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

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

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

LUCAS v. SOUTH CAROLINA COASTAL COUNCIL

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

SCALIA, J. In 1986, petitioner David H. Lucas paid $975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes. In 1988, however, the South Carolina Legislature enacted the Beachfront Management Act, S.C. Code § 48–39–250 *et seq*. (Supp. 1990) (Act), which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels. See § 48–39–290(A). A state trial court found that this prohibition rendered Lucas's parcels "valueless." . . . This case requires us to decide whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of "just compensation." . . .

South Carolina's expressed interest in intensively managing development activities in the so-called "coastal zone" dates from 1977 when, in the aftermath of Congress's passage of the federal Coastal Zone Management Act of 1972 . . . , the legislature enacted a Coastal Zone Management Act of its own. See S.C. Code § 48–39–10 *et seq*. (1987). In its original form, the South Carolina Act required owners of coastal zone land that qualified as a "critical area" . . . to obtain a permit from the newly created South Carolina Coastal Council (respondent here) prior to committing the land to a "use other than the use the critical area was devoted to on [September 28, 1977]." [Citation omitted.]

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

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

The Beachfront Management Act brought Lucas's plans to an abrupt end. Under that 1988 legislation, the Council was directed to establish a "baseline" connecting the landward-most "point[s] of erosion . . . during the past forty years" in the region of the Isle of Palms that includes Lucas's lots. [Citation omitted.] In action not challenged here, the Council fixed this baseline landward of Lucas's parcels. That was significant, for under the Act construction of occupable improvements was flatly prohibited seaward of a line drawn 20 feet landward of, and parallel to, the baseline [citation omitted]. The Act provided no exceptions. . . .

Lucas promptly filed suit in the South Carolina Court of Common Pleas, contending that the Beachfront Management Act's construction bar effected a taking of his property without just compensation. Lucas did not take issue with the validity of the Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives. Following a bench trial, the court agreed. . . . The trial court . . . found that the Beachfront Management Act decreed a permanent ban on construction insofar as Lucas's lots were concerned, and that this prohibition "deprive[d] Lucas of any reasonable economic use of the lots . . . , eliminated the unrestricted right of use, and render[ed] them valueless." . . . The court thus concluded that Lucas's properties had been "taken" by operation of the Act, and it ordered respondent to pay "just compensation" in the amount of $1,232,387.50. . . .

The Supreme Court of South Carolina reversed. It found dispositive what it described as Lucas's concession "that the Beachfront Management Act [was] properly and validly designed to preserve . . . South Carolina's beaches." [Citation omitted.] Failing an attack on the validity of the statute as such, the court believed itself bound to accept the "uncontested . . . findings" of the South Carolina legislature that new construction in the coastal zone—such as petitioner intended—threatened this public resource. [Citation omitted.] The Court ruled that when a regulation respecting the use of property is designed "to prevent serious public harm" . . . , no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value. . . .

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

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

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

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

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

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

Prior to Justice Holmes' exposition in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), it was generally thought that the Takings Clause reached only a "direct appropriation" of property [citation omitted], or the functional equivalent of a "practical ouster of [the owner's] possession." [Citations omitted.] Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 U.S., at 414–415. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." *Id*., at 415. These considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Ibid*.

Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70–odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "'set formula'" for determining how far is too far, preferring to "engag[e] in . . . essentially ad hoc, factual inquiries," *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978) (quoting *Goldblatt* v. *Hempstead*, 369 U.S. 590, 594 (1962)). See Epstein, Takings: Descent and Resurrection, 1987 Sup. Ct. Rev. 1, 4. We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. For example, in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), we determined that New York's law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking . . . , even though the facilities occupied at most only 1½ cubic feet of the landlords' property . . . .

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. See *Agins*, 447 U.S., at 260; see also *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U.S. 470, 495 (1987); *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 295–296 (1981).[3] As we have said on numerous

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

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

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

occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests *or denies an owner economically viable use of his land*." *Agins*, *supra*, at 260 (citations omitted) (emphasis added).[4]

We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. See *San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S., at 652 (Brennan, J., dissenting). "[F]or what is the land but the profits thereof [?]" 1 E. Coke, Institutes ch. 1, § 1 (1st Am. ed. 1812). Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," *Penn Central Transportation Co.*, 438 U.S., at 124, in a manner that secures an "average reciprocity of advantage" to everyone concerned. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S., at 415. And the *functional* basis for permitting the government, by regulation, to affect property values without compensation—that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *id.*, at 413—does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive

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

[4] Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme—and, we think, unsupportable—view of the relevant calculus, see *Penn Central Transportation Co.* v. *New York City*, 42 N.Y.2d 324, 333–334, 366 N.E.2d 1271, 1276–1277 (1977), aff'd, 438 U.S. 104 (1978), where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the taking claimant's other holdings in the vicinity.) Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. Compare *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 414 (1922) (law restricting subsurface extraction of coal held to effect a taking), with *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U.S. 470, 497–502 (1987) (nearly identical law held not to effect a taking); see also *id.*, at 515–520 (REHNQUIST, C.J., dissenting); Rose, *Mahon* Reconstructed: Why the Takings Issue is Still a Muddle, 57 S. Cal. L. Rev. 561, 566–569 (1984). The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.

options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. . . . As Justice Brennan explained: "From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property." *San Diego Gas & Elec. Co.*, *supra*, at 652 (Brennan, J., dissenting). The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation. [Citations omitted.] We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.[5] . . .

The trial court found Lucas's two beachfront lots to have been rendered valueless by respondent's enforcement of the coastal-zone construction ban.[6] Under Lucas's theory of the case, which rested upon our "no economically viable use" statements, that finding entitled him to compensation. Lucas believed it unnecessary to take issue with either the purposes behind the Beachfront Management Act, or the means chosen by the South Carolina Legislature to effectuate those purposes. The South Carolina Supreme Court, however, thought otherwise. In its view, the Beachfront Management Act was no ordinary enactment, but involved an exercise of South Carolina's "police powers" to mitigate the harm to the public interest that petitioner's use of his land might occasion. [Citation omitted.] By neglecting to dispute the findings enumerated in the Act or otherwise to challenge the legislature's purposes, petitioner "concede[d] that the beach/dune area of South Carolina's shores is an extremely valuable public resource; that the erection of new construction, *inter alia*, contributes to the erosion and destruction of this public

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[5] JUSTICE STEVENS criticizes the "deprivation of all economically beneficial use" rule as "wholly arbitrary", in that "[the] landowner whose property is diminished in value 95% recovers nothing," while the landowner who suffers a complete elimination of value "recovers the land's full value." . . . This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally. *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978). It is true that in at least *some* cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these "all-or-nothing" situations.

JUSTICE STEVENS similarly misinterprets our focus on "developmental" uses of property (the uses proscribed by the Beachfront Management Act) as betraying an "assumption that the only uses of property cognizable under the Constitution are *developmental* uses." . . . We make no such assumption. Though our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land, there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause. See, *e.g.*, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982) (interest in excluding strangers from one's land).

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

resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm." [Citation omitted.] In the court's view, these concessions brought petitioner's challenge within a long line of this Court's cases sustaining against Due Process and Takings Clause challenges the State's use of its "police powers" to enjoin a property owner from activities akin to public nuisances. See *Mugler* v. *Kansas*, 123 U.S. 623 (1887) (law prohibiting manufacture of alcoholic beverages); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915) (law barring operation of brick mill in residential area); *Miller* v. *Schoene*, 276 U.S. 272 (1928) (order to destroy diseased cedar trees to prevent infection of nearby orchards); *Goldblatt* v. *Hempstead*, 369 U.S. 590 (1962) (law effectively preventing continued operation of quarry in residential area).

It is correct that many of our prior opinions have suggested that "harmful or noxious uses" of property may be proscribed by government regulation without the requirement of compensation. For a number of reasons, however, we think the South Carolina Supreme Court was too quick to conclude that that principle decides the present case. The "harmful or noxious uses" principle was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power. . . . We made this very point in *Penn Central Transportation Co.*, where, in the course of sustaining New York City's landmarks preservation program against a takings challenge, we rejected the petitioner's suggestion that *Mugler* and the cases following it were premised on, and thus limited by, some objective conception of "noxiousness" . . . . "Harmful or noxious use" analysis was, in other words, simply the progenitor of our more contemporary statements that "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' . . . ." *Nollan*, *supra*, at 834 (quoting *Agins* v. *Tiburon*, 447 U.S., at 260); see also *Penn Central Transportation Co.*, *supra*, at 127; *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 387–388 (1926).

The transition from our early focus on control of "noxious" uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between "harm-preventing" and "benefit-conferring" regulation is often in the eye of the beholder. It is quite possible, for example, to describe in *either* fashion the ecological, economic, and aesthetic concerns that inspired the South Carolina legislature in the present case. One could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from "harming" South Carolina's ecological resources; or, instead, in order to achieve the "benefits" of an ecological preserve.[7] [Citations omitted.]

[7] In the present case, in fact, some of the "[South Carolina] legislature's 'findings'" to which the South Carolina Supreme Court purported to defer in characterizing the purpose of the Act as "harm-preventing" [citation omitted] seem to us phrased in "benefit-conferring" language instead. For example, they describe the importance of a construction ban in enhancing "South Carolina's annual tourism industry revenue," S.C. Code § 48–39250(1)(b) (Supp. 1991), in "provid[ing] habitat for numerous species of plants and animals, several of which are threatened or endangered," § 48–39–250(1)(c), and in "provid[ing] a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being." § 48–39–250(1)(d). It would be pointless to make the outcome of this case hang upon this terminology, since the same interests could readily be described in "harm-preventing" fashion.

JUSTICE BLACKMUN, however, apparently insists that we *must* make the outcome hinge (exclusively) upon the South Carolina Legislature's other, "harm-preventing" characterizations, focusing on the declaration that "prohibitions on building in front of the setback line are necessary to protect people and property from storms, high tides, and beach erosion." . . . He says "[n]othing in the record undermines [this] assessment" . . . , apparently seeing no significance in the fact that the statute permits owners of *existing* structures to remain (and even to rebuild if their structures are not "destroyed beyond repair," S.C. Code Ann. § 48–39–290(B)), and in the fact that the 1990 amendment authorizes the Council to issue

Whether one or the other of the competing characterizations will come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of real estate. . . . A given restraint will be seen as mitigating "harm" to the adjacent parcels or securing a "benefit" for them, depending upon the observer's evaluation of the relative importance of the use that the restraint favors. . . . Whether Lucas's construction of single-family residences on his parcels should be described as bringing "harm" to South Carolina's adjacent ecological resources thus depends principally upon whether the describer believes that the State's use interest in nurturing those resources is so important that any competing adjacent use must yield.[8]

When it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"—which require compensation—from regulatory deprivations that do not require compensation. *A fortiori* the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed. The South Carolina Supreme Court's approach would essentially nullify *Mahon*'s affirmation of limits to the noncompensable exercise of the police power. Our cases provide no support for this: None of them that employed the logic of "harmful use" prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land. See *Keystone Bituminous Coal Assn.*, 480 U.S., at 513–514 (REHNQUIST, C.J., dissenting).[9]

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.[10]

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

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

[9] *E.g.*, *Mugler* v. *Kansas*, 123 U.S. 623 (1887) (prohibition upon use of a building as a brewery; other uses permitted); *Plymouth Coal Co.* v. *Pennsylvania*, 232 U.S. 531 (1914) (requirement that "pillar" of coal be left in ground to safeguard mine workers; mineral rights could otherwise be exploited); *Reinman* v. *Little Rock*, 237 U.S. 171 (1915) (declaration that livery stable constituted a public nuisance; other uses of the property permitted); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915) (prohibition of brick manufacturing in residential area; other uses permitted); *Goldblatt* v. *Hempstead*, 369 U.S. 590 (1962) (prohibition on excavation; other uses permitted).

