TO THE HOUSE OF REPRESENTATIVES:

I am returning without my approval H.R. 278, the "Alaska Native Claims Settlement Act Amendments of 1987," because it is fundamentally inconsistent with the promises of the Alaska Native Claims Settlement Act of 1971 (ANCSA), raises the possibility of constituting an unconstitutional taking in violation of the Fifth Amendment, and almost certainly risks enormous financial exposure for the United States. When ANCSA was enacted fifteen years ago, it extinguished the claims of Alaskan natives and established corporations to be governed by state law. The natives were vested with stock in their corporations. They naturally looked forward, as all corporate shareholders, to one day having the option of redeeming their investments. Although ANCSA did not permit selling, or alienation, of native stock until 1991, it did assure them that, after that year, this most fundamental right would be theirs.

That year quickly approaches, but H.R. 278 now arises and not only threatens to withhold the guarantees of ANCSA, but does so in ways which portend bringing down upon the United States the ultimate liability for these inconsistent policy shifts. First, it mandates automatic and indefinite extensions of the 1991 "deadline" for lifting restrictions on alienation of stock. No longer may natives be assured of actually ever seeing profit from their investments. Second, those who nevertheless wish to sell their stock, so-called "dissenters," are virtually

cut out of any meaningful opportunity for doing this. The corporation must have already unsuccessfully proposed amending its articles to allow such alienation and, even in this unlikely event, dissenters' stock is assessed and reimbursed at a greatly undervalued rate. Third, those who keep their stock, willingly or unwillingly, will inevitably have it diluted because new shares may be issued without consideration. And fourth, the bill gives the corporation the option of putting its every asset into a "settlement trust," and thus insulating management from any accountability to the natives.

H.R. 278 would deprive Alaska natives of the benefit of the bargain they struck with the federal government in 1971. These natives will have waited twenty years for the right to alienate their shares. Congress now proposes simply to abolish that right without compensation. Not only is this unfair, but also it expresses the view that Alaska natives are legally incompetent to manage their own economic and social affairs. I do not share this view, and believe that it is fundamentally inconsistent with our American ideal of freedom and self-determination.

Moreover, H.R. 278 raises serious constitutional concerns under the Takings Clause of the Fifth Amendment. See Hodel v. Irving, 107 S.Ct. 2076, 2084 (1987). Under current law, natives have the right to alienate their shares after December 18, 1991. H.R. 278 would extend the alienation restrictions beyond that date. In Irving, the Supreme Court held that

Congress committed an unconstitutional taking by prohibiting Indians from passing on small, undivided interests in property to their heirs, a right previously theirs under federal law. H.R. 278 would pose similar "takings" concerns by limiting Alaska natives' right to alienate their shares in native corporations.

If H.R. 278 is found to be a taking, then the bill would expose the United States to potentially enormous financial liability notwithstanding the bill's inclusion of a provision prohibiting money judgments against the United States in civil actions challenging the extension of alienation restrictions. Indeed, this provision itself then would violate the Fifth Amendment by prohibiting just compensation. Recent Supreme Court precedent establishes that the assertion of sovereign immunity does not bar "a court [from] award[ing] money damages against the government" since "it is the Constitution that dictates the [just compensation] remedy for interference with property rights amounting to a taking." See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S.Ct. 2378, 2386 & n.9 (1987).

In sum, H.R. 278 breaks the promises made to Alaska natives in the ANCSA, and threatens to expose the United States to enormous financial liability because of the serious constitutional questions it raises under the Fifth Amendment.

U.S. Department of Justice
Office of Legal Counsel

1/26/88

Pat,

I hope this is of assistance.

Brad

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable James C. Miller
Director
Office of Management and Budget
Washington, D.C. 20530

Dear Mr. Miller:

In compliance with your request, we have examined a facsimile of H.R. 278, "The Alaska Native Claims Settlement Act Amendments of 1987." The Department of Justice recommends that the bill be vetoed.

The purpose of this bill is to address the so-called "1991" issues, those lingering questions growing out of the expiration in 1991 of restrictions on the alienation of native corporation stock in Alaska. As you know, the Alaska Native Claims Settlement Act of 1971 (ANCSA) extinguished native land claims and established corporations governed by state law. ANCSA provided that the land was to be privately owned by the corporations and not held in trust by the United States as in the lower forty-eight states, and that individual natives were "vested" with stock interests. As for any corporate enterprise, ANCSA promoted the prospect of economic self sufficiency for the natives through healthy returns on their investments. But it did not set in motion every element of the usual corporate machinery. It withheld perhaps the most crucial one until the end of 1991 -- the right of stockholders to sell, or alienate, their interests. That year quickly approaches, and as it does, concern has been voiced in certain quarters that native rights and land will dissipate in widespread sale of their stock. It is primarily this fear that prompts H.R. 278.

We commend the goal of encouraging native corporations to retain their lands. The means by which the bill purports to achieve this goal prevent our endorsement of it. H.R. 278 effectively forecloses any future alienability of native stock by extending the current 1991 deadline automatically and indefinitely. It permits the dilution in value of all shares and greatly inhibits those natives wishing to sell their stock after 1991 with no ultimate assurance that they may ever do so at a fair price. Other provisions establish ethnic distinctions between natives and non-natives, and shield any management

accountability by allowing corporate assets to be placed beyond corporate control. The aggregate effect of these retreats from the promises of ANCSA paralyzes corporate growth and actively encourages its decline. But denying any native option of redeeming their investments portends even more ominous legal consequences.

The bill raises serious concerns under the Takings Clause of the Fifth Amendment, which threaten to expose the United States to enormous financial liability. If the courts find a taking, then the Fifth Amendment would require the United States to pay just compensation to the Alaska natives notwithstanding the bill's declaration that "No money judgment shall be entered against the United States in a civil action" challenging the "extension of alienability restrictions." The Supreme Court held just last term that, once a taking is found, sovereign immunity is no bar to the "award [of] money damages against the government" since "it is the Constitution that dictates the [just compensation] remedy for interference with property rights amounting to a taking." First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S.Ct 2378, 2386 & n.9 (1987). Moreover, Congress could not avoid liability even if it subsequently amended the statute since the Fifth Amendment would require compensation for temporary takings that might occur between December 18, 1991 and the time a court finds the extension of alienation restrictions to be a taking. Id. With this preface, we turn our concerns to the underlying question of takings risks.

At the forefront is the mandate in Sections 5 and 8 that restraints on alienation of native stock continue beyond 1991. The former section also allows the disinheriting of non-native spouses, which is a likely taking under Hodel v. Irving, 107 S. Ct. 2076 (1987). The latter section provides virtually meaningless "opt-out" provisions for corporations wishing to terminate alienation restrictions, giving those corporations only one chance to choose this before 1991, and requiring approval by a likely prohibitive majority vote of the shareholders.

Even so, dissenters' rights under Section 9 apparently arise only in the improbable event that such an amendment to the corporate articles is proposed. And, as Section 4 allows dilution of stock value by permitting the issuance of new shares without consideration, so does Section 9 devalue the worth of any dissenting stock by allowing the exclusion of nearly all significant corporate assets in assessing its price, by allowing the deferring of payment for it for five years, and by severely restricting its alienation. The final assault on the expectations of those many natives who, fifteen years ago, received vested interests in their corporations, is Section 10. It gives the corporation the option to put its every asset into a

"settlement trust," thus insulating management from any responsibility to the natives.

The Department of Justice would support legislation which fulfills the fundamental promises of ANCSA, but H.R. 278 falls far short of even modestly making good on the federal assurances of 1971. It plays havoc with stock values and the most elemental of corporate privileges -- stock alienability. Where ANCSA promoted native economic self sufficiency, H. R. 278 denies them their chance for a fair profit. Our qualms would not be nearly so grave, however, but for Hodel v. Irving, in which the Supreme Court found that a statute with economic impacts much like those of H.R. 278 -- barring Indian owners from transferring land by devise -- constituted a taking in violation of the Fifth Amendment. The Court found this to be "virtually an abrogation of the right to pass on ... property ... [a] part of the Anglo-American system since feudal times." Each of the elements of H.R. 278 which we have identified, and certainly their aggregate, pose such "takings" risks, and the United States must expect that passage of H.R. 278 would bring down on it an array of such claims.[1]

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[1] The Court's decision in Irving appears to limit its earlier decision in Andrus v. Allard, 444 U.S. 51 (1979) (upholding abrogation of the right to sell eagle parts against Fifth Amendment challenge). In Irving, three members of the Court (Chief Justice Rehnquist and Justices Scalia and Powell) expressly stated in a separate concurrence that the decision "effectively limits Allard to its facts." 107 S.Ct. at 2085. Although three other members of the Court (Justices Brennan, Marshall, and Blackmun) disagreed, the majority opinion itself distinguished Allard with a "But c.f." cite, indicating the majority's recognition that Allard is an analogous decision inconsistent with Irving. Although it may be possible to reconcile Allard with Irving by drawing a distinction for purposes of the Fifth Amendment between the right to sell and the right to devise property, we do not find this distinction persuasive. Moreover, given that Irving is the Court's most recent pronouncement, and that H.R. 278 is similar to the statute in Irving, we think Irving controls.

For these reasons, the Department of Justice recommends against Executive approval of H.R. 278. Accordingly, we have enclosed a veto message. If there is any question whether the bill might not be vetoed, please advise me before any action is taken.

Sincerely,

John R. Bolton
Assistant Attorney General

Enclosure

343-1351

H.R. 275

Don Perlman

Secretary Hodel is very concerned — he is prepared to come back & talk to the President

Wants to talk to A.B.

on takings issue

relationship between lower 48 Indians

trustee & ward relationship treated as "dependent people"

relationship between
US & Alaskan Natives
has never been regarded as
trustee & ward
— always free
to sell lands
without See. 8

Interior argues
to vote stock is taking

financial exposure would
be huge

in some corporations — as
many as 20-30%
ownership is non Native

---

5 basic points on politics

① when legislation is
fundamentally rotten when
Congress never has to take us

Seriously on anything

(2) I cannot believe anyone can identify a single vote

If not you

Interior argues is a tactical matter — low profile

If he based it largely on the legal issues, they would understand that

they need ANWAR

Tax Reform Act where all loopholes were to be closed

except Alaska Natives

Cap to all ~~net~~ net operating loss

Secretary will not ~~suggest~~ send another note to Signal if he's backed up

petition for clarification, the Commission did not believe that the unions had adequately supported their contention that the RLA had anything to say about the trackage rights issue.[16] Similarly, the Commission declined to address the other issues that the unions raised, such as whether MKT's and DRGW's use of their own crews violated the terms of the labor protective conditions that the Commission had imposed in the approval order. See App. to Pet. for Cert. in No. 85–793, pp. A–45–A50 (discussing the terms imposed pursuant to *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), and *Norfolk & Western R. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653, 664 (1980)). Surveying the many opportunities that the unions had to raise objections to the trackage rights proposals during the proceedings, the Commission concluded:

> "BLE, UTU, and various other railway labor organizations participated in these proceedings, and none made any argument or presented any evidence that the responsive trackage rights proposals would violate any applicable labor agreement. Rather, the record supports the conclusion that the trackage rights operations, using the tenants' crews, could be implemented as approved without raising any dispute over crew assignments between the employees of different railroads." App. to Pet for Cert. in No. 85–793, p. at A45.

It is thus clear that the agency's refusal to take action based on the unions' new claim that the use of the tenants' crews conflicted with various laws was based on the premise that the unions had, so to speak, procedurally defaulted on those claims. There is no basis for concluding that this decision constituted an abuse of discretion.

I would therefore reverse the Court of Appeals on these grounds, not because it lacked jurisdiction.

that the railroads wished to be allowed to use their own crews. See *ante*, at 2363; see also *Missouri, Pacific R. Co., supra*, at 112; App. to Pet. for Cert. in No. 85–793, pp. 45A–50A. The ICC's conclusion that the unions should have been aware of the terms of the proposals is entitled to substantial deference, resting as it does on the intricacies of practice before the Commission.

16. The Commission prefaced its discussion of the § 11341 issue by concluding that the unions had not adequately demonstrated that "the trackage rights agreements ... involve a change in UP–MP employees' working conditions in a manner contrary to RLA requirements." *Id.*, at A43.

FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE, Appellant,

v.

COUNTY OF LOS ANGELES, CALIFORNIA.

No. 85–1199.

Argued Jan. 14, 1987.

Decided June 9, 1987.

Landowner filed complaint in Superior Court of California against county and county flood control district alleging that regulatory ordinance prohibiting construction on landowner's property denied landowner all use of its property. Landowner sought to recover in inverse condemnation and in tort. Defendants moved to strike portions of complaint that alleged that ordinance denied all use of property. The Superior Court struck allegation, and landowner appealed. Following affirmance by the California Court of Appeal and denial of review by the California Supreme Court, appeal was taken. The Supreme Court, Chief Justice Rehnquist, held that: (1) claim that earlier California Supreme Court decision had improperly held that just compensation clause did not require compensation as remedy for temporary regulatory takings was properly presented, and (2) under just compensation clause, where government has taken property by land use regulation, landowner may recover damages for taking before it is finally determined that regulation constitutes taking of his property.

Reversed and remanded.

Justice Stevens filed dissenting opinion, in parts one and three of which Justices Blackmun and O'Connor joined.

1. Federal Courts ⇐504

Claim that California Supreme Court case improperly held that just compensation clause of Fifth Amendment does not require compensation as remedy for temporary regulatory takings, or those regulatory takings which are ulitimately invalidated by courts, was properly presented for review, where California Court of Appeal assumed that complaint sought damages for uncompensated taking of all use of landowner's property by ordinance, and had relied on California Supreme Court decision for conclusion that remedy for taking was limited to nonmonetary relief, thus isolating remedial question for Supreme Court's consideration. U.S.C.A. Const. Amend. 5.

2. Federal Courts ⇐501

Where state court has considered and decided federal constitutional claim, Supreme Court need not consider how or when question was raised.

3. Federal Courts ⇐505

By holding that failure to provide compensation was not unconstitutional, California courts upheld validity of statute or ordinance against federal constitutional question of whether regulatory ordinance violated just compensation clause of Fifth Amendment, and therefore, case came within terms of statute authorizing appeal to Supreme Court of state decision upholding validity of statute allegedly repugnant to Federal Constitution. 28 U.S.C.A. § 1257(2); U.S.C.A. Const.Amends. 5, 14.

4. Eminent Domain ⇐1, 69

Just compensation clause is designed not to limit governmental interference of property rights per se, but rather, to secure compensation in event of otherwise proper interference amounting to taking. U.S.C.A. Const.Amends. 5, 14.

5. Eminent Domain ⇐266

While typical taking occurs when government acts to condemn property in exercise of its power of eminent domain, entire doctrine of inverse condemnation is predicated on proposition that taking may occur without such formal proceedings. U.S.C.A. Const.Amend. 5.

6. Eminent Domain ⇐114

Temporary takings which deny landowner all use of his property are not different in kind from permanent takings, for which Constitution clearly requires compensation. U.S.C.A. Const.Amend. 5.

7. Eminent Domain ⇐114

Invalidation of ordinance without payment of fair value for use of property during period landowner is denied use of property under regulatory ordinance is constitutionally insufficient remedy for taking. U.S.C.A. Const.Amend. 5.

8. Eminent Domain ⇐124

Valuation of property which has been taken must be calculated as of time of taking; depreciation in value of property by reason of preliminary activity is not chargeable to government.

9. Eminent Domain ⇐124

Under just compensation clause, where government has taken property by land use regulation, landowner may recover damages for time before it is finally determined that regulation constitutes taking of his property. U.S.C.A. Const.Amends. 5, 14.

10. Eminent Domain ⇐69

Once court determines that taking has occurred, government retains whole range of options already available: amendment of regulation, withdrawal of invalidated regulation, or exercise of eminent domain; however, where government's activities have already worked taking of all use of property, no subsequent action by government can relieve it of duty to provide compensation for period during which taking was effective. U.S.C.A. Const.Amend. 5.

Syllabus *

In 1957, appellant church purchased land on which it operated a campground, known as "Lutherglen," as a retreat center and a recreational area for handicapped children. The land is located in a canyon along the banks of a creek that is the natural drainage channel for a watershed area. In 1978, a flood destroyed Lutherglen's buildings. In response to the flood, appellee Los Angeles County, in 1979, adopted an interim ordinance prohibiting the construction or reconstruction of any building or structure in an interim flood protection area that included the land on which Lutherglen had stood. Shortly after the ordinance was adopted, appellant filed suit in a California trial court, alleging, *inter alia*, that the ordinance denied appellant all use of Lutherglen, and seeking to recover damages in inverse condemnation for such loss of use. The trial court granted a motion to strike the allegation, basing its ruling on *Agins v. Tiburon*, 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979) (aff'd on other grounds, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980)), in which the California Supreme Court held that a landowner may not maintain an inverse condemnation suit based upon a "regulatory" taking, and that compensation is not required until the challenged regulation or ordinance has been held excessive in an action for declaratory relief or a writ of mandamus and the government has nevertheless decided to continue the regulation in effect. Because appellant alleged a regulatory taking and sought only damages, the trial court deemed the allegation that the ordinance denied all use of Lutherglen to be irrelevant. The California Court of Appeal affirmed.

Held:

1. The claim that the *Agins* case improperly held that the Just Compensation Clause of the Fifth Amendment does not require compensation as a remedy for "temporary" regulatory takings—those regulatory takings which are ultimately invalidated by the courts—is properly presented in this case. In earlier cases, this Court was unable to reach the question because either the regulations considered to be in issue by the state courts did not effect a taking, or the factual disputes yet to be resolved by state authorities might still lead to the conclusion that no taking had occurred. Here, the California Court of Appeal assumed that the complaint sought damages for the uncompensated "taking" of all use of Lutherglen by the ordinance, and relied on the California Supreme Court's *Agins* decision for the conclusion that the remedy for the taking was limited to nonmonetary relief, thus isolating the remedial question for this Court's consideration. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. ——, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981); and *Agins*, all distinguished. Pp. 2383–2385.

2. Under the Just Compensation Clause, where the government has "taken" property by a land-use regulation, the landowner may recover damages for the time before it is finally determined that the regulation constitutes a "taking" of his property. The Clause is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. A landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to compensation. While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings. "Temporary" regulatory takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings for which the Constitution clearly requires compensation. Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain. But where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective. Invalidation of the ordinance without payment of fair value for the use of the property during such period would be a constitutionally insufficient remedy. Pp. 2385–2389.

Reversed and remanded.

REHNQUIST, C.J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, POWELL, and SCALIA, JJ., joined. STEVENS, J., filed a dissenting opinion, in Parts I and III of which BLACKMUN and O'CONNOR, JJ., join.

Michael M. Berger, Los Angeles, Cal., for petitioner.

Jack R. White, Los Angeles, Cal., for respondent.

Chief Justice REHNQUIST delivered the opinion of the Court.

In this case the California Court of Appeal held that a landowner who claims that his property has been "taken" by a land-use regulation may not recover damages for the time before it is finally determined that the regulation constitutes a "taking" of his property. We disagree, and conclude that in these circumstances the Fifth and Fourteenth Amendments to the United States Constitution would require compensation for that period.

