. 328 U.S. 256 (1946).

253. *Id.* at 262. (Footnote omitted.)

254. Because of such total prohibitions, many property owners have been driven into foreclosure. *See* cases cited in Berger & Kanner, *Thoughts on The White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property,* 19 LOY. L.A.L. REV. 685, 741, n. 255 (1986).

255. Brief of Appellee at 45, *Lutheran Church.*

> without exception must be accountable for their conscious actions. The Vietnam and Watergate scandals of the late 1960's and early 1970's, in which the government sought to hide the truth of its actions and thereby avoid accountability, wrenchingly brought about an informed maturity in America's body politic—an understanding that government is neither inherently good nor bad but simply there, to be used or abused by those in authority depending upon the dictates of their consciences and the powers fashioned by the existing system. In the liberal democracy, government, which generally acts well and for the social good, is designed to serve the people, and in turn, must be answerable for how it serves. It can be no different in the particularized world of land use law. Questions of takings and compensation remedies require a balancing of public responsibility and individual rights, tempered by a constitutionally sanctioned sensitivity to what is just and fair to the community of one. The Constitution was never meant to make things easy but to make them right.[256]

Indeed, if what the regulators are doing is unconstitutional, a little inhibition might be a good thing.[257] In fact, the U.S. Supreme Court, a frequent target of such "risk to the fisc" arguments, generally disregards them.[258]

Building on its previous argument, the County asserted that awarding damages for temporary takings would "usurp" the legislative function.[259] The County's argument is again refuted, this time by the Arizona Supreme Court which has succinctly held:

> No legislative prerogative is usurped by awarding damages for the time the property was temporarily taken under an invalid zoning ordinance. The regulating body can still weigh all the relevant considerations and determine for itself how best to effectuate its policy in the future. The same alternatives are open to them after a remedy of invalidation plus temporary damages as exist after invalidation alone. The legislative body may pay to acquire the land outright, agree to

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256. Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls,* 15 RUTGERS L. J. 15, 99 (1983); *see also* Berger, *To Regulate or Not to Regulate—Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights,* 8 LOY. L.A.L. REV. 253, 286-87 (1975); *cf.* The Tower Commission Report (1987).

257. There is a growing body of judicial opinion that concern for compensatory consequences might result in *better* service from government employees. *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 661, n. 26 (1981), (Brennan, J., dissenting); Owen v. City of Independence, 445 U.S. 622, 656 (1980); Hutto v. Finney, 437 U.S. 678, 691 (1978); Corrigan v. City of Scottsdale, 720 P.2d 513, 517-18 (Ariz. 1986), cert. denied, 107 S. Ct. 577 (1986); Burrows v. City of Keene, 432 A.2d 15, 20 (N.H. 1981).

258. *See* cases discussed in Berger & Kanner, *Thoughts on The White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property,* 19 LOY. L.A.L. REV. 685, 749-53 (1986).

259. Brief of Appellee at 46, *Lutheran Church.*

pay the landowner a certain amount in order to continue the regulation, or simply abandon the regulation altogether.[260]

In fact, it is invalidation, if anything, which "usurps" legislative power. If the sole remedy is invalidation, the judiciary assumes the right on a continuing basis to overrule legislative determinations. It stifles legislative flexibility.

Moreover, sole reliance on invalidation would disregard the teaching of recent cases such as *Ruckelshaus v. Monsanto Co.*[261] and *Hawaii Housing Auth. v. Midkiff.*[262] In this line of cases, the Court held that the judicial role in "second guessing the legislature" is extremely narrow. Providing compensation comports with this rule. It leaves the regulation intact, thus giving deference to the legislative determination that the regulation is needed and merely adding a compensatory element when that is deemed to be constitutionally required.

Thus, far from "usurping" the prerogative of the legislature, the compensation remedy *defers* to the legislature by upholding the regulation when proper compensation is provided. That leaves legislative bodies a full range of choice, something the invalidation remedy cannot do.[263]

Finally, the County responded to the suggestion that some government agencies have toyed with property owners by drafting outrageous regulations in the first place and then, after a court has held the regulations invalid, only slightly changing the regulations when in fact they warranted more serious revisions.[264] The County argued that basing a

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260. Corrigan v. City of Scottsdale, 720 P.2d 513, 517 (Ariz. 1986), *cert. denied,* 107 S. Ct. 577 (1986). *See also* Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations,* 29 U.C.L.A. L. REV. 711, 728, n.102 (1982). For cases applying a compensatory remedy after invalidating a land use ordinance, *see* Nemmers v. City of Dubuque, 764 F.2d 502 (8th Cir. 1985); Wheeler v. City of Pleasant Grove, 664 F.2d 99, 101 (5th Cir. 1981), *cert. denied,* 456 U.S. 973 (1982); Gordon v. City of Warren, 579 F.2d 386 (6th Cir. 1978); Sixth Camden Corp. v. Township of Evesham, 420 F. Supp. 709, 727-28 (D.N.J. 1976); City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978).

261. 467 U.S. 986 (1984).

262. 467 U.S. 229 (1984).

263. *See* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949).

264. Instances of abuse are reported in R. BABCOCK, THE ZONING GAME 13 (1966); R. BABCOCK & C. SIEMON, THE ZONING GAME REVISITED 288 (1985); D. MANDELKER, ENVIRONMENT AND EQUITY 71 (1981); WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION 293 (D. Hagman & D. Misczynski eds. 1978); Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use controls,* 15 RUTGERS L. J. 15, 69-70 (1983); Branch, *Sins of City Planners,* 42 PUB. AD. REV. 1, 4 (1982); *cf.* Delogu, *Local Land use Controls: An Idea Whose Time Has Passed,* 36 ME. L. REV. 261, 278 (1984); Delogu, *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses,* 32 ME. L. REV. 29, 36 (1980); Kratovil, *Eminent Domain Revisited and Some Land Use Problems,* 34 DE PAUL L. REV. 587, 591 (1985); *see* Mandelker, *Land Use Takings: The Compensation Issue,* 8 HASTINGS CONST. L. Q. 491, 505

rule on such "assumed gamesmanship' " would punish the well-intentioned along with the odious.[265]

This argument misses the point. "Punishment" is not involved. What is sought is compensation for a taking of property. The just compensation clause seeks equity, not sanctions.[266] Indeed, it has long been held that government, as a creature of the Constitution, is not even capable of forming the intent to deprive an individual of property without just compensation.[267] That being so, when a taking occurs, compensation follows. The Constitution was designed to protect against *all* uncompensated takings, not just malicious ones.