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

This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S., at 413. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale), see *Andrus* v. *Allard*, 444 U.S. 51, 66–67 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.[11]

Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S., at 426—though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title. Compare *Scranton* v. *Wheeler*, 179 U.S. 141, 163 (1900) (interests of "riparian owner in the submerged lands . . . bordering on a public navigable water" held subject to Government's navigational servitude), with *Kaiser Aetna* v. *United States*, 444 U.S., at 178–180 (imposition of navigational servitude on marina created and rendered navigable at private expense held to constitute a taking). We believe similar treatment must be accorded confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.[12]

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

[11] After accusing us of "launch[ing] a missile to kill a mouse" . . . , JUSTICE BLACKMUN expends a good deal of throw-weight of his own upon a noncombatant, arguing that our description of the "understanding" of land ownership that informs the Takings Clause is not supported by early American experience. That is largely true, but entirely irrelevant. The practices of the States *prior* to incorporation of the Takings and Just Compensation Clauses, see *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226 (1897)—which, as JUSTICE BLACKMUN acknowledges, occasionally included *outright physical appropriation* of land without compensation . . . —were out of accord with any plausible interpretation of those provisions. JUSTICE BLACKMUN is correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all . . . , but even he does not suggest (explicitly, at least) that we renounce the Court's contrary conclusion in *Mahon*. Since the text of the Clause can be read to encompass regulatory as well as physical deprivations (in contrast to the text originally proposed by Madison . . . ("No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation")[)], we decline to do so as well.

[12] The principal "otherwise" that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of "real and personal property, in cases of actual necessity, to prevent the spreading of a fire" or to forestall other grave threats to the lives and property of others. [Citations omitted.]

On this analysis, the owner of a lake bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit. . . . In light of our traditional resort to "existing rules or understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth (and Fourteenth) amendments, *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577 (1972); see, *e.g.*, *Ruckelshaus* v. *Monsanto Co*., 467 U.S. 986, 1011–1012 (1984); [further citation omitted], this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional. When, however, a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.

The "total taking" inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, see, *e.g.*, Restatement (Second) of Torts §§ 826, 827, the social value of the claimant's activities and their suitability to the locality in question, see, *e.g.*, *id.*, §§ 828(a) and (b), 831, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, see, *e.g.*, *id.*, §§ 827(e), 828(c), 830. The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so, see Restatement (Second) of Torts, *supra*, § 827, comment g. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the "essential use" of land [citation omitted]. The question, however, is one of state law to be dealt with on remand. We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*. As we have said, a "State, by *ipse dixit*, may not transform private property into public property without compensation . . . ." [Citation omitted.] Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.[13]

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

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

So ordered.

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

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

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

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

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

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

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

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

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

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

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

Petitioner Lucas is a contractor, manager, and part owner of the Wild Dune development on the Isle of Palms. He has lived there since 1978. In December 1986, he purchased two of the last four pieces of vacant property in the development.[1] The area is notoriously unstable. In roughly half of the last 40 years, all or part of petitioner's property was part of the beach or flooded twice daily by the ebb and flow of the tide. . . . Between 1957 and 1963, petitioner's property was under water. . . . Between 1963 and 1973 the shoreline was 100 to 150 feet onto petitioner's property. . . . In 1973 the first line of stable vegetation was about halfway through the property. . . . Between 1981 and 1983, the Isle of Palms issued 12 emergency orders for sandbagging to protect property in the Wild Dune development. . . . Determining that local habitable structures were in imminent danger of collapse, the Council issued permits for two rock revetments to protect condominium developments near petitioner's property from erosion; one of the revetments extends more than halfway onto one of his lots. . . .

The South Carolina Supreme Court found that the Beach Management Act did not take petitioner's property without compensation. The decision rested on two premises that until today were unassailable—that the State has the power to prevent any use of property it finds to be harmful to its citizens, and that a state statute is entitled to a presumption of constitutionality.

The Beachfront Management Act includes a finding by the South Carolina General Assembly that the beach/dune system serves the purpose of "protect[ing] life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner." § 48–39–250(1)(a). The General Assembly also found that "development unwisely has been sited too close to the [beach/dune] system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property." § 48–39–250(4); see also § 48–39–250(6) (discussing the need to "afford the beach/dune system space to accrete and erode").

If the state legislature is correct that the prohibition on building in front of the setback line prevents serious harm, then, under this Court's prior cases, the Act is constitutional. "Long ago it was recognized that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community, and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U.S. 470, 491–492 (1987) . . . .

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

The Court consistently has upheld regulations imposed to arrest a significant threat to the common welfare, whatever their economic effect on the owner. See *e.g.*, *Goldblatt* v. *Hempstead*, 369 U.S. 590, 592–593 (1962); *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); *Gorieb* v. *Fox*, 274 U.S. 603, 608 (1927); *Mugler* v. *Kansas*, 123 U.S. 623 (1887). . . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I dissent.

STEVENS, J., dissenting. . . .

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

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

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

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

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

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

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

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

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

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

Accordingly, I respectfully dissent.

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

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

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

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

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

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

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

Note

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

PALAZZOLO v. RHODE ISLAND

Supreme Court of the United States
533 U.S. 606 (2001)

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined, and in which STEVENS, J., joined as to Part II-A. O'CONNOR, J., and SCALIA, J., filed concurring opinions. STEVENS, J., filed an opinion concurring in part and dissenting in part. GINSBURG, J., filed a dissenting opinion, in which SOUTER and BREYER, JJ., joined. BREYER, J., filed a dissenting opinion.

KENNEDY, J. . . .The Rhode Island Supreme Court . . . recited multiple grounds for rejecting petitioner's suit. The court held, first, that petitioner's takings claim was not ripe . . . ; second,

that petitioner had no right to challenge regulations predating 1978, when he succeeded to legal ownership of the property from SGI . . . ; and third, that the claim of deprivation of all economically beneficial use was contradicted by undisputed evidence that he had $ 200,000 in development value remaining on an upland parcel of the property . . . . In addition to holding petitioner could not assert a takings claim based on the denial of all economic use the court concluded he could not recover under the more general test of *Penn Central Transp. Co. v. New York City, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978).* On this claim, too, the date of acquisition of the parcel was found determinative, and the court held he could have had "no reasonable investment-backed expectations that were affected by this regulation" because it predated his ownership, *746 A.2d at 717;* see also *Penn Central, supra, at 124*.

We disagree with the Supreme Court of Rhode Island as to the first two of these conclusions; and, we hold, the court was correct to conclude that the owner is not deprived of all economic use of his property because the value of upland portions is substantial. We remand for further consideration of the claim under the principles set forth in *Penn Central*.

II

The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897),* prohibits the government from taking private property for public use without just compensation. The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use. Our cases establish that even a minimal "permanent physical occupation of real property" requires compensation under the Clause. *Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982).* In *Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 67 L. Ed. 322, 43 S. Ct. 158 (1922),* the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. In Justice Holmes' well-known, if less than self-defining, formulation, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." *Id. at 415*.

Since Mahon, we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking. First, we have observed, with certain qualifications, see *infra* at 19–21, that a regulation which "denies all economically beneficial or productive use of land" will require compensation under the Takings Clause. *Lucas, 505 U.S. at 1015;* see also *id. at 1035* (KENNEDY, J., concurring); *Agins v. City of Tiburon, 447 U.S. 255, 261, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980).* Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. *Penn Central, supra, at 124*. These inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960).*

Petitioner seeks compensation under these principles. At the outset, however, we face the two threshold considerations invoked by the state court to bar the claim: ripeness, and acquisition which postdates the regulation.

A

In *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985),* the Court explained the requirement that a

takings claim must be ripe. The Court held that a takings claim challenging the application of land-use regulations is not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id. at 186*. A final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of "all economically beneficial use" of the property, see *Lucas*, *supra*, *at 1015*, or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred, see *Penn Central*, *supra*, *at 124*. These matters cannot be resolved in definitive terms until a court knows "the extent of permitted development" on the land in question. *MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 351, 91 L. Ed. 2d 285, 106 S. Ct. 2561 (1986)*.

[Writing for the majority, Justice Kennedy concluded that the requirement was met in this case.] . . .

B

We turn to the second asserted basis for declining to address petitioner's takings claim on the merits. When the Council promulgated its wetlands regulations, the disputed parcel was owned not by petitioner but by the corporation of which he was sole shareholder. When title was transferred to petitioner by operation of law, the wetlands regulations were in force. The state court held the postregulation acquisition of title was fatal to the claim for deprivation of all economic use, *746 A.2d at 716*, and to the *Penn Central* claim, *id. at 717*. While the first holding was couched in terms of background principles of state property law, see *Lucas*, *505 U.S. at 1015*, and the second in terms of petitioner's reasonable investment-backed expectations, see *Penn Central*, *438 U.S. at 124*, the two holdings together amount to a single, sweeping, rule: A purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking.

The theory underlying the argument that post-enactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. See, *e.g., Phillips v. Washington Legal Foundation, 524 U.S. 156, 163, 141 L. Ed. 2d 174, 118 S. Ct. 1925 (1998)*. So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.

The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. See *Pennsylvania Coal Co., 260 U.S. at 413* ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law"). The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Nor does the justification of notice take into account the effect on owners at the time of enactment, who are prejudiced as well . . . . The [State's] proposed rule is . . . capricious in effect.

The young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions. The Takings Clause is not so quixotic. A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken. . . .

It is argued that [our conclusion on this point is at odds with our] decision in *Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992)*. In *Lucas* the Court observed that a landowner's ability to recover for a government deprivation of all economically beneficial use of property is not absolute but instead is confined by limitations on the use of land which "inhere in the title itself." *Id. at 1029*. This is so, the Court reasoned, because the landowner is constrained by those "restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id. at 1029*. It is asserted here that *Lucas* stands for the proposition that any new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment.