In 1957, appellant First English Evangelical Lutheran Church purchased a 21–acre parcel of land in a canyon along the banks of the Middle Fork of Mill Creek in the Angeles National Forest. The Middle Fork is the natural drainage channel for a watershed area owned by the National Forest Service. Twelve of the acres owned by the church are flat land, and contained a dining hall, two bunkhouses, a caretaker's lodge, an outdoor chapel, and a footbridge across the creek. The church operated on the site a campground, known as "Lutherglen," as a retreat center and a recreational area for handicapped children.

In July 1977, a forest fire denuded the hills upstream from Lutherglen, destroying approximately 3,860 acres of the watershed area and creating a serious flood hazard. Such flooding occurred on February 9 and 10, 1978, when a storm dropped 11 inches of rain in the watershed. The runoff from the storm overflowed the banks of the Mill Creek, flooding Lutherglen and destroying its buildings.

In response to the flooding of the canyon, appellee County of Los Angeles adopted Interim Ordinance No. 11,855 in January 1979. The ordinance provided that "[a] person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499 (1906).

Creek Canyon...." App. to Juris. Statement A31. The ordinance was effective immediately because the county determined that it was "required for the immediate preservation of the public health and safety...." *Id.*, at A32. The interim flood protection area described by the ordinance included the flat areas on either side of Mill Creek on which Lutherglen had stood.

The church filed a complaint in the Superior Court of California a little more than a month after the ordinance was adopted. As subsequently amended, the complaint alleged two claims against the county and the Los Angeles County Flood Control District. The first alleged that the defendants were liable under Cal.Gov't Code Ann. § 835 (West 1980)[1] for dangerous conditions on their upstream properties that contributed to the flooding of Lutherglen. As a part of this claim, appellant also alleged that "Ordinance No. 11,855 denies [appellant] all use of Lutherglen." App. 12, 49. The second claim sought to recover from the Flood District in inverse condemnation and in tort for engaging in cloud seeding during the storm that flooded Lutherglen. Appellant sought damages under each count for loss of use of Lutherglen. The defendants moved to strike the portions of the complaint alleging that the county's ordinance denied all use of Lutherglen, on the view that the California Supreme Court's decision in *Agins v. Tiburon*, 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979), aff'd on other grounds, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), rendered the allegation "entirely immaterial and irrelevant[, with] no bearing upon any conceivable cause of action herein." App. 22. See Cal.Civ.Proc.Code Ann. § 436 (West Supp.1987) ("The court may ... strike out any irrelevant, false, or improper matter inserted in any pleading").

In *Agins v. Tiburon, supra*, the Supreme Court of California decided that a landowner may not maintain an inverse condemnation suit in the courts of that State based upon a "regulatory" taking. 24 Cal.3d, at 275–277, 157 Cal.Rptr., at 376–78, 598 P.2d, at 29–31. In the court's view, maintenance of such a suit would allow a landowner to force the legislature to exercise its power of eminent domain. Under this decision, then, compensation is not required until the challenged regulation or ordinance has been held excessive in an action for declaratory relief or a writ of mandamus and the government has nevertheless decided to continue the regulation in effect. Based on this decision, the trial court in the present case granted the motion to strike the allegation that the church had been denied all use of Lutherglen. It explained that "a careful re-reading of the *Agins* case persuades the Court that when an ordinance, even a non-zoning ordinance, deprives a person of the total use of his lands, his challenge to the ordinance is by way of declaratory relief or possibly mandamus." App. 26. Because the appellant alleged a regulatory taking and sought only damages, the allegation that the ordinance denied all use of Lutherglen was deemed irrelevant.[2]

On appeal, the California Court of Appeal read the complaint as one seeking "damages for the uncompensated taking of all use of Lutherglen by County Ordinance No. 11,855...." App. to Juris. Statement A13–A14. It too relied on the California Supreme Court's decision in *Agins* in rejecting the cause of action, declining appellant's invitation to reevaluate *Agins* in light of this Court's opinions in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981).

1. Section 835 of the California Government Code establishes conditions under which a public entity may be liable "for injury caused by a dangerous condition of its property...."

2. The trial court also granted defendants' motion for judgment on the pleadings on the second cause of action, based on cloud seeding. It limited trial on the first cause of action for damages under Cal.Gov't Code Ann. § 835 (West 1980), rejecting the inverse condemnation claim. At the close of plaintiff's evidence, the trial court granted a nonsuit on behalf of defendants, dismissing the entire complaint.

The court found itself obligated to follow *Agins* "because the United States Supreme Court has not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief...." App. to Juris. Statement A16. It accordingly affirmed the trial court's decision to strike the allegations concerning appellee's ordinance.[3] The Supreme Court of California denied review.

This appeal followed, and we noted probable jurisdiction. 478 U.S. ——, 106 S.Ct. 3292, 92 L.Ed.2d 708. Appellant asks us to hold that the Supreme Court of California erred in *Agins v. Tiburon* in determining that the Fifth Amendment, as made applicable to the States through the Fourteenth Amendment, does not require compensation as a remedy for "temporary" regulatory takings—those regulatory takings which are ultimately invalidated by the courts.[4] Four times this decade, we have considered similar claims and have found ourselves for one reason or another unable to consider the merits of the *Agins* rule. See *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. ——, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985); *San Diego Gas & Electric Co., supra; Agins v. Tiburon, supra.* For the reasons explained below, however, we find the constitutional claim properly presented in this case, and hold that on these facts the California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment.

I

[1] Concerns with finality left us unable to reach the remedial question in the earlier cases where we have been asked to consider the rule of *Agins*. See *MacDonald, Sommer & Frates, supra*, 477 U.S., at ——, 106 S.Ct. at —— (summarizing cases). In each of these cases, we concluded either that regulations considered to be in issue by the state court did not effect a taking, *Agins v. Tiburon, supra*, 24 Cal.3d, at 263, 157 Cal.Rptr. 372, 598 P.2d 25, or that the factual disputes yet to be resolved by state authorities might still lead to the conclusion that no taking had occurred. *MacDonald, Sommer & Frates, supra*, 477 U.S., at ——, 106 S.Ct. at ——; *Williamson County, supra*, 473 U.S., at ——, 105 S.Ct., at ——; *San Diego Gas & Electric Co., supra*, 450 U.S., at 631–632, 101 S.Ct., at 1293–1294. Consideration of the remedial question in those circumstances, we concluded, would be premature.

3. The California Court of Appeal also affirmed the lower court's orders limiting the issues for trial on the first cause of action, granting a nonsuit on the issues that proceeded to trial, and dismissing the second cause of action—based on cloud seeding—to the extent it was founded on a theory of strict liability in tort. The court reversed the trial court's ruling that the second cause of action could not be maintained against the Flood Control District under the theory of inverse condemnation. The case was remanded for further proceedings on this claim.

These circumstances alone, apart from the more particular issues presented in takings cases and discussed in the text, require us to consider whether the pending resolution of further liability questions deprives us of jurisdiction because we are not presented with a "final judgmen[t] or decre[e]" within the meaning of 28 U.S.C. § 1257. We think that this case is fairly characterized as one "in which the federal issue, finally decided by the highest court in the State [in which a decision could be had], will survive regardless of the outcome of future state-court proceedings." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480, 95 S.Ct. 1029, 1038, 43 L.Ed.2d 328 (1975). As we explain *infra*, at ——–——, the California Court of Appeal rejected appellant's federal claim that it was entitled to just compensation from the county for the taking of its property; this distinct issue of federal law will survive and require decision no matter how further proceedings resolve the issues concerning the liability of the flood control district for its cloud seeding operation.

4. The Fifth Amendment provides "nor shall private property be taken for public use, without just compensation," and applies to the States through the Fourteenth Amendment. See *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

The posture of the present case is quite different. Appellant's complaint alleged that "Ordinance No. 11,855 denies [it] all use of Lutherglen," and sought damages for this deprivation. App. 12, 49. In affirming the decision to strike this allegation, the Court of Appeal assumed that the complaint sought "damages for the uncompensated *taking* of all use of Lutherglen by County Ordinance No. 11,855." App. to Juris. Statement A13–A14 (emphasis added). It relied on the California Supreme Court's *Agins* decision for the conclusion that "the remedy for a *taking* [is limited] to nonmonetary relief...." *Id.*, at A16 (emphasis added). The disposition of the case on these grounds isolates the remedial question for our consideration. The rejection of appellant's allegations did not rest on the view that they were false. Cf. *MacDonald, Sommer & Frates, supra*, at ——, n. 8, 106 S.Ct., at 2568, n. 8 (California court rejected allegation in the complaint that appellant was deprived of all beneficial use of its property); *Agins v. Tiburon*, 447 U.S., at 259, n. 6, 100 S.Ct., at 2141, n. 6 (same). Nor did the court rely on the theory that regulatory measures such as Ordinance No. 11,855 may never constitute a taking in the constitutional sense. Instead, the claims were deemed irrelevant solely because of the California Supreme Court's decision in *Agins* that damages are unavailable to redress a "temporary" regulatory taking.[5] The California Court of Appeal has thus held that regardless of the correctness of appellants' claim that the challenged ordinance denies it "all use of Lutherglen" appellant may not recover damages until the ordinance is finally declared unconstitutional, and then only for any period after that declaration for which the county seeks to enforce it. The constitutional question pretermitted in our earlier cases is therefore squarely presented here.[6]

[2, 3] We reject appellee's suggestion that, regardless of the state court's treatment of the question, we must independently evaluate the adequacy of the complaint and resolve the takings claim on the merits before we can reach the remedial question. However "cryptic"—to use appellee's description—the allegations with respect to the taking were, the California courts deemed them sufficient to present the issue. We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property[7] or whether the county might avoid the

5. It has been urged that the California Supreme Court's discussion of the compensation question in *Agins v. Tiburon*, 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979), aff'd on other grounds, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), was dictum, because the court had already decided that the regulations could not work a taking. See *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141, 1147 (CA9 1983) ("extended dictum"). The Court of Appeal in this case considered and rejected the possibility that the compensation discussion in *Agins* was dictum. See App. to Juris. Statement A14–A15, quoting *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal.App.3d 484, 493, 188 Cal.Rptr. 191, 195 (1982) ("[I]t is apparent that the Supreme Court itself did not intend its discussion [of inverse condemnation as a remedy for a taking] to be considered dictum.... and it has not been treated as such in subsequent Court of Appeal cases"). Whether treating the claim as a takings claim is inconsistent with the first holding of *Agins* is not a matter for our concern. It is enough that the court did so for us to reach the remedial question.

6. Our cases have also required that one seeking compensation must "seek compensation through the procedures the State has provided for doing so" before the claim is ripe for review. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194, 105 S.Ct. 3108, 3121, 87 L.Ed.2d 126 (1985). It is clear that appellant met this requirement. Having assumed that a taking occurred, the California court's dismissal of the action establishes that "the inverse condemnation procedure is unavailable...." *Id.*, at 197, 105 S.Ct., at 3122. The compensation claim is accordingly ripe for our consideration.

7. Because the issue was not raised in the complaint or considered relevant by the California courts in their assumption that a taking had occurred, we also do not consider the effect of the county's permanent ordinance on the conclusions of the courts below. That ordinance, adopted in 1981 and reproduced at App. to Juris. Statement A32–A33, provides that "[a] person shall not use, erect, construct, move onto, or ... alter, modify, enlarge or reconstruct any building or structure within the boundaries of a flood protection district except ... [a]ccessory buildings and structures that will not substantially impede the flow of water, including sewer, gas, electrical, and water systems, approved by the county engineer ... [a]utomobile parking facilities incidental to a lawfully established use ... [and] [f]lood-control structures approved by the chief engineer of the Los Angeles County Flood Control District." County Code § 22.44.-220.

conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations. See *e.g., Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962); *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915); *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887). These questions, of course, remain open for decision on the remand we direct today. We now turn to the question of whether the Just Compensation Clause requires the government to pay for "temporary" regulatory takings.[8]

II

[4] Consideration of the compensation question must begin with direct reference to the language of the Fifth Amendment, which provides in relevant part that "private property [shall not] be taken for public use, without just compensation." As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power. See *Williamson County*, 473 U.S., at ——, 105 S.Ct., at ——; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 297, n. 40, 101 S.Ct. 2352, 2371, n. 40, 69 L.Ed.2d 1 (1981); *Hurley v. Kincaid*, 285 U.S. 95, 104, 52 S.Ct. 267, 269, 76 L.Ed. 637 (1932); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336, 13 S.Ct. 622, 630, 37 L.Ed. 463 (1893); *United States v. Jones*, 109 U.S. 513, 518, 3 S.Ct. 346, 349, 27 L.Ed. 1015 (1883). This basic understanding of

8. In addition to challenging the finality of the takings decision below, appellee raises two other challenges to our jurisdiction. First, going to both the appellate and certiorari jurisdiction of this Court under 28 U.S.C. § 1257, appellee alleges that appellant has failed to preserve for review any claim under federal law. Though the complaint in this case invoked only the California Constitution, appellant argued in the Court of Appeal that "recent Federal decisions ... show the Federal Constitutional error in ... *Agins[v. Tiburon*, 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979)]." App. to Appellant's Opposition to Appellee's Second Motion to Dismiss A13. The Court of Appeal, by applying the state rule of *Agins* to dismiss appellant's action, rejected on the merits the claim that the rule violated the United States Constitution. This disposition makes irrelevant for our purposes any deficiencies in the complaint as to federal issues. Where the state court has considered and decided the constitutional claim, we need not consider how or when the question was raised. *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134, 34 S.Ct. 874, 877, 58 L.Ed. 1245 (1914). Having succeeded in bringing the federal issue into the case, appellant preserved this question on appeal to the Supreme Court of California, see App. to Appellant's Opposition to Appellee's Second Motion to Dismiss A14–A22, which declined to review its *Agins* decision. Accordingly, we find that the issue urged here was both raised and passed upon below.

Second, appellant challenges our appellate jurisdiction on the grounds that the case below did not draw "in question the validity of a statute of any state...." 28 U.S.C. § 1257(2). There is, of course, no doubt that the ordinance at issue in this case is "a statute of [a] state" for purposes of § 1257. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 207, n. 3, 95 S.Ct. 2268, 2272, n. 3, 45 L.Ed.2d 125 (1975). As construed by the state courts, the complaint in this case alleged that the ordinance, by denying all use of the property, worked a taking without providing for just compensation. We have frequently treated such challenges to zoning ordinances as challenges to their validity under the federal constitution, and see no reason to revise that approach here. See, *e.g., MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. ——, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982); *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). By holding that the failure to provide compensation was not unconstitutional, moreover, the California courts upheld the validity of the statute against the particular federal constitutional question at issue here—just compensation—and the case is therefore within the terms of § 1257(2).

the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960).

We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of " 'the self-executing character of the constitutional provision with respect to compensation....' " *United States v. Clarke*, 445 U.S. 253, 257, 100 S.Ct. 1127, 1130, 63 L.Ed.2d 373 (1980), quoting 6 P. Nichols, Eminent Domain § 25.41 (3d rev. ed. 1972). As noted in Justice BRENNAN's dissent in *San Diego Gas & Electric Co.*, 450 U.S., at 654–655, 101 S.Ct., at 1305, it has been established at least since *Jacobs v. United States*, 290 U.S. 13, 54 S.Ct. 26, 78 L.Ed. 142 (1933), that claims for just compensation are grounded in the Constitution itself:

"The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. *That right was guaranteed by the Constitution.* The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty imposed by the Amendment. *The suits were thus founded upon the Constitution of the United States.*" *Id.*, at 16, 54 S.Ct., at 27. (Emphasis added.)

Jacobs, moreover, does not stand alone, for the Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution. See *e.g.*, *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5, 104 S.Ct. 2187, 2191, 81 L.Ed.2d 1 (1984); *United States v. Causby*, 328 U.S. 256, 267, 66 S.Ct. 1062, 1068, 90 L.Ed. 1206 (1946); *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 304–306, 43 S.Ct. 354, 355–356, 67 L.Ed. 664 (1923); *Monongahela Navigation, supra*, 148 U.S., at 327, 13 S.Ct., at 626.[9]

[5] It has also been established doctrine at least since Justice Holmes' opinion for the Court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922) that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.*, at 415, 43 S.Ct., at 160. While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings. In *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 177–178, 20 L.Ed. 557 (1872), construing a provision in the Wisconsin Constitution identical to the Just Compensation Clause, this Court said:

9. The Solicitor General urges that the prohibitory nature of the Fifth Amendment, see *supra*, at ——, combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of the Government to act, not a remedial provision. The cases cited in the text, we think, refute the argument of the United States that "the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government." Brief for United States as *Amicus Curiae* 14. Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking. See *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 655, n. 21, 101 S.Ct. 1287, 1305–1306, n. 21, 67 L.Ed.2d 551 (1981) (BRENNAN, J., dissenting), quoting *United States v. Dickinson*, 331 U.S. 745, 748, 67 S.Ct. 1382, 1384, 91 L.Ed. 1789 (1947).

"It would be a very curious and unsatisfactory result if ... it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use."

Later cases have unhesitatingly applied this principle. See, *e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979); *United States v. Dickinson*, 331 U.S. 745, 750, 67 S.Ct. 1382, 1385, 91 L.Ed. 1789 (1947); *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946).

While the Supreme Court of California may not have actually disavowed this general rule in *Agins*, we believe that it has truncated the rule by disallowing damages that occurred prior to the ultimate invalidation of the challenged regulation. The Supreme Court of California justified its conclusion at length in the *Agins* opinion, concluding that:

"In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances." *Agins v. Tiburon*, 24 Cal.3d, at 276–277, 157 Cal.Rptr., at 378, 598 P.2d, at 31.

We, of course, are not unmindful of these considerations, but they must be evaluated in the light of the command of the Just Compensation Clause of the Fifth Amendment. The Court has recognized in more than one case that the government may elect to abandon its intrusion or discontinue regulations. See *e.g.*, *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984); *United States v. Dow*, 357 U.S. 17, 26, 78 S.Ct. 1039, 1046, 2 L.Ed.2d 1109 (1958). Similarly, a governmental body may acquiesce in a judicial declaration that one of its ordinances has affected an unconstitutional taking of property; the landowner has no right under the Just Compensation Clause to insist that a "temporary" taking be deemed a permanent taking. But we have not resolved whether abandonment by the government requires payment of compensation for the period of time during which regulations deny a landowner all use of his land.

In considering this question, we find substantial guidance in cases where the government has only temporarily exercised its right to use private property. In *United States v. Dow*, *supra*, at 26, 78 S.Ct., at 1046, though rejecting a claim that the Government may not abandon condemnation proceedings, the Court observed that abandonment "results in an alteration in the property interest taken—from [one of] full ownership to one of temporary use and occupation.... In such cases compensation would be measured by the principles normally governing the taking of a right to use property temporarily. See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 [1949]; *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 [1946]; *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 [1945]." Each of the cases cited by the *Dow* Court involved appropriation of private property by the United States for use during World War II. Though the takings were in fact "temporary," see *Petty Motor Co., supra*, 327 U.S., at 375, 66 S.Ct., at 598, there was no question that compensation would be required for the Government's interference with the use of the property; the Court was concerned in each case with determining the proper measure of the monetary relief to which the property holders were entitled. See *Kimball Laundry Co., supra*, 338 U.S., at 4–21, 69 S.Ct., at 1437–1445; *Petty Motor Co., supra*, 327 U.S., 377–381, 66 S.Ct., at 599–601; *General Mo-*

tors, supra, 323 U.S., at 379–384, 65 S.Ct., at 360–362.