This lengthy discussion of the points made by the County of Los Angeles in the *Lutheran Church* case and the possible rebuttals to those arguments point out that a number of different aspects of the taking issue are potentially present in *Lutheran Church.* The Court will soon decide which ones are addressed.

C. *"we shall fight on the beaches"*[268]

Nollan represents the culmination of years of controversy between property owners and the California Coastal Commission.[269] That agency, which has regulatory control over California's entire 1000-mile-long coastline, has conducted a crusade to create public rights to use all beaches from Mexico to Oregon, and to accomplish this at no

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(1981); Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto,* 9 VT. L. REV. 193, 201, 211, (1984). However, Justice Brennan quoted the advice of a prominent California City Attorney and author of a land use text that such tactics are perfectly legal. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 655-56, n. 22 (1981).

265. Brief of Appellee at 47, *Lutheran Church.* Curiously, when Justice O'Connor asked counsel for the County to comment on the "horror stories" that were being perpetrated on property owners, he responded: "Well, Justice O'Connor, I don't know of any horror stories." (Transcript of oral argument before the U.S. Supreme Court 56.)

266. *See, e.g.,* United States v. Fuller, 409 U.S. 488, 490 (1973); Almota Farmers E. & W. Co. v. United States, 409 U.S. 470, 478 (1973); Armstrong v. United States, 364 U.S. 40, 49 (1960); United States v. Commodities Trading Corp., 339 U.S. 121, 124 (1950); United States v. Cors, 337 U.S. 325, 332 (1949); United State v. Willow River Power Co. 324 U.S. 499, 502 (1945); Monongahela Nav. Co. v. United States, 148 U.S. 312, 325 (1893); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 59-4 at 463 (1978); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 HARV. L. REV. 1165, 1181 (1967).

267. *See* Meigs v. M'Clung's lessee, 9 Cranch (13 U.S.) 11, 18 (1815); United States v. Certain Property Located in the Borough of Manhattan, 338 F.2d 596, 598 (2d Cir. 1967); *cf.* Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 891 (Fed. Cir. 1983).

268. Churchill, Speech on Dunkirk, House of Commons (June 4, 1940).

269. For a general discussion of related problems similar to *Nollan, see* R. BABCOCK & C. SIEMON, THE ZONING GAME REVISITED 235-54 (1985); Berger, *You Can't Win Them All—Or Can You?,* 54 CAL. ST. B. J. 16 (1979); Tabor, *The California Coastal Commission and Regulatory Takings,* 17 PAC. L. J. 863 (1986); Comment, *Public Access and the California Coastal Commission: A Question of Overreaching,* 21 SANTA CLARA L. REV. 395 (1981).

cost to the taxpayers. To do that, it has invoked the doctrine of "implied" dedication[270] and has additionally conditioned issuance of development permits on express dedication of coastal access or easements.[271] The latter action is the focus of *Nollan.*

1. The facts

For some time, Mr. and Mrs. Nollan leased a small bungalow on a 3,800 square foot beach lot in Ventura County, California and subleased it to others during the summer vacation period. Years of summer rentals, winter vandals, and coastal weather conditions eventually made it an eyesore and a nuisance in an otherwise attractive neighborhood of new, larger homes. The owner of the property agreed to sell it to the Nollans on condition that they demolish and replace the substandard residence. The Coastal Commission agreed that the Nollans could have a permit to demolish and reconstruct on condition that they dedicate a public use easement over the beach portion (approximately one third of the area) of their lot.

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270. For the author's view of this doctrine, *see* Berger, *Nice Guys Finish Last—At Least They Lose Their Property:* Gion v. City of Santa Cruz, 8 CAL. WEST. L. REV. 75 (1971); Berger, Gion v. City of Santa Cruz: *A License to Steal?*, 49 CAL. ST. B. J. 24 (1974). For the views of others, *see* Briscoe & Stevens, Gion After Seven years: Revolution or Evolution? 53 L.A. BAR J. 207 (1977); Gallagher, Jure & Agnew, *Implied Dedication: The Imaginary Waves of Gion-Dietz,* 5 S.W.U.L. REV. 48 (1973); Note, *Implied Dedication in California: A Need for Legislative Reform,* 7 CAL. W. L. REV. 259 (1970); Note, *The Common Law Doctrine of Implied Dedication and its Effect on the California Coastline Property Owner:* Gion v. City of Santa Cruz, 4 LOY. L.A.L. REV. 438 (1971); Comment, *Californians Need Beaches—Maybe Yours!* 7 SAN DIEGO L. REV. 605 (1970); Comment, *Implied Dedication: A Threat to the Owners of California's Shoreline,* 11 SANTA CLARA LAW. 327 (1971); Note, *This Land is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches,* 44 S. CAL. L. REV. 1092 (1971); Note, *Public Access to Beaches,* 22 STAN. L. REV. 564 (1970); Comment, *Public Or Private Ownership of Beaches: An Alternative to Implied Dedication,* 18 UCLA L. REV. 795 (1971).

271. That government agencies like to characterize these exactions as "donations" or "dedications," voluntarily given as a condition to development approval, should not mask the reality of the situation. Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale,* 52 CORN. L. Q. 871, 876-81 (1967). "As a practical matter, most developers are forced to comply with the requirements laid down by local governments because of the prohibitively expensive financing and opportunity costs incurred as a result of protracted delay caused by litigation." Juergensmeyer & Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma,* 9 FLA. ST. U.L. REV. 415, 417, n. 9 (1981). Thus, any "donation" is purely fictional. As the Supreme Court wisely admonished through Justice Holmes, "in States bound together by a Constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." McDonald v. Mabee, 243 U.S. 90, 91 (1917).