We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here. It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title. This relative standard would be incompatible with our description of the concept in *Lucas*, which is explained in terms of those common, shared understandings of permissible limitations derived from a State's legal tradition, see *Lucas, supra, at 1029–1030*. A regulation or common-law rule cannot be a background principle for some owners but not for others. The determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed. See *Lucas, supra, at 1030* ("The 'total taking' inquiry we require today will ordinarily entail . . . analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities"). A law does not become a background principle for subsequent owners by enactment itself. *Lucas* did not overrule our holding in *Nollan*, which, as we have noted, is based on essential Takings Clause principles.

For reasons we discuss next, the state court will not find it necessary to explore these matters on remand in connection with the claim that all economic use was deprived; it must address, however, the merits of petitioner's claim under *Penn Central*. That claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction.

III

As the case is ripe, and as the date of transfer of title does not bar petitioner's takings claim, we have before us the alternative ground relied upon by the Rhode Island Supreme Court in ruling upon the merits of the takings claims. It held that all economically beneficial use was not deprived because the uplands portion of the property can still be improved. On this point, we agree with the court's decision. Petitioner accepts the Council's contention and the state trial court's finding that his parcel retains $ 200,000 in development value under the State's wetlands regulations. He asserts, nonetheless, that he has suffered a total taking and contends the Council cannot sidestep the holding in *Lucas* "by the simple expedient of leaving a landowner a few crumbs of value." Brief for Petitioner 37.

Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest. This is not the situation of the landowner in this case, however. A regulation permitting a landowner to build a substantial

residence on an 18–acre parcel does not leave the property "economically idle." *Lucas, supra, at 1019.*

In his brief submitted to us petitioner attempts to revive this part of his claim by reframing it. He argues, for the first time, that the upland parcel is distinct from the wetlands portions, so he should be permitted to assert a deprivation limited to the latter. This contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation Law," *80 Harv. L. Rev. 1165, 1192 (1967)*. Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, see, *e.g.*, *Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 497, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987)*; but we have at times expressed discomfort with the logic of this rule, see *Lucas, supra, at 1016–1017, n. 7*, a sentiment echoed by some commentators, see, *e.g.*, Epstein, Takings: Descent and Resurrection, *1987 Sup. Ct. Rev. 1, 16–17 (1987)*; Fee, Unearthing the Denominator in Regulatory Takings Claims, *61 U. Chi. L. Rev. 1535 (1994)*. Whatever the merits of these criticisms, we will not explore the point here. Petitioner did not press the argument in the state courts, and the issue was not presented in the petition for certiorari. The case comes to us on the premise that petitioner's entire parcel serves as the basis for his takings claim, and, so framed, the total deprivation argument fails. . . .

For the reasons we have discussed, the State Supreme Court erred in finding petitioner's claims were unripe and in ruling that acquisition of title after the effective date of the regulations barred the takings claims. The court did not err in finding that petitioner failed to establish a deprivation of all economic value, for it is undisputed that the parcel retains significant worth for construction of a residence. The claims under the *Penn Central* analysis were not examined, and for this purpose the case should be remanded.

The judgment of the Rhode Island Supreme Court is affirmed in part and reversed in part, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

O'CONNOR, J., concurring. I join the opinion of the Court but with my understanding of how the issues discussed in Part II-B of the opinion must be considered on remand.

Part II-B of the Court's opinion addresses the circumstance, present in this case, where a takings claimant has acquired title to the regulated property after the enactment of the regulation at issue. As the Court holds, the Rhode Island Supreme Court erred in effectively adopting the sweeping rule that the preacquisition enactment of the use restriction *ipso facto* defeats any takings claim based on that use restriction. Accordingly, the Court holds that petitioner's claim under *Penn Central Transp. Co. v. New York City, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978)*, "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction."

The more difficult question is what role the temporal relationship between regulatory enactment and title acquisition plays in a proper *Penn Central* analysis. Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance. Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine. Further, the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.

The Fifth Amendment forbids the taking of private property for public use without just compensation. We have recognized that this constitutional guarantee is "'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Penn Central, supra, at 123–124* (quoting *Armstrong v. United States, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960)*). The concepts of "fairness and justice" that underlie the Takings Clause, of course, are less than fully determinate . . . .

We have "identified several factors that have particular significance" in these "essentially ad hoc, factual inquiries." *Penn Central, 438 U.S. at 124*. Two such factors are "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Ibid*. Another is "the character of the governmental action." . . . *Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required.

The Rhode Island Supreme Court concluded that, because the wetlands regulations predated petitioner's acquisition of the property at issue, petitioner lacked reasonable investment-backed expectations and hence lacked a viable takings claim. *746 A.2d 707, 717 (2000)*. The court erred in elevating what it believed to be "[petitioner's] lack of reasonable investment-backed expectations" to "dispositive" status. Ibid. Investment-backed expectations, though important, are not talismanic under *Penn Central*. Evaluation of the degree of interference with investment-backed expectations instead is one factor that points toward the answer to the question whether the application of a particular regulation to particular property "goes too far." *Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (1922)*.

. . . We . . . have never held that a takings claim is defeated simply on account of the lack of a personal financial investment by a postenactment acquirer of property, such as a donee, heir, or devisee. Cf. *Hodel v. Irving, 481 U.S. 704, 714–718, 95 L. Ed. 2d 668, 107 S. Ct. 2076 (1987)*. Courts instead must attend to those circumstances which are probative of what fairness requires in a given case.

If investment-backed expectations are given exclusive significance in the *Penn Central* analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights upon passage of title. On the other hand, if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost.[*] As I understand it, our decision today does not remove the regulatory backdrop against which an owner takes title to property from the purview of the *Penn Central* inquiry. It simply restores balance to that inquiry. Courts properly consider the effect of existing regulations under the rubric

[*] JUSTICE SCALIA'S inapt "government-as-thief" simile is symptomatic of the larger failing of his opinion, which is that he appears to conflate two questions. The first question is whether the enactment or application of a regulation constitutes a valid exercise of the police power. The second question is whether the State must compensate a property owner for a diminution in value effected by the State's exercise of its police power. We have held that "the 'public use' requirement [of the Takings Clause] is . . . coterminous with the scope of a sovereign's police powers." *Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984)*. The relative timing of regulatory enactment and title acquisition, of course, does not affect the analysis of whether a State has acted within the scope of these powers in the first place. That issue appears to be the one on which JUSTICE SCALIA focuses, but it is not the matter at hand. The relevant question instead is the second question described above. It is to this inquiry that "investment-backed expectations" and the state of regulatory affairs upon acquisition of title are relevant under *Penn Central*. JUSTICE SCALIA'S approach therefore would seem to require a revision of the *Penn Central* analysis that this Court has not undertaken.

of investment-backed expectations in determining whether a compensable taking has occurred. As before, the salience of these facts cannot be reduced to any "set formula." *Penn Central, 438 U.S. at 124* (internal quotation marks omitted). The temptation to adopt what amount to *per se* rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context. The court below therefore must consider on remand the array of relevant factors under *Penn Central* before deciding whether any compensation is due.

SCALIA, J., concurring. I write separately to make clear that my understanding of how the issues discussed in Part II-B of the Court's opinion must be considered on remand is not JUSTICE O'CONNOR'S.

The principle that underlies her separate concurrence is that it may in some (unspecified) circumstances be "unfai[r]," and produce unacceptable "windfalls," to allow a subsequent purchaser to nullify an unconstitutional partial taking (though, inexplicably, not an unconstitutional total taking) by the government. The polar horrible, presumably, is the situation in which a sharp real estate developer, realizing (or indeed, simply gambling on) the unconstitutional excessiveness of a development restriction that a naive landowner assumes to be valid, purchases property at what it would be worth subject to the restriction, and then develops it to its full value (or resells it at its full value) after getting the unconstitutional restriction invalidated.

This can, I suppose, be called a windfall —though it is not much different from the windfalls that occur every day at stock exchanges or antique auctions, where the knowledgeable (or the venturesome) profit at the expense of the ignorant (or the risk averse). There is something to be said (though in my view not much) for pursuing abstract "fairness" by requiring part or all of that windfall to be returned to the naive original owner, who presumably is the "rightful" owner of it. But there is nothing to be said for giving it instead to the *government* —which not only did not lose something it owned, but is both the *cause* of the miscarriage of "fairness" and the only one of the three parties involved in the miscarriage (government, naive original owner, and sharp real estate developer) which *acted unlawfully* — indeed *unconstitutionally*. JUSTICE O'CONNOR would eliminate the windfall by giving the malefactor the benefit of its malefaction. It is rather like eliminating the windfall that accrued to a purchaser who bought property at a bargain rate from a thief clothed with the indicia of title, by making him turn over the "unjust" profit *to the thief*.[**]

In my view, the fact that a restriction existed at the time the purchaser took title (other than a restriction forming part of the "background principles of the State's law of property and nuisance," *Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992)*) should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking. The "investment-backed expectations" that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional. Which is to say that a *Penn Central* taking, see *Penn Central Transp. Co. v. New York City, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978)*, no less than a total taking, is not absolved by the transfer of title.

GINSBURG, J. with whom SOUTER, J. and BREYER, J. join, dissenting. . . .

[**] Contrary to JUSTICE O'CONNOR'S assertion, my contention of governmental wrongdoing does not assume that the government exceeded its police powers by ignoring the "public use" requirement of the Takings Clause, see *Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984)*. It is wrong for the government to take property, *even* for public use, without tendering just compensation.

[Justice Ginsburg contended at length that Palazzolo's claim was not yet ripe for adjudication because, in her view, the state of the administrative proceedings between Palazzolo and the regulatory authorities in Westerly left still uncertain "the nature and extent" of the development that eventually would be permitted under the regulation in question, citing *MacDonald, 477 U.S. at 351*. She would accordingly affirm the Rhode Island Supreme Court's judgment.]

BREYER, J., dissenting. I agree with JUSTICE GINSBURG that Palazzolo's takings claim is not ripe for adjudication, and I join her opinion in full. Ordinarily I would go no further. But because the Court holds the takings claim to be ripe and goes on to address some important issues of substantive takings law, I add that, given this Court's precedents, I would agree with JUSTICE O'CONNOR that the simple fact that a piece of property has changed hands (for example, by inheritance) does not always and automatically bar a takings claim. Here, for example, without in any way suggesting that Palazzolo has any valid takings claim, I believe his postregulatory acquisition of the property (through automatic operation of law) by itself should not prove dispositive.

As JUSTICE O'CONNOR explains, under *Penn Central Transp. Co. v. New York City, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978)*, much depends upon whether, or how, the timing and circumstances of a change of ownership affect whatever reasonable investment-backed expectations might otherwise exist. Ordinarily, such expectations will diminish in force and significance — rapidly and dramatically — as property continues to change hands over time. I believe that such factors can adequately be taken into account within the *Penn Central* framework.

Several *amici* have warned that to allow complete regulatory takings claims, see *Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992)*, to survive changes in land ownership could allow property owners to manufacture such claims by strategically transferring property until only a nonusable portion remains. See, e.g., Brief for Daniel W. Bromley et al. as *Amici Curiae* 7–8. But I do not see how a constitutional provision concerned with "'fairness and justice,'" *Penn Central, supra, at 123–124* (quoting *Armstrong v. United States, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960)*), could reward any such strategic behavior.