[6, 7] These cases reflect the fact that "temporary" takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation. Cf. *San Diego Gas & Electric Co.*, 450 U.S., at 657, 101 S.Ct., at 1307 (BRENNAN, J., dissenting) ("Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable"). It is axiomatic that the Fifth Amendment's just compensation provision is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S., at 49, 80 S.Ct., at 1569. See also *Penn Central Transportation Co. v. New York City*, 438 U.S., at 123–125, 98 S.Ct., at 2658–2659; *Monongahela Navigation Co. v. United States*, 148 U.S., at 325, 13 S.Ct., at 625. In the present case the interim ordinance was adopted by the county of Los Angeles in January 1979, and became effective immediately. Appellant filed suit within a month after the effective date of the ordinance and yet when the Supreme Court of California denied a hearing in the case on October 17, 1985, the merits of appellant's claim had yet to be determined. The United States has been required to pay compensation for leasehold interests of shorter duration than this. The value of a leasehold interest in property for a period of years may be substantial, and the burden on the property owner in extinguishing such an interest for a period of years may be great indeed. See, *e.g., United States v. General Motors, supra*. Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period. Cf. *United States v. Causby*, 328 U.S., at 261, 66 S.Ct., at 1065–1066 ("It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken"). Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a "temporary" one, is not a sufficient remedy to meet the demands of the Just Compensation Clause.

Appellee argues that requiring compensation for denial of all use of land prior to invalidation is inconsistent with this Court's decisions in *Danforth v. United States*, 308 U.S. 271, 60 S.Ct. 231, 84 L.Ed. 240 (1939), and *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). In *Danforth*, the landowner contended that the "taking" of his property had occurred prior to the institution of condemnation proceedings, by reason of the enactment of the Flood Control Act itself. He claimed that the passage of that Act had diminished the value of his property because the plan embodied in the Act required condemnation of a flowage easement across his property. The Court held that in the context of condemnation proceedings a taking does not occur until compensation is determined and paid, and went on to say that "[a] reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project," but "[s]uch changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." *Danforth, supra*, 308 U.S., at 285, 60 S.Ct., at 236. *Agins* likewise rejected a claim that the city's preliminary activities constituted a taking, saying that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership.'" See 447 U.S., at 263, n. 9, 100 S.Ct., at 2143, n. 9.

[8, 9] But these cases merely stand for the unexceptional proposition that the valuation of property which has been taken must be calculated as of the time of the taking, and that depreciation in value of the property by reason of preliminary activity is not chargeable to the government. Thus, in *Agins*, we concluded that the preliminary activity did not work a taking. It would require a considerable extension of these decisions to say that no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid.[10]

[10] Nothing we say today is intended to abrogate the principle that the decision to exercise the power of eminent domain is a legislative function, "'for Congress and Congress alone to determine.'" *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240, 104 S.Ct. 2321, 2329, 81 L.Ed.2d 186 (1984), quoting *Berman v. Parker*, 348 U.S. 26, 33, 75 S.Ct. 98, 103, 99 L.Ed. 27 (1954). Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain. Thus we do not, as the Solicitor General suggests, "permit a court, at the behest of a private person, to require the ... Government to exercise the power of eminent domain...." Brief for United States as *Amicus Curiae* 22. We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.

We also point out that the allegation of the complaint which we treat as true for purposes of our decision was that the ordinance in question denied appellant all use of its property. We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us. We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 416, 43 S.Ct., at 160.

Here we must assume that the Los Angeles County ordinances have denied appellant all use of its property for a considerable period of years, and we hold that invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy. The judgment of the California Court of Appeals is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice STEVENS, with whom Justice BLACKMUN and Justice O'CONNOR join as to Parts I and III, dissenting.

One thing is certain. The Court's decision today will generate a great deal of

10. *Williamson County Regional Planning Comm'n*, is not to the contrary. There, we noted that "no constitutional violation occurs until just compensation has been denied." 473 U.S., at 194, n. 13, 105 S.Ct., at 3121, n. 13. This statement, however, was addressed to the issue of whether the constitutional claim was ripe for review and did not establish that compensation is unavailable for government activity occurring before compensation is actually denied. Though, as a matter of law, an illegitimate taking might not occur until the government refuses to pay, the interference that effects a taking might begin much earlier, and compensation is measured from that time. See *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5, 104 S.Ct. 2187, 2191, 81 L.Ed.2d 1 (1984) (Where Government physically occupies land without condemnation proceedings, "the owner has a right to bring an 'inverse condemnation' suit to recover the value of the land *on the date of the intrusion by the Government*").

litigation. Most of it, I believe, will be unproductive. But the mere duty to defend the actions that today's decision will spawn will undoubtedly have a significant adverse impact on the land-use regulatory process. The Court has reached out to address an issue not actually presented in this case, and has then answered that self-imposed question in a superficial and, I believe, dangerous way.

Four flaws in the Court's analysis merit special comment. First, the Court unnecessarily and imprudently assumes that appellant's complaint alleges an unconstitutional taking of Lutherglen. Second, the Court distorts our precedents in the area of regulatory takings when it concludes that all ordinances which would constitute takings if allowed to remain in effect permanently, necessarily also constitute takings if they are in effect for only a limited period of time. Third, the Court incorrectly assumes that the California Supreme Court has already decided that it will never allow a state court to grant monetary relief for a temporary regulatory taking, and then uses that conclusion to reverse a judgment which is correct under the Court's own theories. Finally, the Court errs in concluding that it is the Takings Clause, rather than the Due Process Clause, which is the primary constraint on the use of unfair and dilatory procedures in the land-use area.

I

In the relevant portion of its complaint for inverse condemnation, appellant alleged:

"16

"On January 11, 1979, the County adopted Ordinance No. 11,855, which provides:

" 'Section 1. A person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon, vicinity of Hidden Springs, as shown on Map No. 63 ML 52, attached hereto and incorporated herein by reference as though fully set forth.' "

"17

"Lutherglen is within the flood protection area created by Ordinance No. 11,-855.

"18

"Ordinance No. 11,855 denies First Church all use of Lutherglen." App. 49.

Because the Church sought only compensation, and did not request invalidation of the ordinance, the Superior Court granted a motion to strike those three paragraphs, and consequently never decided whether they alleged a "taking."[1] The Superior Court granted the motion to strike on the basis of the rule announced in *Agins v. Tiburon*, 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979). Under the rule of that case a property owner who claims that a land-use restriction has taken property for public use without compensation, must file an action seeking invalidation of the regulation, and may not simply demand compensation. The Court of Appeal affirmed on the authority of *Agins* alone,[2] also without

1. The Superior Court's entire explanation for its decision to grant the motion to strike reads as follows:

"However a careful rereading of the *Agins* case persuades the Court that when an ordinance, even a non-zoning ordinance, deprives a person of the total use of his lands, his challenge to the ordinance is by way of declaratory relief or possibly mandamus." App. 26.

2. The Court of Appeal described the *Agins* case in this way:

"In *Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25, the plaintiffs filed an action for damages in inverse condemnation and for declaratory relief against the City of Tiburon, which had passed a zoning ordinance in part for 'open space' that would have permitted a maximum of five or a minimum of one dwelling units on the plaintiffs' five acres. A demurrer to both causes of action was sustained, and a judgment of dismissal was entered. The California Supreme Court affirmed the dismissal, finding that the ordinance did not

holding that the complaint had alleged a violation of either the California Constitution or the Federal Constitution. At most, it assumed, *arguendo*, that a constitutional violation had been alleged.

This Court clearly has the authority to decide this case by ruling that the complaint did not allege a taking under the Federal Constitution,[3] and therefore to avoid the novel constitutional issue that it addresses. Even though I believe the Court's lack of self-restraint is imprudent, it is imperative to stress that the Court does not hold that appellant is entitled to compensation as a result of the flood protection regulation that the County enacted. No matter whether the regulation is treated as one that deprives appellant of its property on a permanent or temporary basis, this Court's precedents demonstrate that the type of regulatory program at issue here cannot constitute a taking.

"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.' " *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. ——, ——, 107 S.Ct. 1232, 1245, 94 L.Ed.2d 472 (1987), quoting *Mugler v. Kansas*, 123 U.S. 623, 665, 8 S.Ct. 273, 299, 31 L.Ed. 205 (1887). Thus, in order to protect the health and safety of the community,[4] government may condemn unsafe structures, may close unlawful business operations, may destroy infected

on its face 'deprive the landowner of substantially all reasonable use of his property,' (*Agins, supra*, 24 Cal.3d, at p. 277, 157 Cal.Rptr. 372, 598 P.2d 25), and did not 'unconstitutionally interfere with plaintiff's entire use of the land or impermissibly decrease its value' *(ibid.)*. The Supreme Court further said that 'mandamus or declaratory relief rather than inverse condemnation [was] the appropriate relief under the circumstances.' *(Ibid.)*." App. to Juris. Statement, A14.

3. "The familiar rule of appellate court procedure in federal courts [is] that, without a cross-petition or appeal, a respondent or appellee may support the judgment in his favor upon grounds different from those upon which the court below rested its decision." *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434, 60 S.Ct. 670, 672, 84 L.Ed. 849 (1940) citing *United States v. American R. Exp. Co.*, 265 U.S. 425, 435, 44 S.Ct. 560, 563, 68 L.Ed. 1087 (1924); see also *Dandridge v. Williams*, 397 U.S. 471, 475–476, n. 6, 90 S.Ct. 1153, 1156–57, n. 6, 25 L.Ed.2d 491 (1970). It is also well settled that this Court is not bound by a state court's determination (much less an assumption) that a complaint states a federal claim. See *Staub v. City of Baxley*, 355 U.S. 313, 318, 78 S.Ct. 277, 280, 2 L.Ed.2d 302 (1958); *First National Bank of Guthrie Center v. Anderson*, 269 U.S. 341, 346, 46 S.Ct. 135, 137, 70 L.Ed. 295 (1926). Especially in the takings context, where the details of the deprivation are so significant, the economic drain of litigation on public resources is "too great to permit cases to go forward without a more substantial indication that a constitutional violation may have occurred." *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1026 (CA3), cert. denied, 482 U.S. ——, 107 S.Ct. 2482, 95 L.Ed.2d —— (1987).

4. See *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. ——, ——, 107 S.Ct. 1232, ——, 94 L.Ed.2d 472 (1987) (coal mine subsidence); *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) (rock quarry excavation); *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) (infectious tree disease); *Hadacheck v. Los Angeles*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (emissions from factory); *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887) (intoxicating liquors); see also *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 145, 98 S.Ct. 2646, 2670, 57 L.Ed.2d 631 (1978) (REHNQUIST, J., dissenting) ("The question is whether the forbidden use is dangerous to the safety, health, or welfare of others"). Many state courts have reached the identical conclusion. See *Keystone Bituminous, supra*, 480 U.S., at ——, ——, n. 22, 107 S.Ct., at 1246, n. 22 (citing cases).

In *Keystone Bituminous* we explained that one of the justifications for the rule that health and safety regulation cannot constitute a taking is that individuals hold their property subject to the limitation that they not use it in dangerous or noxious ways. 480 U.S., at ——, n. 20, 107 S.Ct., at 1245, n. 20. The Court's recent decision in *United States v. Cherokee Nation of Oklahoma*, 480 U.S. ——, 107 S.Ct. 1487, 94 L.Ed.2d 704 (1987), adds support to this thesis. There, the Court reaffirmed the traditional rule that when the United States exercises its power to assert a navigational servitude it does not "take" property because the damage sustained results "from the lawful exercise of a power to which the interests of riparian owners have always been subject." *Id.*, at ——, 107 S.Ct., at 1490.

trees, and surely may restrict access to hazardous areas—for example, land on which radioactive materials have been discharged, land in the path of a lava flow from an erupting volcano, or land in the path of a potentially life-threatening flood.[5] When a governmental entity imposes these types of health and safety regulations, it may not be "burdened with the condition that [it] must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community." *Mugler, supra,* 123 U.S., at 668–669, 8 S.Ct., at 300–301; see generally *Keystone Bituminous, supra,* 480 U.S., at ——-——, 107 S.Ct., at ——-——.

In this case, the legitimacy of the County's interest in the enactment of Ordinance No. 11,855 is apparent from the face of the ordinance and has never been challenged.[6] It was enacted as an "interim" measure "temporarily prohibiting" certain construction in a specified area because the County Board believed the prohibition was "urgently required for the immediate preservation of the public health and safety." Even if that were not true, the strong presumption of constitutionality that applies to legislative enactments certainly requires one challenging the constitutionality of an ordinance of this kind to allege some sort of improper purpose or insufficient justification in order to state a colorable federal claim for relief. A presumption of validity is particularly appropriate in this case because the complaint did not even allege that the ordinance is invalid, or pray for a declaration of invalidity or an injunction against its enforcement.[7] Nor did it allege any facts indicating how the ordinance interfered with any future use of the property contemplated or planned by appellant. In light of the tragic flood and the loss of life that precipitated the safety regulations here, it is hard to understand how appellant ever expected to rebuild on Lutherglen.

5. See generally Plater, The Takings Issue in a Natural Setting: Floodlines and the Police Power, 52 Tex.L.Rev. 201 (1974); F. Bosselman, D. Callies, & J. Banta, The Takings Issue 147–155 (1973).

6. It is proper to take judicial notice of the ordinance. It provides, in relevant part:

"ORDINANCE NO. 11,855.

"An interim ordinance temporarily prohibiting the construction, reconstruction, placement or enlargement of any building or structure within any portion of the interim flood protection area delineated within Mill Creek, vicinity of Hidden Springs, declaring the urgency thereof and that this ordinance shall take immediate effect.

"The Board of Supervisors of the County of Los Angeles does ordain as follows:

. . . . .

"Section 4. Studies are now under way by the Department of Regional Planning in connection with the County Engineer and the Los Angeles County Flood Control District, to develop permanent flood protection areas for Mill Creek and other specific areas as part of a comprehensive flood plain management project. Mapping and evaluation of flood data has progressed to the point where an interim flood protection area in Mill Creek can be designated. Development is now occurring which will encroach within the limits of the permanent flood protection area and which will be incompatible with the anticipated uses to be permitted within the permanent flood protection area. If this ordinance does not take immediate effect, said uses will be established prior to the contemplated ordinance amendment, and once established may continue after such amendment has been made because of the provisions of Article 9 of Chapter 5 of Ordinance No. 1494.

"By reason of the foregoing facts this ordinance is urgently required for the immediate preservation of the public health and safety, and the same shall take effect immediately upon passage thereof." App. to Juris. Statement 31–32.

7. Because the complaint did not pray for an injunction against enforcement of the ordinance, or a declaration that it is invalid, but merely sought monetary relief, it is doubtful that we have appellate jurisdiction under 28 U.S.C. § 1257(2). Section 1257(2) provides:

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Even if we do not have appellate jurisdiction, however, presumably the Court would exercise its certiorari jurisdiction pursuant to 28 U.S.C. § 1257(3).

Thus, although the Court uses the allegations of this complaint as a springboard for its discussion of a discrete legal issue, it does not, and could not under our precedents, hold that the allegations sufficiently alleged a taking or that the County's effort to preserve life and property could ever constitute a taking. As far as the United States Constitution is concerned, the claim that the ordinance was a taking of Lutherglen should be summarily rejected on its merits.

II

There is no dispute about the proposition that a regulation which goes "too far" must be deemed a taking. See *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922). When that happens, the Government has a choice: it may abandon the regulation or it may continue to regulate and compensate those whose property it takes. In the usual case, either of these options is wholly satisfactory. Paying compensation for the property is, of course, a constitutional prerogative of the sovereign. Alternatively, if the sovereign chooses not to retain the regulation, repeal will, in virtually all cases, mitigate the overall effect of the regulation so substantially that the slight diminution in value that the regulation caused while in effect cannot be classified as a taking of property. We may assume, however, that this may not always be the case. There may be some situations in which even the temporary existence of a regulation has such severe consequences that invalidation or repeal will not mitigate the damage enough to remove the "taking" label. This hypothetical situation is what the Court calls a "temporary taking." But, contrary to the Court's implications, the fact that a regulation would constitute a taking if allowed to remain in effect permanently is by no means dispositive of the question whether the effect that the regulation has already had on the property is so severe that a taking occurred during the period before the regulation was invalidated.

A temporary interference with an owner's use of his property may constitute a taking for which the Constitution requires that compensation be paid. At least with respect to physical takings, the Court has so held. See *ante,* at 2387–2388 (citing cases). Thus, if the Government appropriates a leasehold interest and uses it for a public purpose, the return of the premises at the expiration of the lease would obviously not erase the fact of the Government's temporary occupation. Or if the Government destroys a chicken farm by building a road through it or flying planes over it, removing the road or terminating the flights would not palliate the physical damage that had already occurred. These examples are consistent with the rule that even minimal physical occupations constitute takings which give rise to a duty to compensate. See *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

But our cases also make it clear that regulatory takings and physical takings are very different in this, as well as other, respects. While virtually all physical invasions are deemed takings, see, *e.g., Loretto, supra; United States v. Causby,* 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), a regulatory program that adversely affects property values does not constitute a taking unless it destroys a major portion of the property's value. See *Keystone Bituminous,* 480 U.S., at ——, 107 S.Ct., at ——; *Hodel v. Virginia Surface Mining & Reclamation Assn.,* 452 U.S. 264, 296, 101 S.Ct. 2352, 2370, 69 L.Ed.2d 1 (1981); *Agins v. Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980). This diminution of value inquiry is unique to regulatory takings. Unlike physical invasions, which are relatively rare and easily identifiable without making any economic analysis, regulatory programs constantly affect property values in countless ways, and only the most extreme regulations can constitute takings. Some divid-

ing line must be established between everyday regulatory inconveniences and those so severe that they constitute takings. The diminution of value inquiry has long been used in identifying that line. As Justice Holmes put it: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal, supra,* 260 U.S., at 413, 43 S.Ct., at 159. It is this basic distinction between regulatory and physical takings that the Court ignores today.

Regulations are three dimensional; they have depth, width, and length. As for depth, regulations define the extent to which the owner may not use the property in question. With respect to width, regulations define the amount of property encompassed by the restrictions. Finally, and for purposes of this case, essentially, regulations set forth the duration of the restrictions. It is obvious that no one of these elements can be analyzed alone to evaluate the impact of a regulation, and hence to determine whether a taking has occurred. For example, in *Keystone Bituminous* we declined to focus in on any discrete segment of the coal in the petitioners' mines, but rather looked to the effect that the restriction had on their entire mining project. See 480 U.S., at ——, 107 S.Ct., at ——; see also *Penn Central, supra,* 438 U.S., at 137, 98 S.Ct., at 2665 (looking at owner's other buildings). Similarly, in *Penn Central,* the Court concluded that it was error to focus on the nature of the uses which were prohibited without also examining the many profitable uses to which the property could still be put. 438 U.S., at 130–131, 98 S.Ct., at 2662; see also *Agins, supra,* 447 U.S., at 262–263, 100 S.Ct., at 2142; *Andrus v. Allard,* 444 U.S. 51, 64–67, 100 S.Ct. 318, 326–327, 62 L.Ed.2d 210 (1979). Both of these factors are essential to a meaningful analysis of the economic effect that regulations have on the value of property and on an owner's reasonable investment-based expectations with respect to the property.