2. *The litigation*

After the permit was issued, the Nollans sued to invalidate the condition. The trial court agreed with the Nollans and remanded the matter to the Coastal Commission for further proceedings.[272] After a rehearing,[273] the Coastal Commission again issued the permit subject to a public access condition and the Nollans returned to court. Because no "new" evidence showed any burden on public access had been created by the Nollans, the trial court again ruled in their favor, this time ordering that the permit be issued free of the public access condition.[274] However, on appeal the California Court of Appeal reversed.[275]

To fully appreciate the *Nollan* decision, it is necessary to discuss the general federal rule regarding conditions and exactions, the law applied in states other than California in land use cases, and then the California rule. As is the case with respect to the compensation issue involved in *Lutheran Church,* California has charted its own course on conditions and exactions as well.

3. *The rule in the federal courts*

While it has decided *no* cases dealing with land use exactions, the Supreme Court is no stranger to governmental attempts to condition the receipt of some governmental benefit on the surrender of a Constitutional right. In *Perry v. Sindermann,*[276] the Court held—in no uncertain terms—that the government could not circumvent the Constitution by imposing conditions:

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272. The trial court found that the Nollans were merely replacing one existing dwelling with another one and that this action was in keeping with the neighborhood. The court also held that the record failed to show that the new home would have any adverse impact on coastal access. The court concluded that an access dedication is Constitutional only when the proposed construction will place a burden on public access and, since none was shown, the action had to be vacated. Clerk's Transcript on Appeal at 235.

273. The Coastal Commission's staff presented a great deal of additional data at the rehearing. Interestingly, none of the assembled data related to the Nollans or their property. Rather, the staff compiled general literature dealing with the need for coastal access, studies about Lake Tahoe (which is nowhere near Ventura County), articles on access problems in other states, and the like. *See* Jurisdictional Statement, Appendix E, Nollan v. California Coastal Comm'n, No. 86-133 (U.S. argued March 30, 1987). The closest the Coastal Commission got to analyzing the impact of the Nollans' construction on beach access was to say that building private residences between the beach and the nearest public highway interferes with the public's view of the beach. This, the Commission argued, leads people to believe there is no beach, and the construction of numerous private residences creates a "psychological" barrier to access by leading people to believe the public has no right to get to the coastline. *Id.* at E37-E38.

274. *Id.*, Appendix D.

275. Nollan v. California Coastal Comm'n., 177 Cal. App. 3d 719, 223 Cal. Rptr. 28 (1986), *prob. juris. noted,* 107 S. Ct. 312 (1986), *dismissal denied,* 107 S. Ct. 665 (1986).

276. 408 U.S. 593 (1972).

> For at least a quarter century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. *It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests* . . . . For if the government could deny a benefit to a person because of his constitutionally protected [rights], *his exercise of those freedoms would in effect be penalized and inhibited.* This would allow the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible.[277]

The Ninth Circuit Court of Appeals recently applied *Perry* in the context of a condition to a land use permit which required "dedication" of property. In *Parks v. Watson,*[278] a property owner sought to have a city vacate "paper" streets[279] on its property so apartments could be built. The city was amenable, but conditioned the "vacation" of the "paper" streets on the property owners' giving to the city property containing valuable geothermal wells.[280] The court lost little time in concluding that the city's desire to own the geothermal wells did not give it the right to extort dedication of the wells. Dedication of the wells bore no rational relationship to the owners' seeking a vacation of the "paper" streets:

> Both case authority and scholarly commentary indicate that a condition requiring an applicant for a government benefit to forgo a constitutional right is unlawful if the condition is not rationally related to the benefit conferred.
>
> . . . .
>
> Since the requirement that Klamath Valley Company give its geothermal wells to the City had no rational relationship to any public purpose related to the vacation of the platted streets, the unrelated purpose does not support the requirement that the company surrender its property without just compensation. . . . The condition violates the fifth amendment.[281]

A similar situation occurred in *Littlefield v. City of Afton.*[282]

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277. *Id.* at 597. (Emphasis added; citation omitted.) For analyses of earlier decisions, *see* Hale, *Unconstitutional Conditions and Constitutional Rights,* 35 COLUM. L. REV. 321 (1935); Note, *Unconstitutional Conditions,* 73 HARV. L. REV. 1595 (1960).

278. 716 F.2d 646 (9th Cir. 1983).

279. That is, streets that appeared on the City's general plan for future construction but that did not exist as traveled ways.

280. These wells produce steam and hot water created by the earth's magma when the magma is close to the surface. The heat energy is used to produce electrical power.

281. *Id.* at 652-53.

282. 785 F.2d 596 (8th Cir. 1986).

There, the city sought to condition the construction of a single residence on the property owners' dedication of an easement permitting access to a neighboring, landlocked parcel, owned by others. Relying, *inter alia*, on *Perry* and *Parks,* the court concluded that, "appellants stated a substantive due process claim when they alleged that the City acted capriciously and arbitrarily and imposed an unconstitutional condition on the granting of the permit."[283]

The Supreme Court dealt with a related matter (also arising in California) 60 years ago in *Frost v. Railroad Commission.*[284] There, by regulation, California conditioned the issuance of permits to private truckers to use the highways on agreement by the private carriers to assume the duties and burdens of public carriers. In holding that the right to use the highways could not be so conditioned, the Court fashioned a fitting template for *Nollan*'s requirement of a fictional donation of an easement in exchange for development permission:

> Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. *In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood, or submit to a requirement which may constitute an intolerable burden.*
>
> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that *it may not impose conditions which require the relinquishment of constitutional rights.* If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.[285]

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283. *Id.* at 607. *See also* Wilkerson v. Johnson, 699 F.2d 325, 328 (6th Cir. 1983) (illegal conditions attached to barbershop permit); Bynam v. Schiro, 219 F. Supp. 204, 210 (E.D. La. 1963) (three judge District Court), aff'd 375 U.S. 395 (1964) (illegal condition on permit: to use city auditorium: speakers had to advocate segregation).

284. 271 U.S. 583 (1926).

285. *Id.* at 593-94. (Emphasis added.)

Thus, the federal constitutional precept is that the government may not condition the grant of any benefit on the surrender of a constitutional right.