STEVENS, J., concurring in part and dissenting in part. . . . [W]hile I join Part II-A of the [Court's] opinion, I dissent from the judgment and, in particular, from Part II-B.

I

Though States and local governments have broad power to adopt regulations limiting land usage, those powers are constrained by the Constitution and by other provisions of state law. In adopting land-use restrictions, local authorities must follow legally valid and constitutionally sufficient procedures and must adhere to whatever substantive requirements are imposed by the Constitution and supervening law. If a regulating body fails to adhere to its procedural or substantive obligations in developing land-use restrictions, anyone adversely impacted by the restrictions may challenge their validity in an injunctive action. If the application of such restriction to a property owner would cause her a "direct and substantial injury," *e.g., Chicago v. Atchison, T. & S. F. R. Co., 357 U.S. 77, 83, 2 L. Ed. 2d 1174, 78 S. Ct. 1063 (1958)*, I have no doubt that she has standing to challenge the restriction's validity whether she acquired title to the property before or after the regulation was adopted. For, as the Court correctly observes, even future generations "have a right to challenge unreasonable limitations on the use and value of land." *Ante*, at 18.

It by no means follows, however, that, as the Court assumes, a succeeding owner may obtain compensation for a taking of property from her predecessor in interest. A taking is a discrete event, a governmental acquisition of private property for which the state is required to provide

just compensation. Like other transfers of property, it occurs at a particular time, that time being the moment when the relevant property interest is alienated from its owner.

Precise specification of the moment a taking occurred and of the nature of the property interest taken is necessary in order to determine an appropriately compensatory remedy. For example, the amount of the award is measured by the value of the property at the time of taking, not the value at some later date. Similarly, interest on the award runs from that date. Most importantly for our purposes today, it is the person who owned the property at the time of the taking that is entitled to the recovery. See, *e.g.*, *Danforth v. United States*, 308 U.S. 271, 284, 84 L. Ed. 240, 60 S. Ct. 231 (1939) ("For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment"). The rationale behind that rule is true whether the transfer of ownership is the result of an arm's-length negotiation, an inheritance, or the dissolution of a bankrupt debtor. Cf. *United States v. Dow, 357 U.S. 17, 20–21, 2 L. Ed. 2d 1109, 78 S. Ct. 1039 (1958).*

II

Much of the difficulty of this case stems from genuine confusion as to when the taking Palazzolo alleges actually occurred. According to Palazzolo's theory of the case, the owners of his Westerly, Rhode Island, property possessed the right to fill the wetland portion of the property at some point in the not-too-distant past. In 1971, the State of Rhode Island passed a statute creating the Rhode Island Coastal Resources Management Council (Council) and delegating the Council the authority to promulgate regulations restricting the usage of coastal land . . . . The Council promptly adopted regulations that, *inter alia*, effectively foreclosed petitioner from filling his wetlands. As the regulations nonetheless provided for a process through which petitioner might seek permission to fill the wetlands, he filed two applications for such permission during the 1980s, both of which were denied.

The most natural reading of petitioner's complaint is that the regulations in and of themselves precluded him from filling the wetlands, and that their adoption therefore constituted the alleged taking. This reading is consistent with the Court's analysis in Part II-A of its opinion (which I join) in which the Court explains that petitioner's takings claims are ripe for decision because respondents' wetlands regulations unequivocally provide that there can be "no fill for any likely or foreseeable use." If it is the regulations themselves of which petitioner complains, and if they did, in fact, diminish the value of his property, they did so when they were adopted.

To the extent that the adoption of the regulations constitute the challenged taking, petitioner is simply the wrong party to be bringing this action. If the regulations imposed a compensable injury on anyone, it was on the owner of the property at the moment the regulations were adopted. Given the trial court's finding that petitioner did not own the property at that time, in my judgment it is pellucidly clear that he has no standing to claim that the promulgation of the regulations constituted a taking of any part of the property that he subsequently acquired.

His lack of standing does not depend, as the Court seems to assume, on whether or not petitioner "is deemed to have notice of an earlier-enacted restriction." If those early regulations changed the character of the owner's title to the property, thereby diminishing its value, petitioner acquired only the net value that remained after that diminishment occurred. Of course, if, as respondent contends, even the prior owner never had any right to fill wetlands, there never was a basis for the alleged takings claim in the first place. But accepting petitioner's theory of the case, he has no standing to complain that preacquisition events may have reduced the value of the property that he acquired. If the regulations are invalid, either because improper procedures were followed when they were adopted, or because they have somehow gone "too far," *Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (1922)*, petitioner may seek to enjoin their enforcement, but he has no right to recover compensation for the value of property

taken from someone else. A new owner may maintain an ejectment action against a trespasser who has lodged himself in the owner's orchard but surely could not recover damages for fruit a trespasser spirited from the orchard before he acquired the property. . . .

III

At oral argument, petitioner contended that the taking in question occurred in 1986, when the Council denied his final application to fill the land. Tr. of Oral Arg. 16. Though this theory, to the extent that it was embraced within petitioner's actual complaint, complicates the issue, it does not alter my conclusion that the prohibition on filling the wetlands does not take from Palazzolo any property right he ever possessed.

The title Palazzolo took by operation of law in 1978 was limited by the regulations then in place to the extent that such regulations represented a valid exercise of the police power. For the reasons expressed above, I think the regulations barred petitioner from filling the wetlands on his property. At the very least, however, they established a rule that such lands could not be filled unless the Council exercised its authority to make exceptions to that rule under certain circumstances. Cf. App. to Brief for Respondents A-13 (laying out narrow circumstances under which the Council retains the discretion to grant a "special exception"). Under the reading of the regulations most favorable to Palazzolo, he acquired no more than the right to a discretionary determination by the Council as to whether to permit him to fill the wetlands. As his two hearings before that body attest, he was given the opportunity to make a presentation and receive such a determination. Thus, the Council properly respected whatever limited rights he may have retained with regard to filling the wetlands . . . .

Though the majority leaves open the possibility that the scope of today's holding may prove limited, see *ante*, at 20–21 (discussing limitations implicit in "background principles" exception); see also *ante*, at 1–4 (O'CONNOR, J., concurring) (discussing importance of the timing of regulations for the evaluation of the merits of a takings claim); *ante*, at 1–2 (BREYER, J., dissenting) (same), the extension of the right to compensation to individuals other than the direct victim of an illegal taking admits of no obvious limiting principle. If the existence of valid land-use regulations does not limit the title that the first postenactment purchaser of the property inherits, then there is no reason why such regulations should limit the rights of the second, the third, or the thirtieth purchaser. Perhaps my concern is unwarranted, but today's decision does raise the spectre of a tremendous — and tremendously capricious — one-time transfer of wealth from society at large to those individuals who happen to hold title to large tracts of land at the moment this legal question is permanently resolved.

IV

In the final analysis, the property interest at stake in this litigation is the right to fill the wetlands on the tract that petitioner owns. Whether either he or his predecessors in title ever owned such an interest, and if so, when it was acquired by the State, are questions of state law. If it is clear — as I think it is and as I think the Court's disposition of the ripeness issue assumes — that any such taking occurred before he became the owner of the property, he has no standing to seek compensation for that taking. On the other hand, if the only viable takings claim has a different predicate that arose later, that claim is not ripe and the discussion in Part II-B of the Court's opinion is superfluous dictum. In either event, the judgment of the Rhode Island Supreme Court should be affirmed in its entirety.

MURR v. WISCONSIN

Supreme Court of the United States
582 US ___ (2017) [from the slip opinion]

JUSTICE KENNEDY delivered the opinion of the Court [in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined].

The classic example of a property taking by the government is when the property has been occupied or otherwise seized. In the case now before the Court, petitioners contend that governmental entities took their real property—an undeveloped residential lot—not by some physical occupation but instead by enacting burdensome regulations that forbid its improvement or separate sale because it is classified as substandard in size. The relevant governmental entities are the respondents.

Against the background justifications for the challenged restrictions, respondents contend there is no regulatory taking because petitioners own an adjacent lot. The regulations, in effecting a merger of the property, permit the continued residential use of the property including for a single improvement to extend over both lots. This retained right of the landowner, respondents urge, is of sufficient offsetting value that the regulation is not severe enough to be a regulatory taking. To resolve the issue whether the landowners can insist on confining the analysis just to the lot in question, without regard to their ownership of the adjacent lot, it is necessary to discuss the background principles that define regulatory takings.

I

A

The St. Croix River originates in northwest Wisconsin and flows approximately 170 miles until it joins the Mississippi River, forming the boundary between Minnesota and Wisconsin for much of its length. The lower portion of the river slows and widens to create a natural water area known as Lake St. Croix. Tourists and residents of the region have long extolled the picturesque grandeur of the river and surrounding area. *E.g.*, E. Ellett, Summer Rambles in the West 136–137 (1853).

Under the Wild and Scenic Rivers Act, the river was designated, by 1972, for federal protection. §3(a)(6), 82 Stat. 908, 16 U.S. C. §1274(a)(6) (designating Upper St. Croix River); Lower Saint Croix River Act of 1972, §2, 86 Stat. 1174, 16 U.S. C. §1274(a)(9) (adding Lower St. Croix River). The law required the States of Wisconsin and Minnesota to develop "a management and development program" for the river area. 41 Fed. Reg. 26237 (1976). In compliance, Wisconsin authorized the State Department of Natural Resources to promulgate rules limiting development in order to "guarantee the protection of the wild, scenic and recreational qualities of the river for present and future generations." Wis. Stat. §30.27(l) (1973).

Petitioners are two sisters and two brothers in the Murr family. Petitioners' parents arranged for them to receive ownership of two lots the family used for recreation along the Lower St. Croix River in the town of Troy, Wisconsin. The lots are adjacent, but the parents purchased them separately, put the title of one in the name of the family business, and later arranged for transfer of the two lots, on different dates, to petitioners. The lots, which are referred to in this litigation as Lots E and F, are described in more detail below.

For the area where petitioners' property is located, the Wisconsin rules prevent the use of lots as separate building sites unless they have at least one acre of land suitable for development. Wis. Admin. Code §§ NR 118.04(4), 118.03(27), 118.06(1)(a)(2)(a), 118.06(1)(b) (2017). A grandfather clause relaxes this restriction for substandard lots which were "in separate ownership from abutting lands" on January 1, 1976, the effective date of the regulation. § NR 118.08(4)(a)(1). The clause permits the use of qualifying lots as separate building sites. The rules

also include a merger provision, however, which provides that adjacent lots under common ownership may not be "sold or developed as separate lots" if they do not meet the size requirement. § NR 118.08(4)(a)(2). The Wisconsin rules require localities to adopt parallel provisions, see § NR 118.02(3), so the St. Croix County zoning ordinance contains identical restrictions, see St. Croix County, Wis., Ordinance §17.361.4.a (2005). The Wisconsin rules also authorize the local zoning authority to grant variances from the regulations where enforcement would create" unnecessary hardship." § NR 118.09(4)(b); St. Croix County Ordinance §17.09.232.