Just as it would be senseless to ignore these first two factors in assessing the economic effect of a regulation, one cannot conduct the inquiry without considering the duration of the restriction. See generally, Williams, Smith, Siemon, Mandelker, & Babcock, The White River Junction Manifesto, 9 Vt.L.Rev. 193, 215–218 (Fall 1984). For example, while I agreed with the Chief Justice's view that the permanent restriction on building involved in *Penn Central* constituted a taking, I assume that no one would have suggested that a temporary freeze on building would have also constituted a taking. Similarly, I am confident that even the dissenters in *Keystone Bituminous* would not have concluded that the restriction on bituminous coal mining would have constituted a taking had it simply required the mining companies to delay their operations until an appropriate safety inspection could be made.

On the other hand, I am willing to assume that some cases may arise in which a property owner can show that prospective invalidation of the regulation cannot cure the taking—that the temporary operation of a regulation has caused such a significant diminution in the property's value that compensation must be afforded for the taking that has already occurred. For this ever to happen, the restriction on the use of the property would not only have to be a substantial one, but it would have to remain in effect for a significant percentage of the property's useful life. In such a case an application of our test for regulatory takings would obviously require an inquiry into the duration of the restriction, as well as its scope and severity. See *Williamson Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 190–191, 105 S.Ct. 3108, 3119, 87 L.Ed.2d 126 (1985) (refusing to evaluate taking claim when the long-term economic effects were uncertain because it was not clear that restrictions would remain in effect permanently).

The cases that the Court relies upon for the proposition that there is no distinction between temporary and permanent takings, see *ante,* at 2387, are inapposite, for they all deal with physical takings—where the diminution of value test is inapplicable.[8] None of those cases is controversial; the state certainly may not occupy an individual's home for a month and then escape compensation by leaving and declaring the occupation "temporary." But what does that have to do with the proper inquiry for regulatory takings? Why should there be a constitutional distinction between a permanent restriction that only reduces the economic value of the property by a fraction—perhaps one-third—and a restriction that merely postpones the development of a property for a fraction of its useful life—presumably far less than a third? In the former instance, no taking has occurred; in the latter case, the Court now proclaims that compensation for a taking must be provided. The Court makes no effort to explain these irreconcilable results. Instead, without any attempt to fit its proclamation into our regulatory takings cases, the Court boldly announces that once a property owner makes out a claim that a regulation would constitute a taking if allowed to stand, then he or she is entitled to damages for the period of time between its enactment and its invalidation.

Until today, we have repeatedly rejected the notion that all temporary diminutions in the value of property automatically activate the compensation requirement of the Takings Clause. In *Agins,* we held:

> "The State Supreme Court correctly rejected the contention that the municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property as to constitute a taking.... Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.'" 447 U.S., at 263, n. 9, 100 S.Ct., at 2143, n. 9, quoting *Danforth v. United States,* 308 U.S. 271, 285, 60 S.Ct. 231, 236, 84 L.Ed. 240 (1939).[9]

Our more recent takings cases also cut against the approach the Court now takes. In *Williamson, supra,* and *MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. ——, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986), we held that we could not review a taking claim as long as the property owner had an opportunity to obtain a variance or

8. In *United States v. Dow,* 357 U.S. 17, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958), the United States had "entered into physical possession and began laying the pipe line through the tract." *Id.,* at 19, 78 S.Ct., at 1043. In *Kimball Laundry Co. v. United States,* 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949), the United States Army had taken possession of the laundry plant including all "the facilities of the company, except delivery equipment." *Id.,* at 3, 69 S.Ct., at 1436. In *United States v. Petty Motor Co.,* 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946), the United States acquired by condemnation a building occupied by tenants and ordered the tenants to vacate. In *United States v. General Motors Corp.,* 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945), the Government occupied a portion of a leased building.

9. The Court makes only a feeble attempt to explain why the holding in *Agins* and *Danforth* is not controlling here. It is tautological to claim that the case stands for the "unexceptional proposition that the valuation of property which has been taken must be calculated *as of the time of the taking.*" *Ante,* at 2388 (emphasis added). The question in *Danforth* was when the taking occurred. The question addressed in the relevant portion of *Agins* was whether the temporary fluctuations in value themselves constituted a taking. In rejecting the claims in those cases, the Court necessarily held that the temporary effects did not constitute takings of their own right. The cases are therefore directly on point here. If even the temporary effects of a decision to condemn, the ultimate taking, do not ordinarily constitute a taking in and of themselves, then *a fortiori,* the temporary effects of a regulation should not.

some other form of relief from the zoning authorities that would permit the development of the property to go forward. See *Williamson, supra,* 473 U.S., at 190–191, 105 S.Ct., at 3119; *County of Yolo, supra,* 477 U.S., at ——, 106 S.Ct., at ——. Implicit in those holdings was the assumption that the temporary deprivation of all use of the property would not constitute a taking if it would be adequately remedied by a belated grant of approval of the developer's plans. See Sallet, Regulatory "Takings" and Just Compensation: The Supreme Court's Search for a Solution Continues, 18 Urb.Law. 635, 653 (1986).

The Court's reasoning also suffers from severe internal inconsistency. Although it purports to put to one side "normal delays in obtaining building permits, changes in zoning ordinances, variances and the like," *ante,* at 2389, the Court does not explain why there is a constitutional distinction between a total denial of all use of property during such "normal delays" and an equally total denial for the same length of time in order to determine whether a regulation has "gone too far" to be sustained unless the Government is prepared to condemn the property. Precisely the same interference with a real estate developer's plans may be occasioned by protracted proceedings which terminate with a zoning board's decision that the public interest would be served by modification of its regulation and equally protracted litigation which ends with a judicial determination that the existing zoning restraint has "gone too far," and that the board must therefore grant the developer a variance. The Court's analysis takes no cognizance of these realities. Instead, it appears to erect an artificial distinction between "normal delays" and the delays involved in obtaining a court declaration that the regulation constitutes a taking.[10]

In my opinion, the question whether a "temporary taking" has occurred should not be answered by simply looking at the reason a temporary interference with an owner's use of his property is terminated.[11] Litigation challenging the validity of a land-use restriction gives rise to a delay that is just as "normal" as an administrative procedure seeking a variance or an approval of a controversial plan.[12] Just because a plaintiff can prove that a land-use restriction would constitute a taking if allowed to remain in effect permanently does not mean that he or she can also prove that its temporary application rose to the level of a constitutional taking.

III

The Court recognizes that the California courts have the right to adopt invalidation of an excessive regulation as the appropriate remedy for the permanent effects of overburdensome regulations, rather than allowing the regulation to stand and ordering the government to afford compensation for the permanent taking. See *ante,* at 2388; see also *County of Yolo, supra,* 477 U.S., at ——, 106 S.Ct., at —— (WHITE, J., dissenting); *San Diego Gas & Electric Co. v. San Diego,* 450 U.S. 621, 657, 101 S.Ct. 1287, 1306, 67 L.Ed.2d 551 (1981) (BRENNAN, J., dissenting). The difference between these two remedies is less substantial than one might assume. When a court invalidates a regulation, the Legislative or Executive Branch must then decide whether to condemn the property in order to proceed with the regulatory scheme. On the other hand, if the court requires compensation for a permanent taking, the Executive or Legislative Branch may still repeal the regulation and thus prevent the permanent taking. The difference, therefore, is only in what will happen in the case of Legislative or Executive inertia. Many scholars have debated the respective merits of the alternate approaches in light of separation of powers concerns,[13] but our only concern is with a *state court's* decision on which procedure it considers more appropriate. California is fully competent to decide how it wishes to deal with the separation of powers implications of the remedy it routinely uses.[14]

Once it is recognized that California may deal with the permanent taking problem by invalidating objectionable regulations, it becomes clear that the California Court of Appeal's decision in this case should be affirmed. Even if this Court is correct in stating that one who makes out a claim for a permanent taking is automatically entitled to some compensation for the temporary aspect of the taking as well, the States still have the right to deal with the permanent aspect of a taking by invalidating the regulation. That is all that the California courts have done in this case. They have refused to proceed upon a complaint which sought only damages, and which did not contain a request for a declaratory invalidation of the regulation, as clearly required by California precedent.

The Court seriously errs, therefore, when it claims that the California court held that "a land-owner who claims that his property has been 'taken' by a land-use regulation may not recover damages for the time before it is finally determined that the regulation constitutes a 'taking' of his property." *Ante,* at 2381. Perhaps the Court discerns such a practice from some of the California Supreme Court's earlier decisions, but that is surely no reason for reversing a procedural judgment in a case in which the dismissal of the complaint was entirely consistent with an approach that the Court endorses. Indeed, I am not all that sure how the California courts would deal with a land owner who seeks both invalidation of the regulation and damages for the temporary taking that occurred prior to the requested invalidation.

As a matter of regulating the procedure in its own state courts, the California Supreme Court has decided that mandamus or declaratory relief rather than inverse condemnation provides "the appropriate relief," for one who challenges a regulation as a taking. *Agins v. Tiburon,* 24 Cal.3d, at 277, 157 Cal.Rptr., at 378, 598 P.2d, at 31. This statement in *Agins* can be interpreted in two quite different ways. First, it may merely require the property owner to exhaust his equitable remedies before asserting any claim for damages. Under that reading, a postponement of any consideration of monetary relief, or even a requirement that a "temporary regulatory taking" claim be asserted in a separate proceeding after the temporary interference has ended, would not violate the Federal Constitution. Second, the *Agins* opinion may be read to indicate that California

10. Whether delays associated with a judicial proceeding that terminates with a holding that a regulation was not authorized by state law would be a "normal delay" or a temporary taking depends, I suppose, on the unexplained rationale for the Court's artificial distinction.

11. "[T]he Constitution measures a taking of property not by what a State says, or what it intends, but by what it *does.*" *Hughes v. Washington,* 389 U.S. 290, 298, 88 S.Ct. 438, 443, 19 L.Ed.2d 530 (1967) (Stewart, J., concurring). The fact that the effects of the regulation are stopped by judicial, as opposed to administrative decree, should not affect the question of whether compensation is required.

12. States may surely provide a forum in their courts for review of general challenges to zoning ordinances and other regulations. Such a procedure then becomes part of the "normal" process. Indeed, when States have set up such procedures in their courts, we have required resort to those processes before considering takings claims. See *Wiliamson, Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

13. See, *e.g.,* Mandelker, Land Use Takings: The Compensation Issue, 8 Hastings Const. L.Q. 491 (1981); Williams, Smith, Siemon, Mandelker, & Babcock, The White River Junction Manifesto, 9 Vt.L.Rev. 193, 233–234 (Fall 1984); Berger & Kanner, Thoughts on the *White River Junction Manifesto:* A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property, 19 Loyola (LA) L.Rev. 685, 704–712 (1986); Comment, Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations, 29 UCLA L.Rev. 711, 725–726 (1982).

14. For this same reason, the parties' and *amicis'* conflicting claims about whether this Court's cases, such as *Hurley v. Kincaid,* 285 U.S. 95, 52 S.Ct. 267, 76 L.Ed. 637 (1932), provide that compensation is a less intrusive remedy than invalidation, are not relevant here.

courts will never award damages for a temporary regulatory taking.[15] Even if we assume that such a rigid rule would bar recovery in the California courts in a few meritorious cases, we should not allow a litigant to challenge the rule unless his complaint contains allegations explaining why declaratory relief would not provide him with an adequate remedy, and unless his complaint at least complies with the California rule of procedure to the extent that the rule is clearly legitimate. Since the First Amendment is not implicated, the fact that California's rule may be somewhat "overbroad" is no reason for permitting a party to complain about the impact of the rule on other property owners who actually file complaints that call California's rule into question.

In any event, the Court has no business speculating on how the California courts will deal with this problem when it is presented to them. Despite the many cases in which the California courts have applied the *Agins* rule, the Court can point to no case in which application of the rule has deprived a property owner of his rightful compensation.

In criminal litigation we have steadfastly adhered to the practice of requiring the defendant to exhaust his or her state remedies before collaterally attacking a conviction based on a claimed violation of the Federal Constitution. That requirement is supported by our respect for the sovereignty of the several States and by our interest in having federal judges decide federal constitutional issues only on the basis of fully developed records. See generally *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). The States' interest in controlling land-use development and in exploring all the ramifications of a challenge to a zoning restriction should command the same deference from the federal judiciary. See *Williamson*, 473 U.S., at 194–197, 105 S.Ct., at 3121–3122. And our interest in avoiding the decision of federal constitutional questions on anything less than a fully informed basis counsels against trying to decide whether equitable relief has forestalled a temporary taking until after we know what the relief is. In short, even if the California courts adhere to a rule of never granting monetary relief for a temporary regulatory taking, I believe we should require the property owner to exhaust his state remedies before confronting the question whether the net result of the state proceedings has amounted to a temporary taking of property without just compensation. In this case, the Church should be required to pursue an action demanding invalidation of the ordinance prior to seeking this Court's review of California's procedures.[16]

The appellant should not be permitted to circumvent that requirement by omitting any prayer for equitable relief from its complaint. I believe the California Supreme Court is justified in insisting that the owner recover as much of its property as possible before foisting any of it on an unwilling governmental purchaser. The Court apparently agrees with this proposition. Thus, even on the Court's own radical view of temporary regulatory takings announced today, the California courts had the right to strike this complaint.

IV

There is, of course, a possibility that land-use planning, like other forms of regulation, will unfairly deprive a citizen of the right to develop his property at the time and in the manner that will best serve his economic interests. The "regulatory taking" doctrine announced in *Pennsylvania Coal* places a limit on the permissible scope of land-use restrictions. In my opinion, however, it is the Due Process Clause rather than that doctrine that protects the property owner from improperly motivated, unfairly conducted, or unnecessarily protracted governmental decisionmaking. Violation of the procedural safeguards mandated by the Due Process Clause will give rise to actions for damages under 42 U.S.C. § 1983, but I am not persuaded that delays in the development of property that are occasioned by fairly conducted administrative or judicial proceedings are compensable, except perhaps in the most unusual circumstances. On the contrary, I am convinced that the public interest in having important governmental decisions made in an orderly, fully informed way amply justifies the temporary burden on the citizen that is the inevitable by-product of democratic government.

As I recently wrote:

"The Due Process Clause of the Fourteenth Amendment requires a State to employ fair procedures in the administration and enforcement of all kinds of regulations. It does not, however, impose the utopian requirement that enforcement action may not impose any cost upon the citizen unless the government's position is completely vindicated. We must presume that regulatory bodies such as zoning boards, school boards, and health boards, generally make a good-faith effort to advance the public interest when they are performing their official duties, but we must also recognize that they will often become involved in controversies that they will ultimately lose. Even though these controversies are costly and temporarily harmful to the private citizen, as long as fair procedures are followed, I do not believe there is any basis in the Constitution for characterizing the inevitable by-product of every such dispute as a 'taking' of private property." *Williamson, supra*, 473 U.S., at 205, 105 S.Ct., at 3127 (opinion concurring in judgment).

The policy implications of today's decision are obvious and, I fear, far reaching. Cautious local officials and land-use planners may avoid taking any action that might later be challenged and thus give rise to a damage action. Much important regulation will never be enacted,[17] even

15. The California Supreme Court's discussion of the policy implications in *Agins* is entirely consistent with the view that the court was choosing between remedies (invalidation or compensation) with respect to the permanent effect of a regulation, and was not dealing with the temporary taking question at all. Subsequent California Supreme Court cases applying the *Agins* rule do not shed light on this question.

16. In the habeas corpus context, we have held that a prisoner has not exhausted his state remedies when the state court refuses to consider his claim because he has not sought the appropriate state remedy. See *Woods v. Nierstheimer*, 328 U.S. 211, 216, 66 S.Ct. 996, 999, 90 L.Ed. 1177 (1946); *Ex parte Hawk*, 321 U.S. 114, 116–117, 64 S.Ct. 448, 449–450, 88 L.Ed. 572 (1944). This rule should be applied with equal force here.

17. It is no answer to say that "[a]fter all, if a policeman must know the Constitution, then why not a planner?" *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 661, n. 26, 101 S.Ct. 1287, 1309, n. 26, 67 L.Ed.2d 551 (1981) (BRENNAN, J., dissenting). To begin with, the Court has repeatedly recognized that it itself cannot establish any objective rules to assess when a regulation becomes a taking. See *Hodel v. Irving*, 481 U.S. ——, ——, 107 S.Ct. 2076, ——, 95 L.Ed.2d —— (1987); *Andrus v. Allard*, 444 U.S. 51, 65, 100 S.Ct. 318, 326, 62 L.Ed.2d 210 (1979); *Penn Central*, 438 U.S., at 123–124, 98 S.Ct., at 2658–2659. How then can it demand that land planners do any better? However confusing some of our criminal procedure cases may be, I do not believe they have been as open-ended and standardless as our regulatory takings cases are. As one commentator concluded: "The chaotic state of taking law makes it especially likely that availability of the damages remedy will induce land-use planning officials to stay well back of the invisible line that they dare not cross." Johnson, Compensation for Invalid Land-Use Regulations, 15 Ga.L.Rev. 559, 594 (1981); see also Sallet, The Problem of Municipal Liability for Zoning and Land-Use Regulation, 31 Cath.U.L.Rev. 465, 478 (1982); *Charles v. Diamond*, 41 N.Y.2d 318, 331–332, 392 N.Y.S.2d 594, 604, 360 N.E.2d 1295, 1305 (1977); *Allen v. City and County of Honolulu*, 58 Haw. 432, 439, 571 P.2d 328, 331 (1977).

Another critical distinction between police activity and land-use planning is that not every missed call by a policeman gives rise to civil liability; police officers enjoy individual immunity for actions taken in good faith. See *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984). Moreover, municipalities are not subject to civil liability for police officers' routine judgment errors. See *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In the land regulation context, however, I am afraid that any decision by a competent regulatory body may establish a "pol-

perhaps in the health and safety area. Were this result mandated by the Constitution, these serious implications would have to be ignored. But the loose cannon the Court fires today is not only unattached to the Constitution, but it also takes aim at a long line of precedents in the regulatory takings area. It would be the better part of valor simply to decide the case at hand instead of igniting the kind of litigation explosion that this decision will undoubtedly touch off.

I respectfully dissent.

Edward O'LONE, etc., et al., Petitioners

v.

ESTATE OF Ahmad Uthman SHABAZZ and Sadr-Ud-Din Nafis Mateen.

No. 85–1722.

Argued March 24, 1987.

Decided June 9, 1987.