4. *The rules in states other than California*

State courts have developed several variants of the test to determine whether an exaction is constitutional. All except California require *some* rational and substantial nexus between the condition imposed by the government and the need created by the proposed project.[286]

Illinois is perhaps the most vigilant in protecting the rights of the individual. Its courts will not permit an exaction absent a direct cause-and-effect relationship between the action proposed by the property owner and the exaction demanded by the government:

> If the requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is *specifically and uniquely attributable to his activity*, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power.[287]

The Wisconsin Supreme Court slightly modified the Illinois rule because of concerns that casting the rule in problematic terms "specifically and uniquely attributable" to the applicant might place so heavy a

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286. One commentator concluded an exhaustive examination of state court decisions as follows:

> All these tests, *with the possible exception of those used in California*, attempt to examine the needs of the area being subdivided or the burdens it will place on public facilities and then determine whether the exaction in some way meets the need or offsets the burden. *The California court, while parroting constitutionally required reasonableness, states its rule in no-win language* and requires the developer to bear the burden of proving that there is no reasonable relationship between the dedication requirement and health, safety, and general welfare. Note, however, that *this test completely ignores the question of confiscation as though it never arises.*

Staples, *Exaction—Mandatory Dedications and Payments in Lieu of Dedication*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN III, 119 (S.W. Legal Foundation 1980). (Emphasis added.)

287. Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961). (Emphasis added.) This approach of strictly protecting individual rights has also been applied in other states. *See* Admiral Dev. Corp. v. City of Maitland, 267 So. 2d 860 (Fla. App. 1972); Schwing v. City of Baton Rouge, 249 So. 2d 304 (La. App. 1971); Baltimore Planning Comm'n v. Victor Dev. Co., 275 A.2d 478 (Md. 1970); State ex rel. Noland v. St. Louis County, 478 S.W.2d 363 (Mo. 1972); Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964); Simpson v. City of North Platte, 292 N.W.2d 297 (Neb. 1980); McKain v. City Plan. Comm'n 270 N.E.2d 370 (Ohio App. 1971); Frank Ansuini, Inc. v. City of Cranston, 264 A.2d 910 (R.I. 1970); Board of Supervisors v. Rowe, 216 S.E.2d 199 (Va. 1975).

burden of proof on government agencies that no conditions would ever be valid. The Court therefore placed an interpretive gloss on the phrase "specifically and uniquely attributable" which protects the individual but also permits the government to append rationally related conditions:

> In most instances it would be impossible for the municipality to prove that the land required to be dedicated for a park or school site was to meet a need solely attributable to the anticipated influx of people into the community to occupy this particular subdivision. On the other hand, a municipality might well be able to establish that a group of subdivisions approved over a period of several years had been responsible for bringing into the community a considerable number of people making it necessary that the land dedications required of subdividers be utilized for school, park, and recreational purposes for the benefit of such influx. In the absence of contravening evidence this would establish a reasonable basis for finding that the need for the acquisition was occasioned by the activity of the subdivider. Possible contravening evidence would be a showing that the municipality prior to the opening up of the subdivisions, acquired sufficient lands for school, park, and recreational purposes to provide for future anticipated needs including such influx, or that the normal growth of the municipality would have made necessary the acquisition irrespective of the influx caused by opening up of subdivisions.
>
> There also may be situations, unlike the instant one, where there is no substantial influx from the outside and the proposed subdivision only fulfills a purely local need within the community. In those situations it may be more difficult to adduce proof sufficient to sustain a land-dedication requirement.
>
> We conclude that a required dedication of land for school, park, or recreational sites as a condition for approval of the subdivision plat should be upheld as a valid exercise of police power *if the evidence reasonably establishes that the municipality will be required to provide more land for schools, parks, and playgrounds as a result of approval of the subdivision.*[288]

More recently, the rule generally being applied in state courts is that the condition or exaction is valid *if* it is rationally related to the applicant's proposed action. "Rationally related" means there must be

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288. Jordan v. Village of Menomonee Falls, 137 N.W.2d 442, 447-48 (Wis. 1965). (Emphasis added.) The Wisconsin gloss on the Illinois rule has also been followed by other courts. *See, e.g.*, Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 273 A.2d 880 (Conn. 1970); Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966); Call v. City of West Jordan, 614 P.2d 1257 (Utah 1980).

some nexus between the problem caused by the applicant and the *quid pro quo* demanded by the government.[289]

State courts have also recognized a relationship between development exactions and special assessment districts, and have often analyzed the validity of each by reference to the other. In assessment district cases, property owners in a specified area are assessed the cost of installing public improvements (e.g., new or improved streets, curbs, gutters, street lights, etc.). The cost is spread among the property owners according to the benefit they receive from the improvements. But the constitutional proscription against the uncompensated taking of private property for public use precludes assessing an owner *more* than he benefits:[290]

> In resolving this issue, analogy may be made to the law governing special assessments. The special assessment a town may charge a landowner for a public improvement which, in part, specially benefits his property can be compared to defendant's subdivision exaction. To the extent that it applies private property to public use, the special assessment, like the subdivision exaction is restricted by the principle of just compensation . . . . [S]pecial assessments upon property for the cost of public improvements are in violation of our Constitution if they are in substantial excess of the [equivalent in special] benefits

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289. *See* Bethlehem Evangelical Lutheran Church v. City of Lakewood, 626 P.2d 668 (Colo. 1981); Town of Longboat Key v. Lands End, Ltd., 433 So. 2d 574 (Fla. App. 1983); Lampton v. Pinaire, 610 S.W.2d 915 (Ky. App. 1980); Howard County v. JJM, Inc., 482 A.2d 908 (Md. 1984); Collis v. City of Bloomington, 246 N.W.2d 19 (Minn. 1976); Briar West, Inc. v. City of Lincoln, 291 N.W.2d 730 (Neb. 1980); J.E.D. Associates, Inc. v. Town of Atkinson, 432 A.2d 12 (N.H. 1981); Longridge Builders, Inc. v. Planning Bd., 245 A.2d 336 (N.J. 1968); Kamhi v. Planning Bd., 452 N.E.2d 1193 (N.Y. 1983); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984); Call v. City of West Jordan, 614 P.2d 1257 (Utah 1980); *see generally* Bley, *Exactions in the 1980s,* INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 297, 314 (S.W. Legal Foundation 1984); Connors & Meacham, *Paying the Piper: What Can Local Governments Require as a Condition of Development Approval?*, INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN ch. 2 at 2-12, 2-16 (S.W. Legal Foundation 1986); Juergensmeyer & Blake, *Impact Fees: An answer to Local Governments' Capital Funding Dilemma,* 9 FLA, ST. U. L. REV. 415, 430-33 (1981); Reps & Smith, *Control of Urban Land Subdivision,* 14 SYRACUSE L. REV. 405, 407 (1963); Staples, *Exaction—Mandatory Dedications and Payments in Lieu of Dedication,* INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 111, 120-23 (S.W. Legal Foundation 1980).