B

Petitioners' parents purchased Lot F in 1960 and built a small recreational cabin on it. In 1961, they transferred title to Lot F to the family plumbing company. In 1963, they purchased neighboring Lot E, which they held in their own names. The lots have the same topography. A steep bluff cuts through the middle of each, with level land suitable for development above the bluff and next to the water below it. The line dividing Lot E from Lot F runs from the riverfront to the far end of the property, crossing the bluff top along the way. Lot E has approximately 60 feet of river frontage, and Lot F has approximately 100 feet. Though each lot is approximately 1.25 acres in size, because of the waterline and the steep bank they each have less than one acre of land suitable for development. Even when combined, the lots' buildable land area is only 0.98 acres due to the steep terrain.

The lots remained under separate ownership, with Lot F owned by the plumbing company and Lot E owned by petitioners' parents, until transfers to petitioners. Lot F was conveyed to them in 1994, and Lot E was conveyed to them in 1995. *Murr* v. *St. Croix County Bd. of Adjustment*, 2011 WI App 29, 332 Wis. 2d 172, 177–178, 184–185, 796 N. W. 2d 837, 841, 844 (2011); 2015 WI App 13,359 Wis. 2d 675, 859 N. W. 2d 628 (unpublished opinion), App. to Pet. for Cert. A–3, ¶¶4–5. (There are certain ambiguities in the record concerning whether the lots had merged earlier, but the parties and the courts below appear to have assumed the merger occurred upon transfer to petitioners.)

A decade later, petitioners became interested in moving the cabin on Lot F to a different portion of the lot and selling Lot E to fund the project. The unification of the lots under common ownership, however, had implicated the state and local rules barring their separate sale or development. Petitioners then sought variances from the St. Croix County Board of Adjustment to enable their building and improvement plan, including a variance to allow the separate sale or use of the lots. The Board denied the requests, and the state courts affirmed in relevant part. In particular, the Wisconsin Court of Appeals agreed with the Board's interpretation that the local ordinance "effectively merged" Lots E and F, so petitioners "could only sell or build on the single larger lot." *Murr*, *supra*, at 184, 796 N. W. 2d, at 844.

Petitioners filed the present action in state court, alleging that the state and county regulations worked a regulatory taking by depriving them of "all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot." App. 9. The parties each submitted appraisal numbers to the trial court. Respondents' appraisal included values of $698,300 for the lots together as regulated; $771,000 for the lots as two distinct build-able properties; and $373,000 for Lot F as a single lot with improvements. Record 17–55, 17–56. Petitioners' appraisal included an unrebutted, estimated value of $40,000 for Lot E as an undevelopable lot, based on the counterfactual assumption that it could be sold as a separate property. *Id*., at 22–188.

The Circuit Court of St. Croix County granted summary judgment to the State, explaining that petitioners retained "several available options for the use and enjoyment of their property." Case No. 12–CV–258 (Oct. 31, 2013), App. to Pet. for Cert. B–9. For example, they could preserve the existing cabin, relocate the cabin, or eliminate the cabin and build a new residence on Lot E, on

Lot F, or across both lots. The court also found petitioners had not been deprived of all economic value of their property. Considering the valuation of the property as a single lot versus two separate lots, the court found the market value of the property was not significantly affected by the regulations because the decrease in value was less than 10 percent. *Ibid.*

The Wisconsin Court of Appeals affirmed. The court explained that the regulatory takings inquiry required it to "'first determine what, precisely, is the property at issue.'" *Id.*, at A–9, ¶17. Relying on Wisconsin Supreme Court precedent in *Zealy* v. *Waukesha*, 201 Wis. 2d 365, 548 N. W. 2d 528 (1996), the Court of Appeals rejected petitioners' request to analyze the effect of the regulation son Lot E only. Instead, the court held the takings analysis "properly focused" on the regulations' effect "on the Murrs' property as a whole"—that is, Lots E and F together. App. to Pet. for Cert. A–12, ¶22.

Using this framework, the Court of Appeals concluded the merger regulations did not effect a taking. In particular, the court explained that petitioners could not reasonably have expected to use the lots separately because they were "'charged with knowledge of the existing zoning laws'" when they acquired the property. *Ibid*. (quoting *Murr*, *supra*, at 184, 796 N. W. 2d, at 844). Thus, "even if [petitioners] did intend to develop or sell Lot E separately, that expectation of separate treatment became unreasonable when they chose to acquire Lot E in 1995, after their having acquired Lot F in 1994." App. to Pet. for Cert. A– 17, ¶30. The court also discounted the severity of the economic impact on petitioners' property, recognizing the Circuit Court's conclusion that the regulations diminished the property's combined value by less than 10 percent. The Supreme Court of Wisconsin denied discretionary review. This Court granted certiorari, 577 U.S. ___ (2016).

II

A

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." The Clause is made applicable to the States through the Fourteenth Amendment. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226 (1897). As this Court has recognized, the plain language of the Takings Clause "requires the payment of compensation whenever the government acquires private property for a public purpose," see *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002), but it does not address in specific terms the imposition of regulatory burdens on private property. Indeed, "[p]rior to Justice Holmes's exposition in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), it was generally thought that the Takings Clause reached only a direct appropriation of property, or the functional equivalent of a practical ouster of the owner's possession," like the permanent flooding of property. *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (citation, brackets, and internal quotation marks omitted); accord, *Horne* v. *Department of Agriculture*, 576 U.S. ___, ___ (2015) (slip op., at 7); see also *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982). *Mahon*, however, initiated this Court's regulatory takings jurisprudence, declaring that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S., at 415. A regulation, then, can be so burdensome as to become a taking, yet the *Mahon* Court did not formulate more detailed guidance for determining when this limit is reached.

In the near century since *Mahon*, the Court for the most part has refrained from elaborating this principle through definitive rules. This area of the law has been characterized by "ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances." *Tahoe-Sierra, supra,* at 322 (citation and internal quotation marks omitted). The Court has, however, stated two guidelines relevant here for determining when government regulation is so onerous that it constitutes a taking. First, "with certain qualifications . . . a regulation which 'denies all economically beneficial or productive use of land' will require

compensation under the Takings Clause." *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 617 (2001) (quoting *Lucas*, *supra*, at 1015). Second, when a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on "a complex of factors," including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Palazzolo*, *supra*, at 617 (citing *Penn Central Transp. Co*. v. *New York City*, 438 U.S. 104, 124 (1978)).

By declaring that the denial of all economically beneficial use of land constitutes a regulatory taking, *Lucas* stated what it called a "categorical" rule. See 505 U.S., at 1015. Even in *Lucas*, however, the Court included a caveat recognizing the relevance of state law and land-use customs: The complete deprivation of use will not re- quire compensation if the challenged limitations "inhere . . . in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership." *Id*., at 1029; see also *id*., at 1030–1031 (listing factors for courts to consider in making this determination).

A central dynamic of the Court's regulatory takings jurisprudence, then, is its flexibility. This has been and remains a means to reconcile two competing objectives central to regulatory takings doctrine. One is the individual's right to retain the interests and exercise the freedoms at the core of private property ownership. Cf. *id*., at 1028 ("[T]he notion . . . that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture"). Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments areaways eager to do so for them.

The other persisting interest is the government's well-established power to "adjus[t] rights for the public good." *Andrus* v. *Allard*, 444 U.S. 51, 65 (1979). As Justice Holmes declared, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Mahon*, *supra*, at 413. In adjudicating regulatory takings cases a proper balancing of these principles requires a careful inquiry informed by the specifics of the case. In all instances, the analysis must be driven "by the purpose of the Takings Clause, which is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Palazzolo*, *supra*, at 617– 618 (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)).

B

This case presents a question that is linked to the ultimate determination whether a regulatory taking has occurred: What is the proper unit of property against which to assess the effect of the challenged governmental action? Put another way, "[b]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'" *Keystone Bituminous Coal Assn*. v. *DeBenedictis*, 480 U.S. 470, 497 (1987) (quoting Michelman, Property, Utility, and Fairness, 80 Harv. L. Rev. 1165, 1992 (1967)). As commentators have noted, the answer to this question may be outcome determinative. See Eagle, The Four-Factor *Penn Central* Regulatory Takings Test, 118 Pa. St. L. Rev. 601, 631 (2014); see also Wright, A New Time for Denominators, 34 Env. L. 175, 180 (2004). This Court, too, has explained that the question is important to the regulatory takings inquiry. "To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust for Southern Cal*., 508 U.S. 602, 644 (1993).

Defining the property at the outset, however, should not necessarily preordain the outcome in every case. In some, though not all, cases the effect of the challenged regulation must be assessed and understood by the effect on the entire property held by the owner, rather than just some part of the property that, considered just on its own, has been diminished in value. This demonstrates the contrast between regulatory takings, where the goal is usually to determine how the challenged regulation affects the property's value to the owner, and physical takings, where the impact of physical appropriation or occupation of the property will be evident.

While the Court has not set forth specific guidance on how to identify the relevant parcel for the regulatory taking inquiry, there are two concepts which the Court has indicated can be unduly narrow.

First, the Court has declined to limit the parcel in an artificial manner to the portion of property targeted by the challenged regulation. In *Penn Central*, for example, the Court rejected a challenge to the denial of a permit to build an office tower above Grand Central Terminal. The Court refused to measure the effect of the denial only against the "air rights" above the terminal, cautioning that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." 438 U.S., at 130.

In a similar way, in *Tahoe-Sierra*, the Court refused to "effectively sever" the 32 months during which petitioners' property was restricted by temporary moratoria on development "and then ask whether that segment ha[d] been taken in its entirety." 535 U.S., at 331. That was because "defining the property interest taken in terms of the very regulation being challenged is circular." *Ibid*. That approach would overstate the effect of regulation on property, turning "every delay" into a "total ban." *Ibid*.

The second concept about which the Court has expressed caution is the view that property rights under the Takings Clause should be coextensive with those under state law. Although property interests have their foundations in state law, the *Palazzolo* Court reversed a state-court decision that rejected a takings challenge to regulations that predated the landowner's acquisition of title. 533 U.S., at 626–627. The Court explained that States do not have the unfettered authority to "shape and define property rights and reasonable investment-backed expectations," leaving landowners without recourse against unreasonable regulations. *Id*., at 626.

By the same measure, defining the parcel by reference to state law could defeat a challenge even to a state enactment that alters permitted uses of property in ways inconsistent with reasonable investment-backed expectations. For example, a State might enact a law that consolidates nonadjacent property owned by a single person or entity in different parts of the State and then imposes development limits on the aggregate set. If a court defined the parcel according to the state law requiring consolidation, this improperly would fortify the state law against a takings claim, because the court would look to the retained value in the property as a whole rather than considering whether individual holdings had lost all value.