State prison inmates brought civil rights suit challenging certain prison regulations as violative of their First Amendment rights. The United States District Court for the District of New Jersey, 595 F.Supp. 928, John F. Gerry, J., concluded no constitutional violation had occurred, and prisoners appealed. The Court of Appeals, 782 F.2d 416, Adams, Acting Chief Judge, vacated and remanded. The Supreme Court, Chief Justice Rehnquist, held that: (1) separate burden should not have been placed on prison officials to prove that no reasonable method existed by which inmates' religious rights could be accommodated without creating bona fide security problems; (2) prison officials had acted in reasonable manner by precluding Islamic inmates from attending weekly Friday religious service and prison regulations to that effect thus did not violate free exercise of religion clause of the First Amendment; and (3) even where claims were made under the First Amendment, Supreme Court would not substitute its judgment on difficult and sensitive matters of institutional administration for determinations of those charged with formidable task of running prison.

Judgment of the Court of Appeals reversed.

Justice Brennan filed dissenting opinion in which Justices Marshall, Blackmun, and Stevens joined.

1. Prisons ⇐4(1)

Heightened scrutiny of prison regulations allegedly impinging on inmates' constitutional rights is not appropriate whenever regulations effectively prohibit, rather than simply limit, particular exercise of constitutional rights; presence or absence of alternative accommodations of inmates' rights is properly considered factor in reasonableness analysis rather than basis for heightened scrutiny.

2. Prisons ⇐4(14)

Separate burden should not have been placed on state prison officials to prove that no reasonable method existed by which prisoners' religious rights could be accommodated without creating bona fide security problems, based on prisoners' claim that prison regulations inhibited exercise of their constitutional rights and violated free exercise of religion clause of the First Amendment. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇐84.5(14)
Prisons ⇐4(14)

State prison officials acted in reasonable manner in precluding prisoners who were members of Islamic faith from attending religious service held on Friday afternoons, and prison regulations to that effect did not violate free exercise of religion clause of the First Amendment; prison policies were related to legitimate security and rehabilitative concerns, alternative means of exercising religious faith with respect to other practices were available, and placing Islamic prisoners into work groups so as to permit them to exercise religious rights would have adverse impact. U.S.C.A. Const.Amend. 1.

4. Constitutional Law ⇐72
Prisons ⇐4(2)

Even where claims are made under the First Amendment, the United States Supreme Court would not substitute its judgment on difficult and sensitive matters of institutional administration for determinations of those charged with formidable task of running prison. U.S.C.A. Const.Amend. 1.

Syllabus *

Respondents, prison inmates who are members of the Islamic faith, brought suit under 42 U.S.C. § 1983 contending that two policies adopted by New Jersey prison officials prevented them from attending Jumu'ah, a congregational service held on Friday afternoons, and thereby violated their rights under the Free Exercise Clause of the First Amendment. The first such policy, Standard 853, required inmates in respondents' custody classifications to work outside the buildings in which they were housed and in which Jumu'ah was held, while the second, a policy memorandum, prohibited inmates assigned to outside work from returning to those buildings during the day. The Federal District Court concluded that no constitutional violation had occurred, but the Court of Appeals vacated and remanded, ruling that the prison policies could be sustained only if the State showed that the challenged regulations were intended to and did serve the penological goal of security, and that no reasonable method existed by which prisoners' religious rights could be accommodated without creating bona fide security problems. The court also held that the expert testimony of prison officials should be given due weight on, but is not dispositive of, the accommodation issue.

Held:

1. The Court of Appeals erred in placing the burden on prison officials to disprove the availability of alternative methods of accommodating prisoners' religious rights. That approach fails to reflect the respect and deference the Constitution allows for the judgment of prison administrators. P. 2405.

2. The District Court's findings establish that the policies challenged here are reasonably related to legitimate penological interests, and therefore do not offend the Free Exercise Clause. Both policies have a rational connection to the legitimate governmental interests in institutional order and security invoked to justify them, as is demonstrated by findings that Standard 853 was a response to critical overcrowding and was designed to ease tension and drain on the facilities during that part of the day when the inmates were outside, and that the policy memorandum was necessary since returns from outside work details generated congestion and delays at the main gate, a high risk area, and since the need to decide return requests placed pressure on guards supervising outside work details. Rehabilitative concerns also support the policy memorandum, in light of testimony indicating that corrections officials sought thereby to simulate working conditions and responsibilities in society. Although the policies at issue may prevent some Muslim prisoners from attending Jumu'ah, their reasonableness is supported by the fact that they do not deprive respondents of all forms of religious exercise but instead allow participation in a number of

icy or custom" and give rise to liability after

today.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499 (1906).

"[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults. *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S.Ct. 3035, 3044, 61 L.Ed.2d 797 (1979)." *Eddings v. Oklahoma*, 455 U.S., at 115–116, 102 S.Ct., at 877–878 (footnotes omitted).

See *Gallegos v. Colorado*, 370 U.S. 49, 54, 82 S.Ct. 1209, 1212, 8 L.Ed.2d 325 (1962) (a 14- year-old "cannot be compared with an adult" when assessing the voluntariness of a confession). Where a capital defendant's chronological immaturity is compounded by "serious emotional problems, ... a neglectful, sometimes even violent, family background, ... [and] mental and emotional development ... at a level several years below his chronological age," *id.*, at 116, 102 S.Ct., at 878, the relevance of this information to the defendant's culpability, and thus to the sentencing body, is particularly acute. The Constitution requires that a capital sentencing system reflect this difference in criminal responsibility between children and adults.

Where information at the sentencing stage in a capital case may be highly relevant, counsel's burden of justifying a failure to investigate or present it is similarly heightened. There is no indication that counsel understood the relevance, much less the extraordinary importance, of the facts of Burger's mental and emotional immaturity, and his character and background, that were not investigated or presented in this case. This evidence bears directly on Burger's culpability and responsibility for the murder and in fact directly supports the strategy counsel claimed to have deemed best—to emphasize the difference in criminal responsibility between the two participants in the crime. Absent an explanation that does not appear in this record, counsel's decision not to introduce—or even to discover—this mitigating evidence is unreasonable, and his performance constitutionally deficient.[4]

B

Imposing the death penalty on an individual who is not yet legally an adult is unusual and raises special concern.[5] At least, where a State permits the execution of a

4. As the Court notes, *ante*, at ——, Alvin Leaphart, the appointed counsel who represented petitioner in the state courts, was an experienced and respected lawyer. In concluding there was ineffective assistance in this case, I do not question the Court's view. Any lawyer who has participated in litigation knows that judgment calls—particularly in a trial—cannot always be reasonable or correct. Moreover, this Court has not yet addressed the question presented in *Thompson v. Oklahoma*, 724 P.2d 780 (Okla.Crim.App.1986), cert. granted, 479 U.S. ——, 107 S.Ct. 1284, 94 L.Ed.2d 143 (1987), whether the Eighth Amendment imposes an age limitation on the application of the death penalty. See *Eddings v. Oklahoma*, 455 U.S. 104, 110, n. 5, 102 S.Ct. 869, 874, n. 5, 71 L.Ed.2d 1 (1982).

I also share the concern expressed by Judge Edenfield in *Blake v. Zant*, 513 F.Supp. 772, 802, n. 13 (S.D.Ga.1981) that the routine raising of charges of ineffective assistance of counsel is likely to have a significant "chilling effect" on the willingness of experienced lawyers to undertake the defense of capital cases. See *ante*, at 3118, n. 2. In this case, however, I conclude that the facts and circumstances that no one now disputes clearly show that counsel made a serious mistake of judgment in failing fully to develop and introduce mitigating evidence that the Court concedes was "relevant" and that the jury would have been compelled "to consider". See *ante*, at 3123, n. 7.

5. We noted in *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) that "[e]very State in the country makes some separate provision for juvenile offenders." *Id.*, at 116, n. 12, 102 S.Ct. 877, n. 12 (citing *In re Gault*, 387 U.S. 1, 14, 87 S.Ct. 1428, 1436, 18 L.Ed.2d 527 (1967)). Of the 37 States that have enacted capital punishment statutes since this Court's decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), 11 prohibit the execution of persons under 18 at the time of the offense. Three States impose a prohibition at age 17, and Nevada sets its limit at age 16. Streib, The Eighth Amendment and Capital Punishment of Juveniles, 34 Cleveland State L.Rev. 363, 368–369, and nn. 33–36 (1986). Of the States permitting imposition of the death penalty on juveniles, over half of them explicitly denominate youth as a mitigating factor. The American Law Institute's Model Penal Code capital punishment statute states an exclusion for defendants "under 18 years of age at the time of the commission of the crime." § 210.6(1)(d) (1980). The Institute reasons "that civilized societies will not tolerate the spectacle of execution of children, and this opinion is confirmed by the American experience in punishing youthful offenders." *Id.*, Comment, p. 133. In 1983, the American Bar Association adopted a resolution stating that the organization "oppo[ses], in principle, the imposition of capital punishment on any person for an offense committed while that person was under the age of 18." See ABA Opposes Capital Punishment for Persons under 18, 69 A.B.A.J. 1925 (1983).

minor, great care must be taken to ensure that the minor truly deserves to be treated as an adult. A specific inquiry including "age, actual maturity, family environment, education, emotional and mental stability, and ... prior record" is particularly relevant when a minor's criminal culpability is at issue. See *Fare v. Michael C.*, 442 U.S. 707, 734, n. 4, 99 S.Ct. 2560, 2576, n. 4, 61 L.Ed.2d 197 (1979) (POWELL, J., dissenting). No such inquiry occurred in this case. In every realistic sense Burger not only was a minor according to law, but clearly his mental capacity was subnormal to the point where a jury reasonably could have believed that death was not an appropriate punishment. Because there is a reasonable probability that the evidence not presented to the sentencing jury in this case would have affected its outcome, Burger has demonstrated prejudice due to counsel's deficient performance.

III

As I conclude that counsel's performance in this case was deficient, and the deficiency may well have influenced the sentence that Burger received, I would vacate Burger's death sentence and remand for resentencing.

James Patrick NOLLAN, et ux., Appellant

v.

CALIFORNIA COASTAL COMMISSION.

No. 86–133.

Argued March 30, 1987.

Decided June 26, 1987.

Property owners brought action against California Coastal Commission seeking writ of mandate. The Commission had imposed as a condition to approval of rebuilding permit requirement that owners provide lateral access to public to pass and repass across property. The Superior Court, Ventura County, William L. Peck, J., granted peremptory writ of mandate, and the Commission appealed. The California Court of Appeal, Abbe, J., 177 Cal.App.3d 719, 223 Cal.Rptr. 28, reversed and remanded with directions. Appeal was taken. The Supreme Court, Justice Scalia, held that Commission could not, without paying compensation, condition grant of permission to rebuild house on property owners' transfer to public of easement across beachfront property.

Reversed.

International opinion on the issue is reflected in Article 6 of the International Covenant on Civil and Political Rights and the American Convention on Human Rights. See United Nations, Human Rights, A Compilation of International Instruments 9 (1983). See also Weissbrodt, United States Ratification of the Human Rights Covenants, 63 Minn.L.Rev. 35, 40 (1978). Both prohibit the execution of individuals under the age of 18 at the time of their crime. The United States is not a party to either of these treaties, but at least 73 other nations have signed or ratified the International Covenant. See Weissbrodt, *supra*. All European countries forbid imposition of the death penalty on those under 18 at the time of their offense. Streib, *supra*, at 389 (citing Amnesty International, The Death Penalty (1979)).

Justice Brennan filed a dissenting opinion in which Marshall joined.

Justice Blackmun filed a dissenting opinion.

Justice Stevens filed a dissenting opinion in which Justice Blackmun joined.

1. Eminent Domain ⇐2(1.2)

Although outright taking of uncompensated, permanent, public-access easement violates Fifth Amendment taking clause, conditioning property owners' rebuilding permit on granting of easement can be allowed for land use regulation if condition substantially furthers governmental purposes that justify denial of permit. U.S.C.A. Const.Amend. 5.

2. Eminent Domain ⇐2(10)

California Coastal Commission could not, without paying compensation, condition grant of permission to rebuild house on property owners' transfer to public of easement across beachfront property. U.S.C.A. Const.Amend. 5.

Syllabus *

The California Coastal Commission granted a permit to appellants to replace a small bungalow on their beachfront lot with a larger house upon the condition that they allow the public an easement to pass across their beach, which was located between two public beaches. The County Superior Court granted appellants a writ of administrative mandamus and directed that the permit condition be struck. However, the State Court of Appeal reversed, ruling that imposition of the condition did not violate the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment.

Held:

1. Although the outright taking of an uncompensated, permanent, public-access easement would violate the Takings Clause, conditioning appellants' rebuilding permit on their granting such an easement would be lawful land-use regulation if it substantially furthered governmental purposes that would justify denial of the permit. The government's power to forbid particular land uses in order to advance some legitimate police-power purpose includes the power to condition such use upon some concession by the owner, even a concession of property rights, so long as the condition furthers the same governmental purpose advanced as justification for prohibiting the use. Pp. 3145–3148.

2. Here the Commission's imposition of the access-easement condition cannot be treated as an exercise of land-use regulation power since the condition does not serve public purposes related to the permit requirement. Of those put forth to justify it—protecting the public's ability to see the beach, assisting the public in overcoming a perceived "psychological" barrier to using the beach, and preventing beach congestion—none is plausible. Moreover, the Commission's justification for the access requirement unrelated to land-use regulation—that it is part of a comprehensive program to provide beach access arising from prior coastal permit decisions—is simply an expression of the belief that the public interest will be served by a continuous strip of publicly accessible beach. Although the State is free to advance its "comprehensive program" by exercising its eminent domain power and paying for access easements, it cannot compel coastal residents alone to contribute to the realization of that goal. Pp. 3148–3150.

177 Cal.App.3d 719, 223 Cal.Rptr. 28 (1986), reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, POWELL, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined. BLACKMUN, J., filed a dissenting opinion. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Robert K. Best, Sacramento, Cal., for appellants.

Andrea Sheridan Ordin, Los Angeles, Cal., for appellee.

Justice SCALIA delivered the opinion of the Court.

James and Marilyn Nollan appeal from a decision of the California Court of Appeal ruling that the California Coastal Commission could condition its grant of permission to rebuild their house on their transfer to the public of an easement across their beachfront property. 177 Cal.App.3d 719, 223 Cal.Rptr. 28 (1986). The California Court rejected their claim that imposition of that condition violates the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment. *Ibid.* We noted probable jurisdiction. 479 U.S. ——, 107 S.Ct. 312, 93 L.Ed.2d 286 (1986).

I

The Nollans own a beachfront lot in Ventura County, California. A quarter-mile north of their property is Faria County Park, an oceanside public park with a public beach and recreation area. Another public beach area, known locally as "the Cove," lies 1,800 feet south of their lot. A concrete seawall approximately eight feet high separates the beach portion of the Nollans' property from the rest of the lot. The historic mean high tide line determines the lot's oceanside boundary.

The Nollans originally leased their property with an option to buy. The building on the lot was a small bungalow, totaling 504 square feet, which for a time they rented to summer vacationers. After years of rental use, however, the building had fallen into disrepair, and could no longer be rented out.

The Nollans' option to purchase was conditioned on their promise to demolish the bungalow and replace it. In order to do so, under California Public Resources Code §§ 30106, 30212, and 30600 (West 1986), they were required to obtain a coastal development permit from the California Coastal Commission. On February 25, 1982, they submitted a permit application to the Commission in which they proposed to demolish the existing structure and replace it with a three-bedroom house in keeping with the rest of the neighborhood.

The Nollans were informed that their application had been placed on the administrative calendar, and that the Commission staff had recommended that the permit be granted subject to the condition that they allow the public an easement to pass across a portion of their property bounded by the mean high tide line on one side, and their seawall on the other side. This would make it easier for the public to get to Faria County Park and the Cove. The Nollans protested imposition of the condition, but the Commission overruled their objections and granted the permit subject to their recordation of a deed restriction granting the easement. App. 31, 34.

On June 3, 1982, the Nollans filed a petition for writ of administrative mandamus asking the Ventura County Superior Court to invalidate the access condition. They argued that the condition could not be imposed absent evidence that their proposed development would have a direct adverse impact on public access to the beach. The court agreed, and remanded the case to the Commission for a full evidentiary hearing on that issue. *Id.*, at 36.

On remand, the Commission held a public hearing, after which it made further factual findings and reaffirmed its imposition of the condition. It found that the new house would increase blockage of the view of the ocean, thus contributing to the development of "a 'wall' of residential structures" that would prevent the public "psychologically ... from realizing a stretch of coastline exists nearby that they have every

right to visit." *Id.*, at 58. The new house would also increase private use of the shorefront. *Id.*, at 59. These effects of construction of the house, along with other area development, would cumulatively "burden the public's ability to traverse to and along the shorefront." *Id.*, at 65–66. Therefore the Commission could properly require the Nollans to offset that burden by providing additional lateral access to the public beaches in the form of an easement across their property. The Commission also noted that it had similarly conditioned 43 out of 60 coastal development permits along the same tract of land, and that of the 17 not so conditioned, 14 had been approved when the Commission did not have administrative regulations in place allowing imposition of the condition, and the remaining 3 had not involved shorefront property. *Id.*, at 47–48.

The Nollans filed a supplemental petition for a writ of administrative mandamus with the Superior Court, in which they argued that imposition of the access condition violated the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment. The Superior Court ruled in their favor on statutory grounds, finding, in part to avoid "issues of constitutionality," that the California Coastal Act of 1976, Cal.Pub.Res. Code Ann. § 30000 *et seq.*, authorized the Commission to impose public access conditions on coastal development permits for the replacement of an existing single-family home with a new one only where the proposed development would have an adverse impact on public access to the sea. App. 419. In the Court's view, the administrative record did not provide an adequate factual basis for concluding that replacement of the bungalow with the house would create a direct or cumulative burden on public access to the sea. *Id.*, at 416–417. Accordingly, the Superior Court granted the writ of mandamus and directed that the permit condition be struck.

The Commission appealed to the California Court of Appeal. While that appeal was pending, the Nollans satisfied the condition on their option to purchase by tearing down the bungalow and building the new house, and bought the property. They did not notify the Commission that they were taking that action.

The Court of Appeal reversed the Superior Court. 177 Cal.App.3d 719, 223 Cal. Rptr. 28 (1986). It disagreed with the Superior Court's interpretation of the Coastal Act, finding that it required that a coastal permit for the construction of a new house whose floor area, height or bulk was more than 10% larger than that of the house it was replacing be conditioned on a grant of access. *Id.*, at 723–724, 223 Cal.Rptr., at 31; see Cal.Pub.Res.Code § 30212. It also ruled that the requirement did not violate the Constitution under the reasoning of an earlier case of the Court of Appeal, *Grupe v. California Coastal Comm'n*, 166 Cal. App.3d 148, 212 Cal.Rptr. 578 (1985). In that case, the court had found that so long as a project contributed to the need for public access, even if the project standing alone had not created the need for access, and even if there was only an indirect relationship between the access exacted and the need to which the project contributed, imposition of an access condition on a development permit was sufficiently related to burdens created by the project to be constitutional. 177 Cal.App.3d, at 723, 223 Cal.Rptr., at 30–31; see *Grupe, supra*, 166 Cal.App.3d, at 165–168, 212 Cal.Rptr., at 587–590; see also *Remmenga v. California Coastal Comm'n*, 163 Cal.App.3d 623, 628, 209 Cal.Rptr. 628, 631 (1985), appeal dismissed, 474 U.S. 915, 106 S.Ct. 241, 88 L.Ed.2d 250 (1985). The Court of Appeal ruled that the record established that that was the situation with respect to the Nollans' house. 177 Cal.App.3d, at 722–723, 223 Cal.Rptr., at 30–31. It ruled that the Nollans' taking claim also failed because, although the condition diminished the value of the Nollans' lot, it did not deprive them of all reasonable use of their property. *Id.*, at 723, 223 Cal.Rptr., at 30; see *Grupe, supra*, 166 Cal.App.3d, at 175–176, 212 Cal. Rptr., at 595–596. Since, in the Court of Appeal's view, there was no statutory or constitutional obstacle to imposition of the access condition, the Superior Court erred in granting the writ of mandamus. The Nollans appealed to this Court, raising only the constitutional question.