290. The U.S. Supreme Court's views on special assessments were emphatically stated by Justice Harlan in Norwood v. Baker, 172 U.S. 269, 278-79 (1898):

> But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. . . .[T]he guarantees for the protection of private property would be seriously impaired if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvements, could not be questioned by him in the courts of the country.

> received. These special benefits constitute the just compensation to which the specially assessed landowner is entitled.
>
> In view of the analogous deprivation of property worked by a special assessment and a subdivision exaction, it would be plainly unfair to circumvent in the subdivision context the protection guaranteed by the proportionality required of special assessments.[291]

Where no obviously rational relationship exists, exactions have been denounced in stinging terms. In one case, the court stated:

> While in general subdivision regulations are a valid exercise of the police power, made necessary by the problems subdivisions create—i.e., greater needs for municipal services and facilities—the possibility of arbitrariness and unfairness in their application is nonetheless substantial: A municipality could use dedication regulations to exact land or fees from a subdivider far out of proportion to the needs created by his subdivision in order to avoid imposing the burden of paying for additional services on all citizens via taxation. To tolerate this situation would be to allow an otherwise acceptable exercise of police power to become *grand theft.*[292]

Similarly, in a second case, the court held:

> Regulation H requires the dedication of seven-and-one-half per cent of the total land comprising the subdivision without any consideration of the town's need for the land. Moreover, there is evidence, that was improperly excluded, which indicates that some developers would be permitted to pay the town the value of the land in lieu of its dedication. This appears to us to be *an out-and-out plan of extortion* whereby developers are required to pay for the privilege of using their land for valid and reasonable purposes even though it satisfies all other requirements of the town's zoning and subdivision regulations.
>
> . . . Municipal officials having authority to adopt ordinances and regulations have a constitutional duty to observe these [constitutional] protections [of private property rights]. They may not attempt to *extort* from a citizen a surrender of his right to just compensation for any part of his property that is taken from him for public use as a price for permission to exercise his right to put his property to whatever legitimate use he desires subject only to reasonable regulation.[293]

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291. Land/Vest Properties, Inc. v. Town of Plainfield, 379 A.2d 200, 204 (N.H. 1977). (Citations omitted.) *See also,* Home Builders Association of Central Arizona, Inc. v. Riddel, 510 P.2d 376 (Ariz. 1973); Briar West, Inc. v. City of Lincoln, 291 N.W.2d 730, 733 (Neb. 1980); Longridge builders, Inc. v. Planning Bd., 245 A.2d 336, 337-38 (N.J. 1968); Reps & Smith, *Control of Urban Land Subdivision,* 14 SYRACUSE L. REV. 405, 407-09 (1963).

292. Collis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976). (Emphasis added.)

293. J.E.D. Associates, Inc. v. Town of Atkinson, 432 A.2d 12, 14-15 (N.H. 1981). (Emphasis added.) To the same effect is West Park Ave., Inc. v. Township of Ocean, 224 A.2d 1, 4

Thus, while there are several variants of the exaction rule in state courts, all—except California—seek to protect the rights of the individual against overreaching demands of the government by requiring a rational relationship between the exaction imposed by the government and the action proposed by the property owner.[294]

5. California's rule relegates the protection of federal constitutional rights to the whim of administrative discretion

The exaction rule now applied in California is exemplified by four contemporary Coastal Commission cases: *Remmenga v. California Coastal Comm'n,*[295] *Grupe v. California Coastal Comm'n,*[296] *Whaler's Village Club v. California Coastal Comm'n,*[297] and *Nollan.* The theory uniting these cases, which places California outside the rule applied elsewhere, is that, while the California courts generally pay lip service to the concept that exactions must bear a reasonable relationship to the permit being sought,[298] their actions belie that assertion. These California cases apply the relationship rule in such an extreme manner that virtually any governmental desire suffices to supply that relationship. In stark contrast to all of the cases (state and federal) discussed earlier, California does not require that the action sought by the permit applicant bear any cause-and-effect relationship to the conditions which are attached to the permit.In *Remmenga,* the property owner sought to construct one house on a 106 acre parcel. He was required to pay $5,000 (in lieu of dedicating property for access to the beach)[299] into a fund to acquire beach access elsewhere. In *Grupe,* the property owner sought to build one home on a 15,000 square foot lot. He was required to dedicate a public access easement over two thirds of his lot. In *Whaler's Village,* condominium owners sought to protect their existing

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(N.J. 1966).

294. *See* Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis,* 86 YALE L. J. 385, 481-86 (1977).

295. 163 Cal. App. 3d 623, 209 Cal. Rptr. 628 (1985), *app. dismissed* 106 S. Ct. 241 (Burger, C. J. and Brennan and Rehnquist, C.J., would have noted probable jurisdiction).

296. 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985).

297. 173 Cal. App. 3d 240, 220 Cal. Rptr. 2 (1985), *app. dismissed* 106 S. Ct. 1962 (1986).

298. *Remmenga*, 163 Cal. App. 3d at 627; *Grupe*, 166 Cal. App. 3d at 164; *Whaler's Village*, 173 Cal. App. 3d at 259. See the analysis of Mr. Staples quoted above in note 286 regarding California's "parroting [the language of] constitutionally required reasonableness . . . ."

In *Nollan,* the Court of Appeals, perhaps encouraged by the refusal of either the U.S. Supreme Court or the California Supreme Court to intervene in *Remmenga, Grupe* or *Whaler's Village,* dropped even the pretense of lip service. It candidly said that "the Nollans' project has not created the need for access to the tidelands . . . ." (177 Cal. App. 3d at 723) and then concluded that the absence of any direct causal relationship was irrelevant.