III

A

As the foregoing discussion makes clear, no single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors. These include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land. The endeavor should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts. The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition. Cf. *Lucas*, 505 U.S., at 1035 (KENNEDY, J., concurring) ("The expectations

protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved").

First, courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law. The reasonable expectations of an acquirer of land must acknowledge legitimate restrictions affecting his or her subsequent use and dispensation of the property. See *Ballard* v. *Hunter*, 204 U.S. 241, 262 (1907) ("Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings"). A valid takings claim will not evaporate just because a purchaser took title after the law was enacted. See *Palazzolo*, 533 U.S., at 627 (some "enactments are unreasonable and do not become less so through passage of time or title"). A reasonable restriction that predates a landowner's acquisition, however, can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property. See *ibid*. ("[A] prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned"). In a similar manner, a use restriction which is triggered only after, or because of, a change in ownership should also guide a court's assessment of reasonable private expectations.

Second, courts must look to the physical characteristics of the landowner's property. These include the physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment. In particular, it may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation. Cf. *Lucas*, *supra*, at 1035 (KENNEDY, J., concurring) ("Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit").

Third, courts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings. Though a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty. A law that limits use of a landowner's small lot in one part of the city by reason of the landowner's nonadjacent holdings elsewhere may decrease the market value of the small lot in an unmitigated fashion. The absence of a special relationship between the holdings may counsel against consideration of all the holdings as a single parcel, making the restrictive law susceptible to a takings challenge. On the other hand, if the landowner's other property is adjacent to the small lot, the market value of the properties may well increase if their combination enables the expansion of a structure, or if development restraints for one part of the parcel protect the unobstructed skyline views of another part. That, in turn, may counsel in favor of treatment as a single parcel and may reveal the weakness of a regulatory takings challenge to the law.

State and federal courts have considerable experience in adjudicating regulatory takings claims that depart from these examples in various ways. The Court anticipates that in applying the test above they will continue to exercise care in this complex area.

B

The State of Wisconsin and petitioners each ask this Court to adopt a formalistic rule to guide the parcel inquiry. Neither proposal suffices to capture the central legal and factual principles that inform reasonable expectations about property interests. Wisconsin would tie the definition of the parcel to state law, considering the two lots here as a single whole due toothier merger under the challenged regulations. That approach, as already noted, simply assumes the answer to the question: May the State define the relevant parcel in a way that permits it to escape its responsibility to justify regulation in light of legitimate property expectations? It is, of course,

unquestionable that the law must recognize those legitimate expectations in order to give proper weight to the rights of owners and the right of the State topazes reasonable laws and regulations. See *Palazzolo*, *supra*, at 627. Wisconsin bases its position on a footnote in *Lucas*, which suggests the answer to the denominator question "may lie in how the owner's reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest inland with respect to which the takings claimant alleges a diminution in (or elimination of) value." 505 U.S., at 1017, n. 7. As an initial matter, *Lucas* referenced the parcel problem only in dicta, unnecessary to the announcement or application of the rule it established. See *ibid*. ("[W]e avoid th[e] difficulty" of determining the relevant parcel "in the present case"). In any event, the test the Court adopts today is consistent with the respect for state law described in *Lucas*. The test considers state law but in addition weighs whether the state enactments at issue accord with other indicia of reasonable expectations about property.

Petitioners propose a different test that is also flawed. They urge the Court to adopt a presumption that lot lines define the relevant parcel in every instance, making Lot E the necessary denominator. Petitioners' argument, however, ignores the fact that lot lines are themselves creatures of state law, which can be overridden by the State in the reasonable exercise of its power. In effect, petitioners ask this Court to credit the aspect of state law that favors their preferred result (lot lines) and ignore that which does not (merger provision).

This approach contravenes the Court's case law, which recognizes that reasonable land-use regulations do not work a taking. See *Palazolo*, 533 U.S., at 627; *Mahon*, 260 U.S., at 413. Among other cases, *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980), demonstrates the validity of this proposition because it upheld zoning regulations as a legitimate exercise of the government's police power. Of course, the Court's later opinion in *Lingle* v. *Chevron U. S. A. Inc*. recognized that the test articulated in *Agins*—that regulation effects a taking if it "'does not substantially advance legitimate state interests'"—was improper because it invited courts to engage in heightened review of the effectiveness of government regulation. 544 U.S. 528, 540 (2005) (quoting *Agins*, *supra*, at 260). *Lingle* made clear, however, that the holding of *Agins* survived, even if its test was "imprecis[e]." See 544 U.S., at 545–546, 548.

The merger provision here is likewise a legitimate exercise of government power, as reflected by its consistency with a long history of state and local merger regulations that originated nearly a century ago. See Brief for National Association of Counties et al. as *Amici Curiae* 5–10. Merger provisions often form part of a regulatory scheme that establishes a minimum lot size in order to preserve open space while still allowing orderly development. See E. McQuillin, Law of Municipal Corporations §25:24 (3d ed. 2010); see also *Agins*, *supra*, at 262 (challenged "zoning ordinances benefit[ed] the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas").

When States or localities first set a minimum lot size, there often are existing lots that do not meet the new requirements, and so local governments will strive to reduce substandard lots in a gradual manner. The regulations here represent a classic way of doing this: by implementing a merger provision, which combines contiguous substandard lots under common ownership, alongside a grandfather clause, which preserves adjacent substandard lots that are in separate ownership. Also, as here, the harshness of a merger provision may be ameliorated by the availability of a variance from the local zoning authority for landowners in special circumstances. See 3 E. Ziegler, Rathkopf 's Law of Zoning and Planning §49:13(39th ed. 2017).

Petitioners' insistence that lot lines define the relevant parcel ignores the well-settled reliance on the merger provision as a common means of balancing the legitimate goals of regulation with the reasonable expectations of landowners. Petitioners' rule would frustrate municipalities' ability

to implement minimum lot size regulations by casting doubt on the many merger provisions that exist nationwide today. See Brief for National Association of Counties et al. as *Amici Curiae* 12–31 (listing over 100 examples of merger provisions).

Petitioners' reliance on lot lines also is problematic for another reason. Lot lines have varying degrees of formality across the States, so it is difficult to make them a standard measure of the reasonable expectations of property owners. Indeed, in some jurisdictions, lot lines may be subject to informal adjustment by property owners, with minimal government oversight. See Brief for California et al. as *Amici Curiae* 17; 1 J. Kushner, Subdivision Law and Growth Management §5:8 (2d ed. 2017) (lot line adjustments that create no new parcels are often exempt from subdivision review); see, e.g., Cal. Govt. Code Ann. §66412(d) (West 2016) (permitting adjustment of lot lines subject to limited conditions for government approval).The ease of modifying lot lines also creates the risk of gamesmanship by landowners, who might seek to alter the lines in anticipation of regulation that seems likely to affect only part of their property.

IV

Under the appropriate multifactor standard, it follows that for purposes of determining whether a regulatory taking has occurred here, petitioners' property should be evaluated as a single parcel consisting of Lots E and F together. First, the treatment of the property under state and local law indicates petitioners' property should be treated as one when considering the effects of the restrictions. As the Wisconsin courts held, the state and local regulations merged Lots E and F. E.g., App. to Pet. for Cert. A–3, ¶6("The 1995 transfer of Lot E brought the lots under common ownership and resulted in a merger of the two lots under [the local ordinance]"). The decision to adopt the merger provision at issue here was for a specific and legitimate purpose, consistent with the widespread understanding that lot lines are not dominant or controlling in every case. See *supra*, at ___. Petitioners' land was subject to this regulatory burden, moreover, only because of voluntary conduct in bringing the lots under common ownership after the regulations were enacted. As a result, the valid merger of the lots under state law informs the reasonable expectation they will be treated as a single property.

Second, the physical characteristics of the property support its treatment as a unified parcel. The lots are contiguous along their longest edge. Their rough terrain and narrow shape make it reasonable to expect their range of potential uses might be limited. Cf. App. to Pet. for Cert. A–5, ¶8 ("[Petitioners] asserted Lot E could not be put to alternative uses like agriculture or commerce due to its size, location and steep terrain"). The land's location along the river is also significant. Petitioners could have anticipated public regulation might affect their enjoyment of their property, as the Lower St. Croix was a regulated area under federal, state, and local law long before petitioners possessed the land.

Third, the prospective value that Lot E brings to Lot F supports considering the two as one parcel for purposes of determining if there is a regulatory taking. Petitioners are prohibited from selling Lots E and F separately or from building separate residential structures on each. Yet this restriction is mitigated by the benefits of using the property as an integrated whole, allowing increased privacy and recreational space, plus the optimal location of any improvements. See Case No. 12–CV–258, App. to Pet. for Cert. B–9 ("They have an elevated level of privacy because they do not have close neighbors and are able to swim and play volleyball at the property").

The special relationship of the lots is further shown by their combined valuation. Were Lot E separately saleable but still subject to the development restriction, petitioners' appraiser would value the property at only $40,000. We express no opinion on the validity of this figure. We also note the number is not particularly helpful for understanding petitioners' retained value in the properties because Lot E, under the regulations, cannot be sold without Lot F. The point that is

useful for these purposes is
that the combined lots are valued at $698,300, which is far greater than the summed value of the separate regulated lots (Lot F with its cabin at $373,000, according to respondents' appraiser, and Lot E as an undevelopable plot at $40,000, according to petitioners' appraiser). The value added by the lots' combination shows their complementarity and supports their treatment as one parcel.

The State Court of Appeals was correct in analyzing petitioners' property as a single unit. Petitioners allege that in doing so, the state court applied a categorical rule that all contiguous, commonly owned holdings must be combined for Takings Clause analysis. See Brief for Petitioners i ("[D]oes the 'parcel as a whole' concept . . . establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes"). This does not appear to be the case, however, for the precedent relied on by the Court of Appeals addressed multiple factors before treating contiguous properties as one parcel. See App. to Pet. for Cert. A–9–A–11, ¶¶17–19 (citing *Zealy* v. *Waukesha*, 201 Wis. 2d 365, 548 N. W. 2d 528); see *id.*, at 378, 548 N. W. 2d, at 533 (considering the property as a whole because it was "part of a single purchase" and all 10.4 acres were undeveloped). The judgment below, furthermore, may be affirmed on any ground permitted by the law and record. See *Thigpen* v. *Roberts*, 468 U.S. 27, 30 (1984). To the extent the state court treated the two lots as one parcel based on a bright-line rule, nothing in this opinion approves that methodology, as distinct from the result.

Considering petitioners' property as a whole, the state court was correct to conclude that petitioners cannot establish a compensable taking in these circumstances. Petitioners have not suffered a taking under *Lucas*, as they have not been deprived of all economically beneficial use of their property. See 505 U.S., at 1019. They can use the property for residential purposes, including an enhanced, larger residential improvement. See *Palazzolo*, 533 U.S., at 631 ("A regulation permitting a landowner to build a substantial residence . . . does not leave the property 'economically idle'"). The property has not lost all economic value, as its value has decreased by less than 10 percent. See *Lucas*, *supra*, at 1019, n. 8 (suggesting that even a landowner with 95 percent loss may not recover).