II

[1] Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather, (as Justice BRENNAN contends) "a mere restriction on its use," *post*, at 3154, n. 3, is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them. J. Sackman, 1 Nichols on Eminent Domain § 2.1[1] (Rev. 3d ed. 1985), 2 *id.*, § 5.01[5]; see 1 *id.*, § 1.42[9], 2 *id.*, § 6.14. Perhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it, but our cases' analysis of the effect of other governmental action leads to the same conclusion. We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433, 102 S.Ct. 3164, 3175, 73 L.Ed.2d 868 (1982), quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S.Ct. 383, 391, 62 L.Ed.2d 332 (1979). In *Loretto* we observed that where governmental action results in "[a] permanent physical occupation" of the property, by the government itself or by others, see 458 U.S., at 432–433, n. 9. 102 S.Ct., at 3174–3175, n. 9, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner," *id.*, at 434–435, 102 S.Ct., at 3175–3176. We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.[1]

Justice BRENNAN argues that while this might ordinarily be the case, the California Constitution's prohibition on any individual's "exclu[ding] the right of way to [any navigable] water whenever it is required for any public purpose," Article X, § 4, produces a different result here. *Post*, at 3153–3154; see also *post*, at 3157, 3158–3159. There are a number of difficulties with that argument. Most obviously, the right of way sought here is not naturally described as one *to* navigable water (from the street to the sea) but *along* it; it is at least highly questionable whether the text of the California Constitution has any prima facie application to the situation before us. Even if it does, however, several California cases suggest that Justice BRENNAN's interpretation of the effect of the clause is erroneous, and that to obtain easements of access across private property the State must proceed through its emi-

1. The holding of *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980), is not inconsistent with this analysis, since there the owner had already opened his property to the general public, and in addition permanent access was not required. The analysis of *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979), is not inconsistent because it was affected by traditional doctrines regarding navigational servitudes. Of course neither of those cases involved, as this one does, a classic right-of-way easement.

nent domain power. See *Bolsa Land Co. v. Burdick*, 151 Cal. 254, 260, 90 P. 532, 534–535 (1907); *Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 185, 50 P. 277, 286 (1897); *Heist v. County of Colusa*, 163 Cal.App.3d 841, 851, 213 Cal.Rptr. 278, 285 (1984); *Aptos Seascape Corp. v. Santa Cruz*, 138 Cal.App.3d 484, 505–506, 188 Cal.Rptr. 191, 204–205 (1982) (None of these cases specifically addressed the argument that Article X, § 4 allowed the public to cross private property to get to navigable water, but if that provision meant what Justice BRENNAN believes, it is hard to see why it was not invoked.) See also 41 Op.Cal.Atty.Gen. 39, 41 (1963) ("In spite of the sweeping provisions of [Article X, § 4], and the injunction therein to the Legislature to give its provisions the most liberal interpretation, the few reported cases in California have adopted the general rule that one may not trespass on private land to get to navigable tidewaters for the purpose of commerce, navigation or fishing"). In light of these uncertainties, and given the fact that, as Justice BLACKMUN notes, the Court of Appeal did not rest its decision on Article X, § 4. *post*, at 3162, we should assuredly not take it upon ourselves to resolve this question of California constitutional law in the first instance. See, *e.g.*, *Jenkins v. Anderson*, 447 U.S. 231, 234, n. 1, 100 S.Ct. 2124, 2127, n. 1, 65 L.Ed.2d 86 (1980). That would be doubly inappropriate since the Commission did not advance this argument in the Court of Appeal, and the Nollans argued in the Superior Court that any claim that there was a pre-existing public right of access had to be asserted through a quiet title action, see Points and Authorities in Support of Motion for Writ of Administrative Mandamus, No. SP50805 (Super.Ct.Cal.), p. 20, which the Commission, possessing no claim to the easement itself, probably would not have had standing under California law to bring. See Cal.Code Civ.Proc.Ann. § 738 (West 1980).[2]

Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land use permit alters the outcome. We have long recognized that land use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land," *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980). See also *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127, 98 S.Ct. 2646, 2660, 57 L.Ed.2d 631 (1978) ("a use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose"). Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter.[3] They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements. See *Agins v. Tiburon*, *supra*, 447 U.S., at 260–262, 100 S.Ct., at 2141–2142 (scenic zoning); *Penn Central Transportation Co. v. New York City*, *supra* (landmark preservation); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) (residential zoning); Laitos and Westfall, Government Interference with Private Interests in Public Resources, 11 Harv.Envtl.L.Rev. 1, 66 (1987). The Commission argues that among these permissible purposes are protecting the public's ability to see the beach, assisting the public in overcoming the "psychological barrier" to using the beach created by a developed shorefront, and preventing congestion on the public beaches. We assume, without deciding, that this is so—in which case the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction)[4] would substantially impede these purposes, unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking. See *Penn Central Transportation Co. v. New York City*, *supra*.

The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree. Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we have assumed

2. Justice BRENNAN also suggests that the Commission's public announcement of its intention to condition the rebuilding of houses on the transfer of easements of access caused the Nollans to have "no reasonable claim to any expectation of being able to exclude members of the public" from walking across their beach. *Post*, at 3158–3159. He cites our opinion in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) as support for the peculiar proposition that a unilateral claim of entitlement by the government can alter property rights. In *Monsanto*, however, we found merely that the takings clause was not violated by giving effect to the Government's announcement that application for "*the right to [the] valuable Government benefit*," *id.*, at 1007, 104 S.Ct., at 2875 (emphasis added), of obtaining registration of an insecticide would confer upon the Government a license to use and disclose the trade secrets contained in the application. *Id.*, at 1007–1008, 104 S.Ct., at 2875–2876. See also *Bowen v. Gilliard*, — U.S. —, —, 107 S.Ct. —, —, 95 L.Ed.2d — (1987). But the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a "governmental benefit." And thus the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary "exchange," 467 U.S., at 1007, 104 S.Ct., at 2875, that we found to have occurred in *Monsanto*. Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

3. Contrary to Justice BRENNAN's claim, *post*, at 3150, our opinions do not establish that these standards are the same as those applied to due process or equal-protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980), not that "the State '*could rationally have decided*' the measure adopted might achieve the State's objective." *Post*, at —, quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466, 101 S.Ct. 715, 725, 66 L.Ed.2d 659 (1981). Justice BRENNAN relies principally on an equal protection case, *Minnesota v. Clover Leaf Creamery Co.*, *supra*, and two substantive due process cases, *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487–488, 75 S.Ct. 461, 464–465, 99 L.Ed. 563 (1955) and *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952), in support of the standards he would adopt. But there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical. *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962), does appear to assume that the inquiries are the same, but that assumption is inconsistent with the formulations of our later cases.

4. If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960); see also *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 656, 101 S.Ct. 1287, 1306, 67 L.Ed.2d 551 (1981) (BRENNAN, J., dissenting); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978). But that is not the basis of the Nollans' challenge here.

it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster. Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion." *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14–15 (1981); see Brief for United States as *Amicus Curiae* 22, and n. 20. See also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S., at 439, n. 17, 102 S.Ct., at 3178, n. 17.[5]

III

The Commission claims that it concedes as much, and that we may sustain the condition at issue here by finding that it is reasonably related to the public need or burden that the Nollans' new house creates or to which it contributes. We can accept, for purposes of discussion, the Commission's proposed test as to how close a "fit" between the condition and the burden is required, because we find that this case does not meet even the most untailored standards. The Commission's principal contention to the contrary essentially turns on a play on the word "access." The Nollans' new house, the Commission found,

5. One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served than would result from more lenient (but nontradeable) development restrictions. Thus, the importance of the purpose underlying the prohibition not only does not *justify* the imposition of unrelated conditions for eliminating the prohibition, but positively militates against the practice.

will interfere with "visual access" to the beach. That in turn (along with other shorefront development) will interfere with the desire of people who drive past the Nollans' house to use the beach, thus creating a "psychological barrier" to "access." The Nollans' new house will also, by a process not altogether clear from the Commission's opinion but presumably potent enough to more than offset the effects of the psychological barrier, increase the use of the public beaches, thus creating the need for more "access." These burdens on "access" would be alleviated by a requirement that the Nollans provide "lateral access" to the beach.

[2] Rewriting the argument to eliminate the play on words makes clear that there is nothing to it. It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house. We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land use power for any of these purposes.[6] Our conclusion on this point is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts. See *Parks v. Watson*, 716 F.2d 646, 651–653 (CA9 1983); *Bethlehem Evangelical Lutheran Church v. Lakewood*, 626 P.2d 668, 671–674 (Colo. 1981); *Aunt Hack Ridge Estates, Inc. v. Planning Comm'n*, 160 Conn. 109, 117–120, 273 A.2d 880, 885 (1970); *Longboat Key v. Lands End, Ltd.*, 433 So.2d 574 (Fla.App.1983); *Pioneer Trust & Saving Bank v. Mount Prospect*, 22 Ill.2d 375, 380, 176 N.E.2d 799, 802 (1961); *Lampton v. Pinaire*, 610 S.W.2d 915, 918–919 (Ky.App. 1980); *Schwing v. Baton Rouge*, 249 So.2d 304 (La.App.), application denied, 259 La. 770, 252 So.2d 667 (1971); *Howard County v. JJM, Inc.*, 301 Md. 256, 280–282, 482 A.2d 908, 920–921 (1984); *Collis v. Bloomington*, 310 Minn. 5, 246 N.W.2d 19 (1976); *State ex rel. Noland v. St. Louis County*, 478 S.W.2d 363 (Mo.1972); *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 33–36, 394 P.2d 182, 187–188 (1964); *Simpson v. North Platte*, 206 Neb. 240, 292 N.W.2d 297 (1980); *Briar West, Inc. v. Lincoln*, 206 Neb. 172, 291 N.W.2d 730 (1980); *J.E.D. Associates v. Atkinson, supra; Longridge Builders, Inc. v. Planning Bd. of Princeton*, 52 N.J. 348, 350–351, 245 A.2d 336, 337–338 (1968); *Jenad, Inc. v. Scarsdale*, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966); *In re MacKall v. White*, 85 App.Div.2d 696, 445 N.Y.S.2d 486 (1981), appeal denied, 56 N.Y.2d 503, 450 N.Y.S.2d 1025, 435 N.E.2d 1100 (1982); *Frank Ansuini, Inc. v. Cranston*, 107 R.I. 63, 68–69, 71, 264 A.2d 910, 913, 914 (1970); *College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 807 (Tex. 1984); *Call v. West Jordan*, 614 P.2d 1257, 1258–1259 (Utah 1980); *Board of Supervisors of James City County v. Rowe*, 216

6. As Justice BRENNAN notes, the Commission also argued that the construction of the new house would " 'increase private use immediately adjacent to public tidelands,' " which in turn might result in more disputes between the Nollans and the public as to the location of the boundary. *Post*, at 3155, quoting App. 62. That risk of boundary disputes, however, is inherent in the right to exclude others from one's property, and the construction here can no more justify mandatory dedication of a sort of "buffer zone" in order to avoid boundary disputes than can the construction of an addition to a single-family house near a public street. Moreover, a buffer zone has a boundary as well, and unless that zone is a "no-man's land" that is off-limits for both neighbors (which is of course not the case here) its creation achieves nothing except to shift the location of the boundary dispute further on to the private owner's land. It is true that in the distinctive situation of the Nollans' property the sea-wall could be established as a clear demarcation of the public easement. But since not all of the lands to which this land-use condition applies have such a convenient reference point, the avoidance of boundary disputes is, even more obviously than the others, a made-up purpose of the regulation.

Va. 128, 136–139, 216 S.E.2d 199, 207–209 (1975); *Jordan v. Menomonee Falls*, 28 Wis.2d 608, 617–618, 137 N.W.2d 442, 447–449 (1965), appeal dismissed, 385 U.S. 4, 87 S.Ct. 36, 17 L.Ed.2d 3 (1966). See also *Littlefield v. Afton*, 785 F.2d 596, 607 (CA8 1986); Brief for National Association of Home Builders et al. as *Amici Curiae* 9–16.

Justice BRENNAN argues that imposition of the access requirement is not irrational. In his version of the Commission's argument, the reason for the requirement is that in its absence, a person looking toward the beach from the road will see a street of residential structures including the Nollans' new home and conclude that there is no public beach nearby. If, however, that person sees people passing and repassing along the dry sand behind the Nollans' home, he will realize that there is a public beach somewhere in the vicinity. *Post*, at 3154–3155. The Commission's action, however, was based on the opposite factual finding that the wall of houses completely blocked the view of the beach and that a person looking from the road would not be able to see it at all. App. 57–59.

Even if the Commission had made the finding that Justice BRENNAN proposes, however, it is not certain that it would suffice. We do not share Justice BRENNAN's confidence that the Commission "should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access," *post*, at 3161, that will avoid the effect of today's decision. We view the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate State interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.

We are left, then, with the Commission's justification for the access requirement unrelated to land use regulation:

> "Finally, the Commission notes that there are several existing provisions of pass and repass lateral access benefits already given by past Faria Beach Tract applicants as a result of prior coastal permit decisions. The access required as a condition of this permit is part of a comprehensive program to provide continuous public access along Faria Beach as the lots undergo development or redevelopment." App. 68.

That is simply an expression of the Commission's belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast. The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its "comprehensive program," if it wishes, by using its power of eminent domain for this "public purpose," see U.S. Const., Amdt. V; but if it wants an easement across the Nollans' property, it must pay for it.

Reversed.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

Appellants in this case sought to construct a new dwelling on their beach lot that would both diminish visual access to the beach and move private development closer to the public tidelands. The Commission reasonably concluded that such "buildout," both individually and cumulatively, threatens public access to the shore. It sought to offset this encroachment by obtaining assurance that the public may walk along the shoreline in order to gain

access to the ocean. The Court finds this an illegitimate exercise of the police power, because it maintains that there is no reasonable relationship between the effect of the development and the condition imposed.

The first problem with this conclusion is that the Court imposes a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century. Furthermore, even under the Court's cramped standard, the permit condition imposed in this case directly responds to the specific type of burden on access created by appellants' development. Finally, a review of those factors deemed most significant in takings analysis makes clear that the Commission's action implicates none of the concerns underlying the Takings Clause. The Court has thus struck down the Commission's reasonable effort to respond to intensified development along the California coast, on behalf of landowners who can make no claim that their reasonable expectations have been disrupted. The Court has, in short, given appellants a windfall at the expense of the public.

I

The Court's conclusion that the permit condition imposed on appellants is unreasonable cannot withstand analysis. First, the Court demands a degree of exactitude that is inconsistent with our standard for reviewing the rationality of a state's exercise of its police power for the welfare of its citizens. Second, even if the nature of the public access condition imposed must be identical to the precise burden on access created by appellants, this requirement is plainly satisfied.

A

There can be no dispute that the police power of the States encompasses the authority to impose conditions on private development. See, *e.g.*, *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); *Gorieb v. Fox*, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228 (1927). It is also by now commonplace that this Court's review of the rationality of a State's exercise of its police power demands only that the State "*could rationally have decided*" that the measure adopted might achieve the State's objective. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466, 101 S.Ct. 715, 725, 66 L.Ed.2d 659 (1981) (emphasis in original).[1] In this case, California has employed its

1. See also *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487–488, 75 S.Ct. 461, 464–465, 99 L.Ed. 563 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it"); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952) ("Our recent decisions make it plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare.... [S]tate legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare").

Notwithstanding the suggestion otherwise, *ante*, at ——, n. 3, our standard for reviewing the threshold question whether an exercise of the police power is legitimate is a uniform one. As we stated over 25 years ago in addressing a takings challenge to government regulation:

> "The term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of 'reasonableness,' this Court has generally refrained from announcing any specific criteria. The classic statement of the rule in *Lawton v. Steele*, 152 U.S. 133, 137 [14 S.Ct. 499, 501, 38 L.Ed. 385] (1894), is still valid today: '... [I]t must appear, first, that the interests of the public ... require [government] intereference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.' Even this rule is not applied with strict precision, for this Court has often said that 'debatable questions as to reasonableness are not for the courts but for the legislature ...' *E.g.*, *Sproles v. Binford*, 286 U.S. 374, 388 [52 S.Ct. 581, 585, 76 L.Ed. 1167] (1932)." *Goldblatt v. Hempstead*, 369 U.S. 590, 594–595, 82 S.Ct. 987, 990–991, 8 L.Ed.2d 130 (1962).

See also *id.*, at 596, 82 S.Ct. at 991 (upholding regulation from takings challenge with citation

police power in order to condition development upon preservation of public access to the ocean and tidelands. The Coastal Commission, if it had so chosen, could have denied the Nollans' request for a development permit, since the property would have remained economically viable without the requested new development.[2] Instead, the State sought to accommodate the Nollans' desire for new development, on the condition that the development not diminish the overall amount of public access to the coastline. Appellants' proposed development would reduce public access by restricting visual access to the beach, by contributing to an increased need for community facilities, and by moving private development closer to public beach property. The Commission sought to offset this diminution in access, and thereby preserve the overall balance of access, by requesting a deed restriction that would ensure "lateral" access: the right of the public to pass and repass along the dry sand parallel to the shoreline in order to reach the tidelands and the ocean. In the expert opinion of the Coastal Commission, development conditioned on such a restriction would fairly attend to both public and private interests.

The Court finds fault with this measure because it regards the condition as insufficiently tailored to address the precise type of reduction in access produced by the new development. The Nollans' development blocks visual access, the Court tells us, while the Commission seeks to preserve lateral access along the coastline. Thus, it

to, *inter alia, United States v. Carolene Products,* 304 U.S. 144, 154, 58 S.Ct. 778, 784, 82 L.Ed. 1234 (1938), for proposition that "exercise of police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it"). In *Connolly v. Pension Benefit Guaranty Corp.,* 475 U.S. ——, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986), for instance, we reviewed a takings challenge to statutory provisions that had been held to be a legitimate exercise of the police power under due process analysis in *Pension Benefit Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984). *Gray,* in turn, had relied on *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976). In rejecting the takings argument that the provisions were not within Congress' regulatory power, the Court in *Connolly* stated, "Although both *Gray* and *Turner Elkhorn* were due process cases, it would be surprising indeed to discover now that in both cases Congress unconstitutionally had taken the assets of the employers there involved." 475 U.S., at ——, 106 S.Ct. at 1025. Our phraseology may differ slightly from case to case—*e.g.,* regulation must "substantially advance," *Agins v. Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980) or be "reasonably necessary to" *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 127, 98 S.Ct. 2646, 2660, 57 L.Ed.2d 631 (1978) the government's end. These minor differences cannot, however, obscure the fact that the inquiry in each case is the same.