299. He could not dedicate property for beach access because the closest part of his 106 acre parcel was more than a mile inland from the beach.

homes from an ocean storm that had undermined one and threatened to destroy others. The condominium owners were required to dedicate to the state the right for the public to use the condominium's private beach. In *Nollan*, the property owners sought to replace a neighborhood eyesore with a large home. To gain permission to reconstruct their home, the Nollans were required to dedicate a public access easement over one third of their lot.

These four cases contained no evidence that the proposed construction would have *any* impact on the public's access to the coast. In *Nollan,* the court was forthright, "the Nollans' project has not created the need for access to the tidelands . . . ."[300] In each of the four cases, the California Court of Appeal acknowledged this non-impact but held it irrelevant. As the court of appeal stated in *Nollan,* "a direct burden on public access need not be demonstrated . . . ."[301]

The California courts' view is that one must examine the construction of a single home (even on a lot already put to residential use for many years) in the context of the entire 1,000 mile coastline of California.[302] As the Court explained in *Remmenga*:

> A regulatory body may constitutionally require a dedication of property in the interest of the general welfare as a condition of permitting land development. It does not act in eminent domain when it does this, and *the validity of the dedication requirement is not dependent on a factual showing that the development has created the need for it.*[303]

By definition, a "rational relationship" must have some basis. Here, the concern is development of the California coastal area in a way that balances the rights of the owners of coastal property and other citizens. Before demanding that a particular property owner "donate" property to the state before being permitted to build on his land, there should be some rational relationship between the proposed development and the "donation."[304]

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300. 177 Cal. App. 3d at 723.

301. *Id.*

302. *Remmenga,* 63 Cal. App. 3d at 630 ("[A] link in a chain barring access . . . .") (citing generalized studies of the entire coastal zone); *Grupe,* 166 Cal. App. 3d at 167 ("[O]ne more brick in the wall . . . ."); *Whaler's Village,* 173 Cal. App. 3d at 260 (quoting *Remmenga*); *Nollan,* 177 Cal. App. 3d at 723 (citing *Remmenga* and *Grupe*).

303. Remmenga v. California Coastal Comm'n., 163 Cal. App. 3d 623, 629, 209 Cal. Rptr. 628, 631 (1985). (Emphasis added; citations omitted; quoting with approval from an earlier Coastal Commission case).

304. Part of the California problem lies in the philosophical belief of the California courts that property owners have no right to do anything with their land; the ability to use land is seen as a privilege. *See, e.g.,* Georgia-Pacific Corp. v. California Coastal Comm'n, 132 Cal. App. 3d 678, 699, 183 Cal. Rptr. 395 (1981); Trent Meredith, Inc. v. City of Oxnard, 114 Cal. App. 3d

A regulatory agency's good intentions are irrelevant to the question whether a rational relationship exists.[305] So is the agency's power (at least in theory). As the U.S. Supreme Court said in *Kaiser Aetna:*

> In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a "taking," however, is an entirely separate question.[306]

Even though providing additional access to California's coast may be a good thing, it does not mean the state may achieve that goal any way it wishes.[307] As in *Kaiser Aetna,* whether the means constitutes a taking "is an entirely separate question." This question is the one before the Court in *Nollan.* For California to answer it constitutionally, there must in fact exist a rational relationship between the proposed use and the imposed exaction.

The only "impediment" to access after construction of the Nollans' home is the same one which existed before: the land is privately owned.[308] But the U.S. Supreme Court concluded in *Pennsylvania*

317, 328, 170 Cal. Rptr. 685 (1981). This concept seems plainly at odds with the U.S. Supreme Court's holdings that property owners have the right to make economically viable use of their land. *See, e.g.,* Agins v. City of Tiburon, 447 U.S. 255, 260 [1980]; Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 [majority], 143-44 [dissent] [1978]; Kaiser Aetna v. United States, 444 U.S. 164, 174, n. 8 [1979].) As recently noted, "[o]f the aggregate rights associated with any property interest, the right of use of property is perhaps of the highest order." Dickman v. Commissioner, 465 U.S. 330, 336 (1984).

305. In a case involving strikingly similar facts, a New York court reached precisely the opposite result of the California court in *Nollan*:

> [A] condition may be imposed upon property so long as there is a reasonable relationship between the problem sought to be alleviated and the application concerning the property. In the case at bar, no such relationship exists. As Special Term properly found, there is currently no lawful, public access to the beach over the petitioner's property. The proposed subdivision will in no manner alter this state of affairs. While the problem of diminishing access to the beach is a matter of serious public concern (see Executive Law, at 912, subd 1), it is not one which can properly be alleviated by requiring petitioner to dedicate a portion of her property to public use.

Mackall v. White, 85 A.D.2d 696, 445 N.Y.S.2d 486 (N.Y. App. 1981); *See also* East Neck Estates, Ltd. v. Luchsinger, 305 N.Y.S.2d 922 (N.Y. 1969) (demand for dedication of $92,000 worth of beach front as condition for permit to develop remainder of $208,000 tract held confiscatory and invalid).

306. 444 U.S. 164, 174 (1979). (Citation omitted.) *See also* cases cited *supra* notes 88-95.

307. Thus, while the U.S. Supreme Court has acknowledged the power of Congress to deal with such diverse, yet substantial, topics as the bankruptcies of northeastern railroads, the registration of pesticides, and the Carter era Iranian hostage crisis, it has firmly expressed the view that the solution to such problems must conform to the just compensation clause. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); Dames & Moore v. Regan, 453 U.S. 654 (1981); Regional Rail Reorganization Act Cases, 410 U.S. 102 (1974). California's "need" for recreational beach access can stand on no more compelling footing.