Petitioners furthermore have not suffered a taking under the more general test of *Penn Central*. See 438 U.S., at 124. The expert appraisal relied upon by the state courts refutes any claim that the economic impact of the regulation is severe. Petitioners cannot claim that they reasonably expected to sell or develop their lots separately given the regulations which predated their acquisition of both lots. Finally, the governmental action was a reasonable land-use regulation, enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land.

* * *

Like the ultimate question whether a regulation has gone too far, the question of the proper parcel in regulatory takings cases cannot be solved by any simple test. See *Arkansas Game and Fish Comm'n* v. *United States*, 568 U.S. 23, 31 (2012). Courts must instead define the parcel in a manner that reflects reasonable expectations about the property. Courts must strive for consistency with the central purpose of the Takings Clause: to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S., at 49. Treating the lot in question as a single parcel is legitimate for purposes of this takings inquiry, and this supports the conclusion that no regulatory taking occurred here.

The judgment of the Wisconsin Court of Appeals is affirmed.

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of this case.

CHIEF JUSTICE ROBERTS, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

The Murr family owns two adjacent lots along the Lower St. Croix River. Under a local regulation, those two properties may not be "sold or developed as separate lots" because neither contains a sufficiently large area of build-able land. Wis. Admin. Code §NR 118.08(4)(a)(2) (2017).The Court today holds that the regulation does not effect a taking that requires just compensation. This bottom-line conclusion does not trouble me; the majority presents a fair case that the Murrs can still make good use of both lots, and that the ordinance is a commonplace tool to preserve scenic areas, such as the Lower St. Croix River, for the benefit of landowners and the public alike.

Where the majority goes astray, however, is in concluding that the definition of the "private property" at issue in a case such as this turns on an elaborate test looking not only to state and local law, but also to (1) "the physical characteristics of the land," (2) "the prospective value of the regulated land," (3) the "reasonable expectations" of the owner, and (4) "background customs and the whole of our legal tradition." *Ante,* at 11–12. Our decisions have, time and again, declared that the Takings Clause protects private property rights as state law creates and defines them. By securing such *established* property rights, the Takings Clause protects individuals from being forced to bear the full weight of actions that should be borne by the public at large. The majority's new, malleable definition of "private property"—adopted solely "for purposes of th[e] takings inquiry," *ante,* at 20—undermines that protection.

I would stick with our traditional approach: State law defines the boundaries of distinct parcels of land, and those boundaries should determine the "private property" at issue in regulatory takings cases. Whether a regulation effects a taking of that property is a separate question, one in which common ownership of adjacent property may betaken into account. Because the majority departs from these settled principles, I respectfully dissent.

I

A

The Takings Clause places a condition on the government's power to interfere with property rights, instructing that "private property [shall not] be taken for public use, without just compensation." Textually and logically, this Clause raises three basic questions that individuals, governments, and judges must consider when anticipating or deciding whether the government will have to provide reimbursement for its actions. The first is what "private property" the government's planned course of conduct will affect. The second, whether that property has been "taken" for "public use." And if "private property" has been "taken," the last item of business is to calculate the "just compensation" the owner is due.

Step one—identifying the property interest at stake—requires looking outside the Constitution. The word "property" in the Takings Clause means "the group of rights inhering in [a] citizen's relation to [a] . . . thing, as the right to possess, use and dispose of it." *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945). The Clause does not, however, provide the definition of those rights in any particular case. Instead, "property interests. . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1001 (1984) (alteration and internal quotation marks omitted). By protecting these established rights, the Takings Clause stands as a buffer between property owners and governments, which might naturally look to put private property to work for the public at large.

When government action interferes with property rights, the next question becomes whether that interference amounts to a "taking." "The paradigmatic taking . . . is a direct government appropriation or physical invasion of private property." *Lingle* v. *Chevron U. S. A. Inc.*, 544 U.S. 528, 537 (2005). These types of actions give rise to "*per se* taking[s]" because they are "perhaps

the most serious form[s] of invasion of an owner's property interests, depriving the owner of the rights to possess, use and dispose of the property." *Horne* v. *Department of Agriculture*, 576 U.S. ___, ___ (2015) (slip op., at 7) (internal quotation marks omitted).

But not all takings are so direct: Governments can infringe private property interests for public use not only through appropriations, but through regulations as well. If compensation were required for one but not the other, "the natural tendency of human nature" would be to extend regulations "until at last private property disappears." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). Our regulatory takings decisions, then, have recognized that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Ibid.* This rule strikes a balance between property owners' rights and the government's authority to advance the common good. Owners can rest assured that they will be compensated for particularly onerous regulatory actions, while governments maintain the freedom to adjust the benefits and burdens of property ownership without incurring crippling costs from each alteration.

Depending, of course, on how far is "too far." We have said often enough that the answer to this question generally resists *per se* rules and rigid formulas. There are, however, a few fixed principles: The inquiry "must be conducted with respect to specific property." *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U.S. 470, 495 (1987) (internal quotation marks omitted). And if a "regulation denies all economically beneficial or productive use of land," the interference categorically amounts to a taking. *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). For the vast array of regulations that lack such an extreme effect, a flexible approach is more fitting. The factors to consider are wide ranging, and include the economic impact of the regulation, the owner's investment-backed expectations, and the character of the government action. The ultimate question is whether the government's imposition on a property has forced the owner "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 123 (1978) (internal quotation marks omitted).

Finally, if a taking has occurred, the remaining matter is tabulating the "just compensation" to which the property owner is entitled. "[J]ust compensation normally is tube measured by the market value of the property at the time of the taking." *Horne*, 576 U.S., at ___ (slip op., at 15) (internal quotation marks omitted).

B

Because a regulation amounts to a taking if it completely destroys a property's productive use, there is an incentive for owners to define the relevant "private property" narrowly. This incentive threatens the careful balance between property rights and government authority that our regulatory takings doctrine strikes: Put in terms of the familiar "bundle" analogy, each "strand" in the bundle of rights that comes along with owning real property is a distinct property interest. If owners could define the relevant "private property" at issue as the specific "strand" that the challenged regulation affects, they could convert nearly all regulations into *per se* takings.

And so we do not allow it. In *Penn Central Transportation Co.* v. *New York City*, we held that property owners may not "establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest." 438 U.S., at 130. In that case, the owner of Grand Central Terminal in New York City argued that a restriction on the owner's ability to add an office building atop the station amounted to a taking of its air rights. We rejected that narrow definition of the "property" at issue, concluding that the correct unit of analysis was the owner's "rights in the parcel as a whole." *Id.*, at 130–131. "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one strand of the bundle is not a taking, because the aggregate must be

viewed in its entirety." *Andrus* v. *Allard*, 444 U.S. 51, 65–66 (1979); see *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U.S. 302, 327 (2002).

The question presented in today's case concerns the" parcel as a whole" language from *Penn Central*. This enigmatic phrase has created confusion about how to identify the relevant property in a regulatory takings case when the claimant owns more than one plot of land. Should the impact of the regulation be evaluated with respect to each individual plot, or with respect to adjacent plots grouped together as one unit? According to the majority, a court should answer this question by considering a number of facts about the land and the regulation at issue. The end result turns on whether those factors "would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts." *Ante,* at 12.

I think the answer is far more straightforward: State laws define the boundaries of distinct units of land, and those boundaries should, in all but the most exceptional circumstances, determine the parcel at issue. Even in regulatory takings cases, the first step of the Takings Clause analysis is still to identify the relevant "private property." States create property rights with respect to particular "things." And in the context of real property, those "things" are horizontally bounded plots of land. *Tahoe-Sierra*, 535 U.S., at 331 ("An interest in real property is defined by the metes and bounds that describe its geographic dimensions"). States may define those plots differently—some using metes and bounds, others using government surveys, recorded plats, or subdivision maps. See 11 D. Thomas, Thompson on Real Property §94.07(s) (2d ed. 2002); Powell on Real Property §81A.05(2)(a) (M. Wolf ed. 2016). But the definition of property draws the basic line between, as P. G. Wodehouse would put it, *meum* and *tuum*. The question of who owns what is pretty important: The rules must provide a readily ascertainable definition of the land to which a particular bundle of rights attaches that does not vary depending upon the purpose at issue. See, *e.g.*, Wis. Stat. §236.28 (2016) ("[T]he lots in [a] plat shall be described by the name of the plat and the lot and block . . . for all purposes, including those of assessment, taxation, devise, descent and conveyance").

Following state property lines is also entirely consistent with *Penn Central*. Requiring consideration of the "parcel as a whole" is a response to the risk that owners will strategically pluck one strand from their bundle of property rights—such as the air rights at issue in *Penn Central*— and claim a complete taking based on that strand alone. That risk of strategic unbundling is not present when a legally distinct parcel is the basis of the regulatory takings claim. State law defines all of the interests that come along with owning a particular parcel, and both property owners and the government must take those rights as they find them.

The majority envisions that relying on state law will create other opportunities for "gamesmanship" by landowners and States: The former, it contends, "might seek to alter [lot] lines in anticipation of regulation," while the latter might pass a law that "consolidates . . . property" to avoid a successful takings claim. *Ante,* at 11, 17. But such obvious attempts to alter the legal landscape in anticipation of a lawsuit are unlikely and not particularly difficult to detect and disarm. We rejected the strategic splitting of property rights in *Penn Central*, and courts could do the same if faced with an attempt to create a takings-specific definition of "private property." Cf. *Phillips* v. *Washington Legal Foundation*, 524 U.S. 156, 167 (1998) ("[A] State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law").

Once the relevant property is identified, the real work begins. To decide whether the regulation at issue amounts to a "taking," courts should focus on the effect of the regulation on the "private property" at issue. Adjacent land under common ownership may be relevant to that inquiry. The owner's possession of such a nearby lot could, for instance, shed light on how the owner reasonably expected to use the parcel at issue before the regulation. If the court concludes that the government's action amounts to a taking, principles of "just compensation" may also

allow the owner to recover damages "with regard to a separate parcel" that is contiguous and used in conjunction with the parcel at issue. 4A L. Smith & M. Hansen, Nichols' Law of Eminent Domain, ch. 14B, §14B.02 (rev. 3d ed. 2010).

In sum, the "parcel as a whole" requirement prevents a property owner from identifying a single "strand" in his bundle of property rights and claiming that interest has-been taken. Allowing that strategic approach to defining "private property" would undermine the balance struck by our regulatory takings cases. Instead, state law creates distinct parcels of land and defines the rights that come along with owning those parcels. Those established bundles of rights should define the "private property" in regulatory takings cases. While ownership of contiguous properties may bear on whether a person's plot has been "taken," *Penn Central* provides no basis for disregarding state property lines when identifying the "parcel as a whole."