Of course, government action may be a valid exercise of the police power and still violate specific provisions of the Constitution. Justice SCALIA is certainly correct in observing that challenges founded upon these provisions are reviewed under different standards. *Ante,* at ——. Our consideration of factors such as those identified in *Penn Central, supra,* for instance, provides an analytical framework for protecting the values underlying the Takings Clause, and other distinctive approaches are utilized to give effect to other constitutional provisions. This is far different, however, from the use of different standards of review to address the threshold issue of the rationality of government action.

2. As this Court declared in *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 127, 106 S.Ct. 455, 459, 88 L.Ed.2d 419 (1985):

"A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred."

We also stated in *Kaiser Aetna v. United States,* 444 U.S. 164, 179, 100 S.Ct. 383, 392, 62 L.Ed.2d 332 (1979), with respect to dredging to create a private marina:

"We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation."

concludes, the State acted irrationally. Such a narrow conception of rationality, however, has long since been discredited as a judicial arrogation of legislative authority. "To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government." *Sproles v. Binford,* 286 U.S. 374, 388, 52 S.Ct. 581, 585, 76 L.Ed. 1167 (1932). Cf. *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. ——, ——, n. 21, 107 S.Ct. 1232, 1245, n. 21, 94 L.Ed.2d 472 (1987) ("The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens ... in excess of the benefits received"). As this Court long ago declared with regard to various forms of restriction on the use of property:

> "Each interferes in the same way, if not to the same extent, with the owner's general right of dominion over his property. All rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life. State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable." *Gorieb, supra,* 274 U.S., at 608, 47 S.Ct., at 677 (citations omitted).

The Commission is charged by both the state constitution and legislature to preserve overall public access to the California coastline. Furthermore, by virtue of its participation in the Coastal Zone Management Act program, the State must "exercise effectively [its] responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone," 16 U.S.C. § 1452(2), so as to provide for, *inter alia,* "public access to the coas[t] for recreation purposes." § 1452(2)(D). The Commission has sought to discharge its responsibilities in a flexible manner. It has sought to balance private and public interests and to accept tradeoffs: to permit development that reduces access in some ways as long as other means of access are enhanced. In this case, it has determined that the Nollans' burden on access would be offset by a deed restriction that formalizes the public's right to pass along the shore. In its informed judgment, such a tradeoff would preserve the net amount of public access to the coastline. The Court's insistence on a precise fit between the forms of burden and condition on each individual parcel along the California coast would penalize the Commission for its flexibility, hampering the ability to fulfill its public trust mandate.

The Court's demand for this precise fit is based on the assumption that private landowners in this case possess a reasonable expectation regarding the use of their land that the public has attempted to disrupt. In fact, the situation is precisely the reverse: it is private landowners who are the interlopers. The public's expectation of access considerably antedates any private development on the coast. Article X, Section 4 of the California Constitution, adopted in 1879, declares:

> "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to any such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of

this State shall always be attainable for the people thereof."

It is therefore private landowners who threaten the disruption of settled public expectations. Where a private landowner has had a reasonable expectation that his or her property will be used for exclusively private purposes, the disruption of this expectation dictates that the government pay if it wishes the property to be used for a public purpose. In this case, however, the State has sought to protect *public* expectations of access from disruption by private land use. The State's exercise of its police power for this purpose deserves no less deference than any other measure designed to further the welfare of state citizens.

Congress expressly stated in passing the CZMA that "[i]n light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate." 16 U.S.C. § 1451(h). It is thus puzzling that the Court characterizes as a "non-land-use justification," *ante*, at ——, the exercise of the police power to "'provide continuous public access along Faria Beach as the lots undergo development or redevelopment.'" *Ibid.* (quoting App. 68). The Commission's determination that certain types of development jeopardize public access to the ocean, and that such development should be conditioned on preservation of access, is the essence of responsible land use planning. The Court's use of an unreasonably demanding standard for determining the rationality of state regulation in this area thus could hamper innovative efforts to preserve an increasingly fragile national resource.[3]

B

Even if we accept the Court's unusual demand for a precise match between the condition imposed and the specific type of burden on access created by the appellants, the State's action easily satisfies this requirement. First, the lateral access condition serves to dissipate the impression that the beach that lies behind the wall of homes along the shore is for private use only. It requires no exceptional imaginative powers to find plausible the Commission's point that the average person passing along the road in front of a phalanx of imposing permanent residences, including the appellants' new home, is likely to conclude that this particular portion of the shore is not open to the public. If, however, that person can see that numerous people are passing and repassing along the dry sand, this conveys the message that the beach is in fact open for use by the public. Furthermore, those persons who go down to the public beach a quarter-mile away will be able to look down the coastline and see that persons have continuous access to the tidelands, and will observe signs that proclaim the public's right of access over the dry sand. The burden produced by the diminution in visual access—the impression that the beach is not open to the public—is thus directly alleviated by the provision for public access over the dry sand. The Court therefore has an unrealistically limited conception of what measures could reasonably be chosen to mitigate the

3. The list of cases cited by the Court as support for its approach, *ante*, at ——, includes no instance in which the State sought to vindicate pre-existing rights of access to navigable water, and consists principally of cases involving a requirement of the dedication of land as a condition of subdivision approval. Dedication, of course, requires the surrender of ownership of property rather than, as in this case, a mere restriction on its use. The only case pertaining to beach access among those cited by the Court is *Mackall v. White*, 85 App.Div.2d 696, 445 N.Y.S.2d 486 (1981). In that case, the court found that a subdivision application could not be conditioned upon a declaration that the landowner would not hinder the public from using a trail that had been used to gain access to a bay. The trail had been used despite posted warnings prohibiting passage, and despite the owner's resistance to such use. In that case, unlike this one, neither the state constitution, state statute, administrative practice, nor the conduct of the landowner operated to create any reasonable expectation of a right of public access.

burden produced by a diminution of visual access.

The second flaw in the Court's analysis of the fit between burden and exaction is more fundamental. The Court assumes that the only burden with which the Coastal Commission was concerned was blockage of visual access to the beach. This is incorrect.[4] The Commission specifically stated in its report in support of the permit condition that "[t]he Commission finds that the applicants' proposed development would present an increase in view blockage, *an increase in private use of the shorefront*, and that this impact would burden the public's ability to traverse to and along the shorefront." App. 65–66 (emphasis added). It declared that the possibility that "the public may get the impression that the beachfront is no longer available for public use" would be "due to *the encroaching nature of private use immediately adjacent to the public use, as well as* the visual 'block' of increased residential build-out impacting the visual quality of the beachfront." *Id.*, at 59 (emphasis added).

The record prepared by the Commission is replete with references to the threat to public access along the coastline resulting from the seaward encroachment of private development along a beach whose mean high tide line is constantly shifting. As the Commission observed in its report, "The Faria Beach shoreline fluctuates during the year depending on the seasons and accompanying storms, and the public is not always able to traverse the shoreline below the mean high tide line." *Id.*, at 67. As a result, the boundary between publicly owned tidelands and privately owned beach is not a stable one, and "[t]he existing seawall is located very near to the mean high water line." *Id.*, at 61. When the beach is at its largest, the seawall is about 10 feet from the mean high tide mark; "[d]uring the period of the year when the beach suffers erosion, the mean high water line appears to be located either on or beyond the existing seawall." *Ibid.* Expansion of private development on appellants' lot toward the seawall would thus "increase private use immediately adjacent to public tidelands, which has the potential of causing adverse impacts on the public's ability to traverse the shoreline." *Id.*, at 62. As the Commission explained:

> "The placement of more private use adjacent to public tidelands has the potential of creating conflicts between the applicants and the public. The results of new private use encroachment into boundary/buffer areas between private and public property can create situations in which landowners intimidate the public and seek to prevent them from using public tidelands because of disputes between the two parties over where the exact boundary between private and public ownership is located. If the applicants' project would result in further seaward encroachment of private use into an area of clouded title, new private use in the subject encroachment area could result in use conflict between private and public entities on the subject shorefront." *Id.*, at 61–62.

The deed restriction on which permit approval was conditioned would directly address this threat to the public's access to the tidelands. It would provide a formal declaration of the public's right of access, thereby ensuring that the shifting character of the tidelands, and the presence of private development immediately adjacent to it, would not jeopardize enjoyment of

4. This may be because the State in its briefs and at argument contended merely that the permit condition would serve to preserve overall public access, by offsetting the diminution in access resulting from the project, such as, *inter alia*, blocking the public's view of the beach. The State's position no doubt reflected the reasonable assumption that the Court would evaluate the rationality of its exercise of the police power in accordance with the traditional standard of review, and that the Court would not attempt to substitute its judgment about the best way to preserve overall public access to the ocean at the Faria Family Beach Tract.

that right.[5] The imposition of the permit condition was therefore directly related to the fact that appellant's development would be "located along a unique stretch of coast where lateral access is inadequate due to the construction of private residential structures and shoreline protective devices along a fluctuating shoreline." *Id.*, at 68. The deed restriction was crafted to deal with the particular character of the beach along which appellants sought to build, and with the specific problems created by expansion of development toward the public tidelands. In imposing the restriction, the State sought to ensure that such development would not disrupt the historical expectation of the public regarding access to the sea.[6]

The Court is therefore simply wrong that there is no reasonable relationship between the permit condition and the specific type of burden on public access created by the appellants' proposed development. Even were the Court desirous of assuming the added responsibility of closely monitoring the regulation of development along the California coast, this record reveals rational public action by any conceivable standard.

II

The fact that the Commission's action is a legitimate exercise of the police power does not, of course, insulate it from a takings challenge, for when "regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922). Conventional takings analysis underscores the implausibility of the Court's holding, for it demonstrates that this exercise of California's police power implicates none of the concerns that underlie our takings jurisprudence.

In reviewing a Takings Clause claim, we have regarded as particularly significant the nature of the governmental action and the economic impact of regulation, especially the extent to which regulation interferes with investment-backed expectations. *Penn Central*, 438 U.S., at 124, 98 S.Ct., at 2659. The character of the government action in this case is the imposition of a condition on permit approval, which allows the public to continue to have access to the coast. The physical intrusion permitted by the deed restriction is minimal. The public is permitted the right to pass and re-pass along the coast in an area from the seawall to the mean high tide mark. App. 46. This area is at its *widest* 10 feet, *id.*, at 61, which means that *even without the permit condition*, the public's right of access permits it to pass on average within a few feet

5. As the Commission's Public Access (Shoreline) Interpretative Guidelines state:
"[T]he provision of lateral access recognizes the potential for conflicts between public and private use and creates a type of access that allows the public to move freely along all the tidelands in an area that can be clearly delineated and distinguished from private use areas.... Thus the 'need' determination set forth in P[ublic] R[esources] C[ode] 30212(a)(2) should be measured in terms of providing access that buffers public access to the tidelands from the burdens generated on access by private development." App. 358–359.

6. The Court suggests that the risk of boundary disputes "is inherent in the right to exclude others from one's property," and thus cannot serve as a purpose to support the permit condition. *Ante*, at 3162, n. 14. The Commission sought the deed restriction, however, not to address a generalized problem inherent in any system of property, but to address the *particular* problem created by the shifting high-tide line along Faria Beach. Unlike the typical area in which a boundary is delineated reasonably clearly, the very problem on Faria Beach is that the boundary is *not* constant. The area open to public use therefore is frequently in question, and, as the discussion, *supra*, demonstrates, the Commission clearly tailored its permit condition precisely to address this specific problem.
The Court acknowledges that the Nollans' seawall could provide "a clear demarcation of the public easement," and thus avoid merely shifting "the location of the boundary dispute further on to the private owner's land." *Ibid.* It nonetheless faults the Commission because every property subject to regulation may not have this feature. This case, however, is a challenge to the permit condition *as applied to the Nollans' property*, so the presence or absence of seawalls on other property is irrelevant.

of the seawall. Passage closer to the 8–foot high rocky seawall will make the appellants even less visible to the public than passage along the high tide area farther out on the beach. The intrusiveness of such passage is even less than the intrusion resulting from the required dedication of a sidewalk in front of private residences, exactions which are commonplace conditions on approval of development.[7] Furthermore, the high tide line shifts throughout the year, moving up to and beyond the seawall, so that public passage for a portion of the year would either be impossible or would not occur on appellant's property. Finally, although the Commission had the authority to provide for either passive or active recreational use of the property, it chose the least intrusive alternative: a mere right to pass and repass. *Id.*, at 370.[8] As this Court made clear in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83, 100 S.Ct. 2035, 2042, 64 L.Ed.2d 741 (1980), physical access to private property in itself creates no takings problem if it does not "unreasonably impair the value or use of [the] property." Appellants can make no tenable claim that either their enjoyment of their property or its value is diminished by the public's ability merely to pass and re-pass a few feet closer to the seawall beyond which appellants' house is located.

Pruneyard is also relevant in that we acknowledged in that case that public access rested upon a "state constitutional ... provision that had been construed to create rights to the use of private property by strangers." *Id.*, at 81, 100 S.Ct., at 2041. In this case, of course, the State is also acting to protect a state constitutional right. See *supra*, at —— (quoting Article X, Section 4 of California Constitution). The constitutional provision guaranteeing public access to the ocean states that "the Legislature shall enact such laws as will give *the most liberal construction to this provision* so that access to the navigable waters of this State shall be always attainable for the people thereof." Cal. Const., Art. X, § 4 (Supp.1987) (emphasis added). This provision is the explicit basis for the statutory directive to provide for public access along the coast in new development projects, Cal.Pub.Res.Code Ann. § 30212 (1986), and has been construed by the state judiciary to permit passage over private land where necessary to gain access to the tidelands. *Grupe v. California Coastal Comm'n*, 166 Cal.App.3d 148, 171–172, 212 Cal.Rptr. 578, 592–593 (1985). The physical access to the perimeter of appellants' property at issue in this case thus results directly from the State's enforcement of the state constitution.

7. See, *e.g.*, *City of Bellefontaine Neighbors v. J.J. Kelley Realty & Bldg. Co.*, 460 S.W.2d 298 (Mo.Ct.App.1970); *Allen v. Stockwell*, 210 Mich. 488, 178 N.W. 27 (1920). See generally Shultz & Kelley, Subdivision Improvement Requirements and Guarantees: A Primer, 28 Wash.U.J.Urban and Contemp.L. 3 (1985).

8. The Commission acted in accordance with its Guidelines both in determining the width of the area of passage, and in prohibiting any recreational use of the property. The Guidelines state that it may be necessary on occasion to provide for less than the normal 25–foot wide accessway along the dry sand when this may be necessary to "protect the privacy rights of adjacent property owners." App. 363. They also provide this advice in selecting the type of public use that may be permitted:
"*Pass and Repass.* Where topographic constraints of the site make use of the beach dangerous, where habitat values of the shoreline would be adversely impacted by public use of the shoreline or where the accessway may encroach closer than 20 feet to a residential structure, the accessway may be limited to the right of the public to pass and repass along the access area. For the purposes of these guidelines, pass and repass is defined as the right to walk and run along the shoreline. This would provide for public access along the shoreline but would not allow for any additional use of the accessway. Because this severely limits the public's ability to enjoy the adjacent state owned tidelands by restricting the potential use of the access areas, this form of access dedication should be used only where necessary to protect the habitat values of the site, where topographic constraints warrant the restriction, or where it is necessary to protect the privacy of the landowner." *Id.*, at 370.

Finally, the character of the regulation in this case is not unilateral government action, but a condition on approval of a development request submitted by appellants. The State has not sought to interfere with any pre-existing property interest, but has responded to appellants' proposal to intensify development on the coast. Appellants themselves chose to submit a new development application, and could claim no property interest in its approval. They were aware that approval of such development would be conditioned on preservation of adequate public access to the ocean. The State has initiated no action against appellants' property; had the Nollans' not proposed more intensive development in the coastal zone, they would never have been subject to the provision that they challenge.

Examination of the economic impact of the Commission's action reinforces the conclusion that no taking has occurred. Allowing appellants to intensify development along the coast in exchange for ensuring public access to the ocean is a classic instance of government action that produces a "reciprocity of advantage." *Pennsylvania Coal, supra,* 260 U.S., at 415, 43 S.Ct., at 160. Appellants have been allowed to replace a one-story 521-square-foot beach home with a two-story 1,674-square-foot residence and an attached two-car garage, resulting in development covering 2,464 square feet of the lot. Such development obviously significantly increases the value of appellants' property; appellants make no contention that this increase is offset by any diminution in value resulting from the deed restriction, much less that the restriction made the property less valuable than it would have been without the new construction. Furthermore, appellants gain an additional benefit from the Commission's permit condition program. They are able to walk along the beach beyond the confines of their own property only because the Commission has required deed restrictions as a condition of approving other new beach developments.[9] Thus, appellants benefit both as private landowners and as members of the public from the fact that new development permit requests are conditioned on preservation of public access.

Ultimately, appellants' claim of economic injury is flawed because it rests on the assumption of entitlement to the full value of their new development. Appellants submitted a proposal for more intensive development of the coast, which the Commission was under no obligation to approve, and now argue that a regulation designed to ameliorate the impact of that development deprives them of the full value of their improvements. Even if this novel claim were somehow cognizable, it is not significant. "[T]he interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." *Andrus v. Allard,* 444 U.S. 51, 66, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979).

With respect to appellants' investment-backed expectations, appellants can make no reasonable claim to any expectation of being able to exclude members of the public from crossing the edge of their property to gain access to the ocean. It is axiomatic, of course, that state law is the source of those strands that constitute a property owner's bundle of property rights. "[A]s a general proposition[,] the law of real property is, under our Constitution, left to the individual States to develop and administer." *Hughes v. Washington,* 389 U.S. 290, 295, 88 S.Ct. 438, 441, 19 L.Ed.2d 530 (1967) (Stewart, J., concurring). See also *Borax Consolidated v. Los Angeles,* 296 U.S. 10, 22, 56 S.Ct. 23, 29, 80 L.Ed. 9 (1935) ("Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law"). In this case, the state constitution explicitly states that no one possessing the "frontage" of any "navigable water in this State,

9. At the time of the Nollans' permit application, 43 of the permit requests for development along the Faria Beach had been conditioned on deed restrictions ensuring lateral public access along the shoreline. App. 48.

shall be permitted to exclude the right of way to such water whenever it is required for any public purpose." Cal. Const., Art. X, § 4. The state Code expressly provides that, save for exceptions not relevant here, "[p]ublic access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects." Cal.Pub.Res.Code Ann. § 30212 (1986). The Coastal Commission Interpretative Guidelines make clear that fulfillment of the Commission's constitutional and statutory duty require that approval of new coastline development be conditioned upon provisions ensuring lateral public access to the ocean. App. 362. At the time of appellants' permit request, the Commission had conditioned all 43 of the proposals for coastal new development in the Faria Family Beach Tract on the provision of deed restrictions ensuring lateral access along the shore. App. 48. Finally, the Faria family had leased the beach property since the early part of this century, and "the Faria family and their lessees [including the Nollans] had not interfered with public use of the beachfront within the Tract, so long as public use was limited to pass and re-pass lateral access along the shore." *Ibid.* California therefore has clearly established that the power of exclusion for which appellants seek compensation simply is not a strand in the bundle of appellants' property rights, and appellants have never acted as if it were. Given this state of affairs, appellants cannot claim that the deed restriction has deprived them of a reasonable expectation to exclude from their property persons desiring to gain access to the sea.