308. *Compare* Mackall v. White, 445 N.Y.S.2d 486 (N.Y. App. 1981), quoted *supra* note

Coal that the "impediment" can only be removed by the constitutional means of purchasing access:

> 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 shortsighted as to acquire only surface rights, without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place, and refusing to pay for it because the public wanted it very much. *The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation.* A similar assumption is made in the decisions upon the Fourteenth Amendment. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.[309]

Because of these actions by the California courts, government entities throughout California have been emboldened to bend their most creative efforts at imposing conditions only marginally related (if at all) to the use of property for which the owner seeks a permit. The fundamental relationship between the government's conditions and the applicant's proposed project is that the government wants the property, the money, or the service and the applicant is a vulnerable and available target, unable to offer more defense than the proverbial fish in a barrel.[310] Moreover, cases like *Nollan* have told governmental entities that they will not be judicially restrained for their actions. Thus, exacting property or funds for certain items may now be the price for obtaining permission to use one's own property, even if the proposed use does not

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309. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922). (Emphasis added; citation omitted.)

310. His only choices are to comply with the demand or not put his property to use. In Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439, n. 17 (1982), the Supreme Court dismissed the non-use alternative as constitutionally unacceptable. *See also* Hall v. City of Santa Barbara, 797 F.2d 1493, 1500 (9th Cir. 1986).

For other decisions explicitly rejecting the imposition of exactions on a target of opportunity unrelated to the need sought to be fulfilled by government, *see, e.g.*, Arnett v. City of Mobile, 449 So. 2d 1222 (Ala. 1984); Simpson v. City of North Platte, 292 N.W.2d 297 (Neb. 1980); West Park Ave., Inc. v. Township of Ocean, 224 A.2d 1 (N.J. 1966).

create the need for the exacted provision, i.e., child care (San Francisco); public art (San Francisco, Santa Monica, Los Angeles); "amenity space," including promenades, playgrounds, and jogging tracks (Los Angeles); low income housing (Monterey, Santa Monica, San Francisco, Santa Barbara); public transit (Los Angeles, San Francisco).[311]

If the harsh California rule is allowed to stand, it will free government agencies to coerce, from randomly chosen individuals, property or money as the price of a routine permit. Given *Nollan,* and the lip service paid to the need for a nexus, *any* exaction will be sustainable. If the facts of *Nollan* can create a "nexus," any facts can.[312]

California has allowed its concern for effectuating broad governmental goals to swallow the Fifth Amendment's prohibition against confiscation of individual rights.[313] If the right to use property is subject to governmental whim, then the right has disappeared. As the U.S. Supreme Court enduringly said more than a century ago:

> It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of

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311. *See* SAN FRANCISCO DOWNTOWN PLAN (1985); San Francisco OFFICE/HOUSING PRODUCTION PROGRAM (1982); SAN FRANCISCO TRANSIT IMPACT DEVELOPMENT FEE ORDINANCE (SAN FRANCISCO ADMIN. CODE § 38.1 *et seq.* (1981); LOS ANGELES PRELIMINARY TRANSIT CORRIDOR SPECIFIC PLAN (1984); MONTEREY ORD. NO. 2416 C.S. (1980); SANTA MONICA GENERAL PLAN: LAND USE AND CIRCULATION ELEMENTS (1984).

312. The Coastal Commission has been so adamant and successful in demanding "donations" of access before the issuance of any permit, it has become the subject of "black humor" among the California bar. In a column in the Los Angeles Daily Journal (the daily legal newspaper with the largest circulation in California), the tongue-in-cheek suggestion was made that the Coastal Commission be given statewide (not just coastal) jurisdiction, in order to give the rest of California the "benefits" of the Coastal Commission's beach access policy:

> Why not extend the Coastal Commission's authority all the way to the eastern edge of the state?
>
> Consider the possibilities.
>
> Say some homeowner in Barstow [a Mojave desert community more than 100 miles from the coast] wants to add a carport to his residence. The commission could step in and require public dedication of an easement for a bicycle path to the ocean as a condition for building permission.
>
> Soon the state would be crisscrossed with paths to the sea for the public to enjoy and everyone's fitness would be enhanced.
>
> We can't allow selfish property owners to hamper public enjoyment of our natural resources.

Policzer, "From the Courts," Los Angeles Daily Journal, October 29, 1985, pt. 2, p. 1.

313. *Compare* Kaiser Aetna v. United States, 444 U.S. 164, 177 (1979); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922).

> the majority, if you choose to call it so, but it is none the less a despotism.[314]

Nollan is an analytical twin of *Kaiser Aetna.*[315] There, the Corps of Engineers sought to compel the owner of a private marina to open the marina for public use. The U.S. Supreme Court would not permit it. "[T]he imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina . . . . And even if the government physically invades only an easement in property, it must nonetheless pay just compensation."[316]

The same is true in *Nollan.* The result of the Coastal Commission's action will be the physical invasion of the Nollans' lot by strangers. Such random, unwanted, and unpredictable intrusions by unknown numbers of the general public is so significant that the Court concluded in *Kaiser Aetna* that, "we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the government cannot take without compensation."[317] The U.S. Supreme Court has routinely noted that governmental actions resulting in actual physical invasion are relatively simple to analyze from the vantage point of the just compensation clause: physical invasion is a taking that cannot be accomplished without compensation.[318]

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314. Loan Ass'n v. Topeka, 20 Wall. (87 U.S.) 655, 662 (1875).

315. Commentators have noted the similarity between *Kaiser Aetna* and Coastal Commission easement exactions. (*See, e.g.,* Tabor, *The California Coastal Commission and Regulatory Takings,* 17 PAC. L. J. 863, 882-90 [1986]; Comment, *Public Access and the California Coastal Commission: A Question of Overreaching,* 21 SANTA CLARA L. REV. 395, 401-02, n. 26 [1981].)

316. *Kaiser Aetna,* 444 U.S. at 180 (1979). (Citations omitted.)

317. *Kaiser Aetna,* 444 U.S. at 179-80 (1979). Three years later, the Court would return to and strengthen this concept in Loretto v. Teleprompter Manhattan CATV Corp.:

> Moreover, an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property. [P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. Furthermore, such an occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982). (Citation omitted.) The point was again re-emphasized earlier this Term in FCC v. Florida Power Corp., 55 U.S.L.W. 4236, 4238 (1987), where the Court characterized a citizen with government permission to use another citizen's property as "an interloper with a government license."

318. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426-35 (1982); Kaiser Aetna v. United States, 444 U.S. 164, 176, 180 (1979); Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); Griggs v. Allegheny County, 369 U.S. 84, 88-89 (1962); United States v. Causby, 328 U.S. 256, 261 (1946); Pumpelly v. Green Bay Co., 13 Wall. (80 U.S.) 166, 181 (1871); *see* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 HARV. L. REV. 1165, 1184 (1967); Kratovil, *Emi-*

The question whether California's goal to increase coastal access for the general public is valid is not the only question involved. California is not writing on a clean slate. Among the things already written are that property may be privately owned and is constitutionally protected. As the Court noted in *Hawaii Housing Authority v. Midkiff*,[319] states are free to engage in land reform, but when private property is taken in the process for use by others, compensation is mandatory.

This type of case raises two questions: 1) is the governmental objective within the ambit of the police power; and 2) if so, does the proposed solution violate the constitutional rights of some citizens? No challenge is raised to the first issue. It can be conceded that the general goal of providing coastal access is legitimate. However, to legally achieve that goal by exaction there must be a rational relationship between the applicant's action and the government's exaction in order for the exaction to satisfy the Constitution. Regardless of the propriety of the governmental goal, the route to its solution must conform to the Constitution, not circumvent it.

V. CONCLUSION

Government agencies focus on what they view as legitimate societal needs. In most cases, the property owners would probably agree that the governmental goals are legitimate. Thus, the question is *not* whether it is good for government to engage in flood control or provide scenic open space or beach access or protection from land subsidence. The question is *how* can government, in our constitutional system, go about achieving its desire?

The U.S. Supreme Court has often cautioned that the means chosen by government officials to meet perceived public needs must be carefully scrutinized for constitutional conformity:

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and of the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing

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nent Domain Revisited and Some Land Use Problems, 34 DE PAUL L. REV. 587, 602 (1985). Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980), in which the Court sanctioned the use of shopping center property by groups exercising their first amendment right to communicate with shoppers, is not to the contrary. In *Pruneyard*, the property owner *wanted* the general public to use his land. That is the whole point of a shopping center. Individual homeowners, like the Nollans, do not. As the Court put it this year in FCC v. Florida Power Corp., 55 U.S.L.W. 4236, 4238 (1987), "it is the invitation . . . that makes the difference."

319. 467 U.S. 229 (1984).

> concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more than mediocre ones.[320]

The Court has an unprecedented opportunity this term to explain Constitutional limits to zealous government officials. Hopefully, it will make the most of that opportunity.

EPILOGUE

After this article was written, the U.S. Supreme Court decided *Lutheran Church*. The decision validates the arguments made in this article. Indeed, the preceding paragraph foretold quite accurately the Court's conclusion. As the Court put it:

> We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the Just Compensation Clause of the Fifth Amendment is one of them.[321]

Each of the following issues has now been definitively dealt with by the Court:

- The *Agins* rule is gone.[322]
- The term "taking" is no mere metaphor.[323]
- The just compensation clause is self-executing.[324]
- A valid regulation can require the payment of just compensation if it takes private property in the process.[325]

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320. Stanley v. Illinois, 405 U.S. 645, 656 (1972). (Footnote omitted.) *See also* Shelton v. Tucker, 364 U.S. 479, 488; McNabb v. United States, 318 U.S. 332, 347 (1943); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922). As Justice Brandeis insightfully admonished: "Experience should teach us to be most on our guard to protect liberty when government's purposes are beneficent . . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Olmstead v. United States, 277 U.S. 438, 479 (1982). (Brandeis, J., dissenting).

321. First English Evangelical Lutheran Church v. County of Los Angeles, no. 85-1199, slip op., p. 16 (June 9, 1987).

322. ". . . the California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment." *Id.* at 5.

323. *See id.* at 9-11.

324. *Id.* at 9-10.

325. ". . . [The Fifth Amendment] is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of *otherwise proper interference* amounting to a taking." *Id.* at 9. (Emphasis added; Court's emphasis deleted.)

• The Constitution requires compensation for *all* takings, permanent or temporary.[326]

Two and a half weeks after *Lutheran Church*, the U.S. Supreme Court decided *Nollan*. That decision also validates the arguments made in this article. In a nutshell, *Nollan* makes the following points:

• Property owners have a ***right*** to build on their property. It is not a governmentally conferred benefit.[327]

• Notwithstanding its label of "dedication," granting a property interest as a condition to a permit to make economic use of land is not a "voluntary" act by the property owner.[328]

• A legitimate exercise of the police power may still require compensation if it violates the Fifth Amendment.[329]

• When improperly used, an exaction is ". . . an out-and-out plan of extortion."[330]

• As in *Lutheran Church*, the Court was compelled to act because the Constitutional rule applied in California was an abberation followed nowhere else.[331]

The Court made it express that it intended its decision to be taken seriously by land use planners. Sophistic game playing will not be tolerated:

> We view the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a '***substantial*** advanc[ing]' of a legitimate State interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.[332]

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326. *Id.* at 12-14.

327. Nollan v. California Coastal Comm'n, No. 86-133, slip op., p. 8, n. 2 (June 26, 1987).

328. *Ibid.*

329. A permit may be denied ". . . unless the denial would interfere so drastically with the [owner's] use of their property as to constitute a taking." *Id.* at 9-10.

330. *Id.* at 11. (The Court quoted with approval from the New Hampshire case quoted *supra* at text accompanying note 293.)

331. Slip op., p. 13. *See* discussion *supra* at text accompanying notes 286-94. Citing all of those cases, the Court stated that, "[o]ur conclusion on this point is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts." (Slip op., p. 13.) In further support, the Court cited the Amicus Curiae Brief written by the author of this article. (*Id.* at 14.)

332. *Id.* at 15.

Good intentions and worthwhile public plans cannot override the Fifth Amendment:

> California is free to advance its 'comprehensive program' [of beach access] if it wishes, by using its power of eminent domain for this 'public purpose,' . . . ; but if it wants an easement across [private] property, it must pay for it.[333]

Eminent domain lawyers will not be without questions to continue their employment.[334] However, after all these years, it is a fitting memorial to the Constitution's bicentennial to have the Court reaffirm that we have a government of limited power, and that the rights of individuals are protected from over-zealous exercises of governmental power.

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333. *Id.* at 15-16.

334. *See, e.g.*, note 8 *supra*.