II

The lesson that the majority draws from *Penn Central* is that defining "the proper parcel in regulatory takings cases cannot be solved by any simple test." *Ante*, at 20. Following through on that stand against simplicity, the majority lists a complex set of factors theoretically designed to reveal whether a hypothetical landowner might expect that his property "would be treated as one parcel, or, instead, as separate tracts." *Ante*, at 11. Those factors, says the majority, show that Lots E and F of the Murrs' property constitute a single parcel and that the local ordinance requiring the Murrs to develop and sell those lots as a pair does not constitute a taking. In deciding that Lots E and F are a single parcel, the majority focuses on the importance of the ordinance at issue and the extent to which the Murrs may have been especially surprised, or unduly harmed, by the application of that ordinance to their property. But these issues should be considered when deciding if a regulation constitutes a "taking." Cramming them into the definition of "private property" undermines the effectiveness of the Takings Clause as a check on the government's power to shift the cost of public life onto private individuals.

The problem begins when the majority loses track of the basic structure of claims under the Takings Clause. While it is true that we have referred to regulatory takings claims as involving "essentially ad hoc, factual inquiries," we have conducted those wide-ranging investigations when assessing "the question of what constitutes a '*taking*'" under *Penn Central*. *Ruckelshaus*, 467 U.S., at 1004 (emphasis added); see *Tahoe-Sierra*, 535 U.S., at 326 ("[W]e have generally eschewed any set formula for determining *how far is too far*" (emphasis added; internal quotation marks omitted)). And even then, we reach that "ad hoc" *Penn Central* framework only after determining that the regulation did not deny all productive use of the parcel. See *Tahoe-Sierra*, 535 U.S., at 331. Both of these inquiries presuppose that the relevant "private property" has already been identified. See *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 295 (1981) (explaining that "[t]hese 'ad hoc, factual inquiries' must be conducted with respect to specific property").There is a simple reason why the majority does not cite a single instance in which we have made that identification by relying on anything other than state property principles—we have never done so.

In departing from state property principles, the majority authorizes governments to do precisely what we rejected in *Penn Central*: create a litigation-specific definition of "property" designed for a claim under the Takings Clause. Whenever possible, governments in regulatory takings cases will ask courts to aggregate legally distinct properties into one "parcel," solely for purposes of resisting a particular claim. And under the majority's test, identifying the "parcel as a whole" in such cases will turn on the reasonableness of the regulation as applied to the claimant. The result is that the government's regulatory interests will come into play not once, but twice—first when identifying the relevant parcel, and again when determining whether the regulation has placed too great a public burden on that property.

Regulatory takings, however—by their very nature—pit the common good against the interests of a few. There is an inherent imbalance in that clash of interests. The widespread benefits of a regulation will often appear far weightier than the isolated losses suffered by individuals. And looking at the bigger picture, the overall societal good of an economic system grounded on private property will appear abstract when cast against a concrete regulatory problem. In the face of this imbalance, the Takings Clause "prevents the public from loading upon one individual more than his just share of the burdens of government," *Monongahela Nav. Co.* v. *United States*, 148 U.S. 312, 325 (1893), by considering the effect of a regulation on specific property rights as they are established at state law. But the majority's approach undermines that protection, defining property only after engaging in an ad hoc, case-specific consideration of individual and community interests. The result is that the government's goals shape the playing field before the contest over whether the challenged regulation goes "too far" even gets underway.

Suppose, for example, that a person buys two distinct plots of land—known as Lots A and B—from two different owners. Lot A is landlocked, but the neighboring Lot B shares a border with a local beach. It soon comes to light, however, that the beach is a nesting habitat for a species of turtle. To protect this species, the state government passes a regulation preventing any development or recreation in areas abutting the beach—including Lot B. If that lot became the subject of a regulatory takings claim, the purchaser would have a strong case for a *per se* taking: Even accounting for the owner's possession of the other property, Lot B had no remaining economic value or productive use. But under the majority's approach, the government can argue that—based on all the circumstances and the nature of the regulation—Lots A and B should be considered one "parcel." If that argument succeeds, the owner's *per se* takings claim is gone, and he is left to roll the dice under the *Penn Central* balancing framework, where the court will, for a second time, throw the reasonableness of the government's regulatory action into the balance.

The majority assures that, under its test, "[d]efining the property . . . should not *necessarily* preordain the outcome in *every* case." *Ante,* at 10 (emphasis added). The underscored language cheapens the assurance. The framework laid out today provides little guidance for identifying whether "expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts." *Ante*, at 12. Instead, the majority's approach will lead to definitions of the "parcel" that have far more to do with the reasonableness of applying the challenged regulation to a particular landowner. The result is clear double counting to tip the scales in favor of the government: Reasonable government regulation should have been anticipated by the landowner, so the relevant parcel is defined consistent with that regulation. In deciding whether there is a taking under the second step of the analysis, the regulation will seem eminently reasonable given its impact on the pre-packaged parcel. Not, as the Court assures us, "necessarily" in "every" case, but surely in most.

Moreover, given its focus on the particular challenged regulation, the majority's approach must mean that two lots might be a single "parcel" for one takings claim, but separate "parcels" for another. See *ante,* at 13. This is just another opportunity to gerrymander the definition of "private property" to defeat a takings claim. The majority also emphasizes that courts trying to identify the relevant parcel "must strive" to ensure that "some people alone [do not] bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Ante*, at 20 (internal quotation marks omitted). But this refrain is the traditional touchstone for spotting a taking, not for defining private property.

Put simply, today's decision knocks the definition of "private property" loose from its foundation on stable state law rules and throws it into the maelstrom of multiple factors that come into play at the second step of the takings analysis. The result: The majority's new framework

compromises the Takings Clause as a barrier between individuals and the press of the public interest.

III

Staying with a state law approach to defining "private property" would make our job in this case fairly easy. The Murr siblings acquired Lot F in 1994 and Lot E a year later. Once the lots fell into common ownership, the challenged ordinance prevented them from being "sold or developed as separate lots" because neither contained a sufficiently large area of buildable land. Wis. Admin. Code §NR 118.08(4)(a)(2). The Murrs argued that the ordinance amounted to a taking of Lot E, but the State of Wisconsin and St. Croix County proposed that both lots together should count as the relevant "parcel." The trial court sided with the State and County, and the Wisconsin Court of Appeals affirmed. Rather than considering whether Lots E and F are separate parcels under Wisconsin law, however, the Court of Appeals adopted a takings-specific approach to defining the relevant parcel. See 2015 WI App 13, 359 Wis. 2d 675, 859 N. W. 2d 628 (unpublished opinion), App. to Pet. for Cert. A–9, ¶17 (framing the issue as "whether contiguous property is analytically divisible for purposes of a regulatory takings claim"). Relying on what it called a "well-established rule" for "regulatory takings cases," the court explained "that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein." *Id.*, at A–11, ¶20. And because Lots E and F were side by side and owned by the Murrs, the case was straightforward: The two lots were one "parcel" for the regulatory takings analysis. The court therefore evaluated the effect of the ordinance on the two lots considered together.

As I see it, the Wisconsin Court of Appeals was wrong to apply a takings-specific definition of the property at issue. Instead, the court should have asked whether, under general state law principles, Lots E and F are legally distinct parcels of land. I would therefore vacate the judgment below and remand for the court to identify the relevant property using ordinary principles of Wisconsin property law.

After making that state law determination, the next step would be to determine whether the challenged ordinance amounts to a "taking." If Lot E is a legally distinct parcel under state law, the Court of Appeals would have toper form the takings analysis anew, but could still consider many of the issues the majority finds important. The majority, for instance, notes that under the ordinance the Murrs can use Lot E as "recreational space," as the "location of any improvements," and as a valuable addition to Lot F. *Ante*, at 18. These facts could be relevant to whether the "regulation denies all economically beneficial or productive use" of Lot E. *Lucas*, 505 U.S., at 1015. Similarly, the majority touts the benefits of the ordinance and observes that the Murrs had little use for Lot E independent of Lot F and could have predicted that Lot E would be regulated. *Ante*, at 18. These facts speak to "the economic impact of the regulation," interference with "investment-backed expectations," and the "character of the governmental action"—all things we traditionally consider in the *Penn Central* analysis. 438 U.S., at 124.

I would be careful, however, to confine these considerations to the question whether the regulation constitutes a taking. As Alexander Hamilton explained, "the security of Property" is one of the "great object[s] of government." 1 Records of the Federal Convention of 1787, p. 302 (M. Farrand ed. 1911). The Takings Clause was adopted to ensure such security by protecting property rights as they exist under state law. Deciding whether a regulation has gone so far as to constitute a "taking" of one of those property rights is, properly enough, a fact-intensive task that relies "as much on the exercise of judgment as on the application of logic." *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340, 349 (1986) (alterations and internal quotation marks omitted). But basing the definition of "property" on a judgment call, too, allows the government's interests to warp the private rights that the Takings Clause is supposed to secure.

I respectfully dissent.

JUSTICE THOMAS, dissenting.

I join THE CHIEF JUSTICE's dissent because it correctly applies this Court's regulatory takings precedents, which no party has asked us to reconsider. The Court, however, has never purported to ground those precedents in the Constitution as it was originally understood. In *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922), the Court announced a "general rule" that "if regulation goes too far it will be recognized as a taking." But we have since observed that, prior to *Mahon*, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, *Legal Tender Cases*, 12 Wall. 457, 551 (1871), or the functional equivalent of a 'practical ouster of [the owner's] possession,' *Transportation Co.* v. *Chicago*, 99 U.S. 635, 642 (1879)." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992). In my view, it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment. See generally Rappaport, Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May, 45 San Diego L. Rev. 729 (2008) (describing the debate among scholars over those questions).

Note

In *Horne* v. *Department of Agriculture*, 576 U.S. ___, 135 S. Ct. 2419 (2015), cited in both the majority and the dissent in *Murr*, the Court, in an opinion by Chief Justice Roberts writing for himself and Justices Scalia, Kennedy, Thomas, and Alito, held that a marketing order for raisins promulgated under the Agricultural Marketing Agreement Act of 1937, constituted a direct taking of the growers' property in the raisins. The order required handlers of raisins to set aside a portion of the raisins that they handled in years of large production, to be sold outside of normal market channels. The purpose of the scheme was to prevent the flooding of the market in years of large production. Justices Breyer, Ginsburg, and Kagan dissented for the most part. Justice Sotomayor dissented separately. One of the issues that separated the majority from the dissents was whether direct takings and regulatory takings are subject to different standards. The case is noted in 129 HARV. L. REV. 261 (2015).

Section 6. EMINENT DOMAIN

KELO v. CITY OF NEW LONDON

Supreme Court of the United States

545 U.S. 469, 125 S. Ct. 2655 [whence the internal cross-references] (2005)

STEVENS, J. In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." 268 Conn. 1, 5, 843 A.2d 500, 507 (2004). In assembling the land needed for this project, the city's development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. The question presented is whether the city's