Even were we somehow to concede a pre-existing expectation of a right to exclude, appellants were clearly on notice when requesting a new development permit that a condition of approval would be a provision ensuring public lateral access to the shore. Thus, they surely could have had no expectation that they could obtain approval of their new development and exercise any right of exclusion afterward. In this respect, this case is quite similar to *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984). In *Monsanto,* the respondent had submitted trade data to the Environmental Protection Agency (EPA) for the purpose of obtaining registration of certain pesticides. The company claimed that the agency's disclosure of certain data in accordance with the relevant regulatory statute constituted a taking. The Court conceded that the data in question constituted property under state law. It also found, however, that certain of the data had been submitted to the agency after Congress had made clear that only limited confidentiality would be given data submitted for registration purposes. The Court observed that the statute served to inform Monsanto of the various conditions under which data might be released, and stated:

> "If, despite the data-consideration and data-disclosure provisions in the statute, Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment-backed expectations are disturbed when EPA acts to use or disclose the data in a manner that was authorized by law at the time of the submission." *Id.,* at 1006–1007, 104 S.Ct., at 2874–2875.

The Court rejected respondent's argument that the requirement that it relinquish some confidentiality imposed an unconstitutional condition on receipt of a Government benefit:

> "[A]s long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking." *Id.,* at 1007, 104 S.Ct., at 2875.

The similarity of this case to *Monsanto* is obvious. Appellants were aware that stringent regulation of development along the California coast had been in place at

least since 1976. The specific deed restriction to which the Commission sought to subject them had been imposed since 1979 on all 43 shoreline new development projects in the Faria Family Beach Tract. App. 48. Such regulation to ensure public access to the ocean had been directly authorized by California citizens in 1972, and reflected their judgment that restrictions on coastal development represented "the advantage of living and doing business in a civilized community." *Andrus v. Allard*, 444 U.S. 51, 67, 100 S.Ct. 318, 328, 62 L.Ed.2d 210 (1979), quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 422, 43 S.Ct., at 163 (Brandeis, J., dissenting). The deed restriction was "authorized by law at the time of [appellants' permit] submission," *Monsanto, supra*, 467 U.S., at 1007, 104 S.Ct., at 2875, and, as earlier analysis demonstrates, *supra*, at ——, was reasonably related to the objective of ensuring public access. Appellants thus were on notice that new developments would be approved only if provisions were made for lateral beach access. In requesting a new development permit from the Commission, they could have no reasonable expectation of, and had no entitlement to, approval of their permit application without any deed restriction ensuring public access to the ocean. As a result, analysis of appellants' investment-backed expectations reveals that "the force of this factor is so overwhelming . . . that it disposes of the taking question." *Monsanto, supra*, at 1005, 104 S.Ct., at 2874.[10]

Standard Takings Clause analysis thus indicates that the Court employs its unduly restrictive standard of police power rationality to find a taking where neither the character of governmental action nor the nature of the private interest affected raise any takings concern. The result is that the Court invalidates regulation that represents a reasonable adjustment of the burdens and benefits of development along the California coast.

III

The foregoing analysis makes clear that the State has taken no property from appellants. Imposition of the permit condition in this case represents the State's reasonable exercise of its police power. The Coastal Commission has drawn on its expertise to preserve the balance between private development and public access, by requiring that any project that intensifies development on the increasingly crowded California coast must be offset by gains in public access. Under the normal standard for review of the police power, this provision is eminently reasonable. Even accepting the Court's novel insistence on a precise *quid pro quo* of burdens and benefits, there is a reasonable relationship between the public benefit and the burden created by appellants' development. The movement of development closer to the ocean creates the prospect of encroachment on public tidelands, because of fluctuation in the mean high tide line. The deed restriction ensures that disputes about the boundary between private and public property will not deter the public from exercising its right to have access to the sea.

10. The Court suggests that *Ruckelshaus v. Monsanto*, 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) is distinguishable, because government regulation of property in that case was a condition on receipt of a "government benefit," while here regulation takes the form of a restriction on "the right to build on one's own property," which "cannot remotely be described as a 'government benefit.'" *Ante*, at 3152, n. 2. This proffered distinction is not persuasive. Both Monsanto and the Nollans hold property whose use is subject to regulation; Monsanto may not sell its property without obtaining government approval and the Nollans may not build new development on their property without government approval. Obtaining such approval is as much a "government benefit" for the Nollans as it is for Monsanto. If the Court is somehow suggesting that "the right to build on one's own property" has some privileged natural rights status, the argument is a curious one. By any traditional labor theory of value justification for property rights, for instance, see, *e.g.*, J. Locke, The Second Treatise of Civil Government 15–26 (1947 ed.), Monsanto would have a superior claim, for the chemical formulae which constitute its property only came into being by virtue of Monsanto's efforts.

Furthermore, consideration of the Commission's action under traditional takings analysis underscores the absence of any viable takings claim. The deed restriction permits the public only to pass and repass along a narrow strip of beach, a few feet closer to a seawall at the periphery of appellants' property. Appellants almost surely have enjoyed an increase in the value of their property even with the restriction, because they have been allowed to build a significantly larger new home with garage on their lot. Finally, appellants can claim the disruption of no expectation interest, both because they have no right to exclude the public under state law, and because, even if they did, they had full advance notice that new development along the coast is conditioned on provisions for continued public access to the ocean.

Fortunately, the Court's decision regarding this application of the Commission's permit program will probably have little ultimate impact either on this parcel in particular or the Commission program in general. A preliminary study by a Senior Lands Agent in the State Attorney General's Office indicates that the portion of the beach at issue in this case likely belongs to the public. App. 85.[11] Since a full study had not been completed at the time of appellants' permit application, the deed restriction was requested "without regard to the possibility that the applicant is proposing development on public land." *Id.*, at 45. Furthermore, analysis by the same Land Agent also indicated that the public had obtained a prescriptive right to the use of Faria Beach from the seawall to the ocean. *Id.*, at 86.[12] The Superior Court explicitly stated in its ruling against the Commission on the permit condition issue that "no part of this opinion is intended to foreclose the public's opportunity to adjudicate the possibility that public rights in [appellants'] beach have been acquired through prescriptive use." *Id.*, at 420.

With respect to the permit condition program in general, the Commission should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access produced by new development. Neither the Commission in its report nor the State in its briefs and at argument highlighted the particular threat to lateral access created by appellants' development project. In defending its action, the State emphasized the general point that *overall* access to the beach had been preserved, since the diminution of access created by the project had been offset by the gain in lateral access. This approach is understandable, given that the State relied on the reasonable assumption that its action was justified under the normal standard of review for determining legitimate exercises of a State's police power. In the future, alerted to the Court's apparently more demanding requirement, it need only make clear that a provision for public access directly responds to a particular type of burden on access created by a new development. Even if I did not believe that the record in this case satisfies this requirement, I would have to acknowledge that the record's documentation of the impact of coastal development indicates that the Commission should have little problem presenting its findings in a way that avoids a takings problem.

Nonetheless it is important to point out that the Court's insistence on a precise accounting system in this case is insensitive to the fact that increasing intensity of

11. The Senior Land Agent's report to the Commission states that "based on my observations, presently, most, if not all of Faria Beach waterward of the existing seawalls [lies] *below* the Mean High Tide Level, and would fall in public domain or sovereign category of ownership." App. 85 (emphasis added).

12. The report of the Senior Land Agent stated: "Based on my past experience and my investigation to date of this property it is my opinion that the area seaward of the revetment at 3822 Pacific Coast Highway, Faria Beach, as well as all the area seaward of the revetments built to protect the Faria Beach community, if not public owned, has been impliedly dedicated to the public for passive recreational use." *Id.*, at 86.

development in many areas calls for farsighted, comprehensive planning that takes into account both the interdependence of land uses and the cumulative impact of development.[13] As one scholar has noted:

> "Property does not exist in isolation. Particular parcels are tied to one another in complex ways, and property is more accurately described as being inextricably part of a network of relationships that is neither limited to, nor usefully defined by, the property boundaries with which the legal system is accustomed to dealing. Frequently, use of any given parcel of property is at the same time effectively a use of, or a demand upon, property beyond the border of the user." Sax, Takings, Private Property, and Public Rights, 81 Yale L.J. 149, 152 (1971) (footnote omitted).

As Congress has declared, "The key to more effective protection and use of the land and water resources of the coastal [is for the states to] develo[p] land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance." 16 U.S.C. § 1451(i). This is clearly a call for a focus on the overall impact of development on coastal areas. State agencies therefore require considerable flexibility in responding to private desires for development in a way that guarantees the preservation of public access to the coast. They should be encouraged to regulate development in the context of the overall balance of competing uses of the shoreline. The Court today does precisely the opposite, overruling an eminently reasonable exercise of an expert state agency's judgment, substituting its own narrow view of how this balance should be struck. Its reasoning is hardly suited to the complex reality of natural resource protection in the twentieth century. I can only hope that today's decision is an aberration, and that a broader vision ultimately prevails.[14]

I dissent.

Justice BLACKMUN, dissenting.

I do not understand the Court's opinion in this case to implicate in any way the public-trust doctrine. The Court certainly had no reason to address the issue, for the Court of Appeal of California did not rest its decision on Art. X, § 4, of the California Constitution. Nor did the parties base their arguments before this Court on the doctrine.

I disagree with the Court's rigid interpretation of the necessary correlation between a burden created by development and a condition imposed pursuant to the State's police power to mitigate that burden. The land-use problems this country faces require creative solutions. These are not advanced by an "eye for an eye" mentality. The close nexus between benefits and burdens that the Court now imposes on permit

13. As the California Court of Appeals noted in 1985, "Since 1972, permission has been granted to construct more than 42,000 building units within the land jurisdiction of the Coastal Commission. In addition, pressure for development along the coast is expected to increase since approximately 85% of California's population lives within 30 miles of the coast." *Grupe v. California Coastal Comm'n,* 166 Cal.App.3d 148, 167, n. 12, 212 Cal.Rptr. 578, 589, n. 12 (1985). See also *Coastal Zone Management Act,* 16 U.S.C. § 1451(c) (increasing demands on coastal zones "have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion").

14. I believe that States should be afforded considerable latitude in regulating private development, without fear that their regulatory efforts will often be found to constitute a taking. "*If* . . . regulation denies the property owner the use and enjoyment of his land and is found to effect a 'taking' ", however, I believe that compensation is the appropriate remedy for this constitutional violation. *San Diego Gas & Electric Co. v. San Diego,* 450 U.S. 621, 656, 101 S.Ct. 1287, 1306, 67 L.Ed.2d 551 (1981) (BRENNAN, J., dissenting) (emphasis added). I therefore see my dissent here as completely consistent with my position in *First English Evangelical Church v. Los Angeles County,* — U.S. —, 107 S.Ct. 2378, 95 L.Ed.2d — (1987).

conditions creates an anomaly in the ordinary requirement that a State's exercise of its police power need be no more than rationally based. See, *e.g., Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 466, 101 S.Ct. 715, 725, 66 L.Ed.2d 659 (1981). In my view, the easement exacted from appellants and the problems their development created are adequately related to the governmental interest in providing public access to the beach. Coastal development by its very nature makes public access to the shore generally more difficult. Appellants' structure is part of that general development and, in particular, it diminishes the public's visual access to the ocean and decreases the public's sense that it may have physical access to the beach. These losses in access can be counteracted, at least in part, by the condition on appellants' construction permitting public passage that ensures access along the beach.

Traditional takings analysis compels the conclusion that there is no taking here. The governmental action is a valid exercise of the police power, and, so far as the record reveals, has a nonexistent economic effect on the value of appellants' property. No investment-backed expectations were diminished. It is significant that the Nollans had notice of the easement before they purchased the property and that public use of the beach had been permitted for decades.

For these reasons, I respectfully dissent.

Justice STEVENS, with whom Justice BLACKMUN joins, dissenting.

The debate between the Court and Justice BRENNAN illustrates an extremely important point concerning government regulation of the use of privately owned real estate. Intelligent, well-informed public officials may in good faith disagree about the validity of specific types of land use regulation. Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence. Yet, because of the Court's remarkable ruling in *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. —, 107 S.Ct. 2378, 95 L.Ed.2d — (1987), local governments and officials must pay the price for the necessarily vague standards in this area of the law.

In his dissent in *San Diego Gas & Electric Co. v. San Diego,* 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981), Justice BRENNAN proposed a brand new constitutional rule.* He argued that a mistake such as the one that a majority of the Court believes that the California Coastal Commission made in this case should automatically give rise to pecuniary liability for a "temporary taking." *Id.,* at 653–661, 101 S.Ct., at 1304–1309. Notwithstanding the unprecedented chilling effect that such a rule will obviously have on public officials charged with the responsibility for drafting and implementing regulations designed to protect the environment and the public welfare, six Members of the Court recently endorsed Justice BRENNAN's novel proposal. See *First English Evangelical Lutheran Church, supra.*

I write today to identify the severe tension between that dramatic development in the law and the view expressed by Justice BRENNAN's dissent in this case that the public interest is served by encouraging state agencies to exercise considerable flexibility in responding to private desires for development in a way that threatens the preservation of public resources. See *ante,* at 3154–3155. I like the hat that Justice BRENNAN has donned today better than the one he wore in *San Diego,* and I am persuaded that he has the better of the legal arguments here. Even if his posi-

* "The constitutional rule I propose requires that, once a court finds that a police power regulation has effected a 'taking,' the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation." 450 U.S., at 658, 101 S.Ct., at 1307.

tion prevailed in this case, however, it would be of little solace to land-use planners who would still be left guessing about how the Court will react to the next case, and the one after that. As this case demonstrates, the rule of liability created by the Court in *First English* is a short-sighted one. Like Justice BRENNAN, I hope "that a broader vision ultimately prevails." *Ante*, at 3161.

I respectfully dissent.

Joseph G. GRIFFIN, Petitioner

v.

WISCONSIN

No. 86–5324.

Argued April 21, 1987.

Decided June 26, 1987.

Probationer was convicted in the Circuit Court, Rock County, J. Richard Long, J., of possession of firearm by a felon, and he appealed. The Court of Appeals, 126 Wis.2d 183, 376 N.W.2d 62, affirmed, and probationer appealed. The Wisconsin Supreme Court, 131 Wis.2d 41, 388 N.W.2d 535, affirmed, and certiorari was granted. The Supreme Court, Justice Scalia, held that search of probationer's home, pursuant to Wisconsin regulation replacing standard of probable cause by "reasonable grounds," satisfied Fourth Amendment.

Affirmed.

Justice Blackmun filed a dissenting opinion in which Justice Marshall joined and in parts of which Justices Brennan and Stevens joined.

Justice Stevens filed a dissenting opinion in which Justice Marshall joined.

1. Criminal Law ⇐982.8

Warrantless search of probationer's home, pursuant to Wisconsin regulation which was valid because special needs of Wisconsin's probation system made warrant requirement impracticable and justified replacement of standard of probable cause by "reasonable grounds," satisfied demands of Fourth Amendment. U.S.C.A. Const.Amend. 4.

2. Criminal Law ⇐982.8
Searches and Seizures ⇐25

Probationer's home, like anyone else's, is protected by Fourth Amendment's requirement that searches be reasonable. U.S.C.A. Const.Amend. 4.

3. Criminal Law ⇐982.8

Supervision of probationer is a special need of the state permitting degree of infringement upon privacy that would not be constitutional if applied to public at large. U.S.C.A. Const.Amend. 4.

4. Federal Courts ⇐381

Supreme Court is bound by state court's interpretation of federal regulation, which is relevant to court's constitutional analysis only insofar as it fixes meaning of the regulation.

5. Constitutional Law ⇐270(5)
Criminal Law ⇐982.8

If regulation established standard of conduct to which probationer had to conform on pain of penalty, state court could not constitutionally adopt so unnatural an interpretation of the language that regulation would fail to provide adequate notice. U.S.C.A. Const.Amend. 4.

6. Criminal Law ⇐982.8

It is reasonable to permit information provided by police officer, whether or not on the basis of firsthand knowledge, to support search of probationer, and it is enough if information provided indicates only likelihood of facts justifying the search. U.S.C.A. Const.Amend. 4.

Syllabus *

Wisconsin law places probationers in the legal custody of the State Department of Social Services and renders them "subject to . . . conditions set by the . . . rules and regulations established by the department." One such regulation permits any probation officer to search a probationer's home without a warrant as long as his supervisor approves and as long as there are "reasonable grounds" to believe the presence of contraband. In determining whether "reasonable grounds" exist, an officer must consider a variety of factors, including information provided by an informant, the reliability and specificity of that information, the informant's reliability, the officer's experience with the probationer, and the need to verify compliance with the rules of probation and with the law. Another regulation forbids a probationer to possess a firearm without a probation officer's advance approval. Upon information received from a police detective that there were or might be guns in petitioner probationer's apartment, probation officers searched the apartment and found a handgun. Petitioner was tried and convicted of the felony of possession of a firearm by a convicted felon, the state trial court having denied his motion to suppress the evidence seized during the search after concluding that no warrant was necessary and that the search was reasonable. The State Court of Appeals and the State Supreme Court affirmed.

Held:

1. The warrantless search of petitioner's residence was "reasonable" within the meaning of the Fourth Amendment because it was conducted pursuant to a regulation that is itself a reasonable response to the "special needs" of a probation system. Pp. 3167–3171.

(a) Supervision of probationers is a "special need" of the State that may justify departures from the usual warrant and probable cause requirements. Supervision is necessary to ensure that probation restrictions are in fact observed, that the probation serves as a genuine rehabilitation period, and that the community is not harmed by the probationer's being at large. Pp. 3167–3168.

(b) The search regulation is valid because the "special needs" of Wisconsin's probation system make the warrant requirement impracticable and justify replacement of the probable cause standard with the regulation's "reasonable grounds" standard. It is reasonable to dispense with the warrant requirement here, since such a requirement would interfere to an appreciable degree with the probation system by setting up a magistrate rather than the probation officer as the determiner of how closely the probationer must be supervised, by making it more difficult for probation officials to respond quickly to evidence of misconduct, and by reducing the deterrent effect that the possibility of expeditious searches would otherwise create. Moreover, unlike the police officer who conducts the ordinary search, the probation officer is required to have the probationer's welfare particularly in mind. A probable cause requirement would unduly disrupt the probation system by reducing the deterrent effect of the supervisory arrangement and by lessening the range of information the probation officer could consider in deciding whether to search. The probation agency must be able to act based upon a lesser degree of certainty in order to intervene before the probationer damages himself or society, and must be able to proceed on the basis of its entire experience with the probationer and to assess probabilities in the light of its knowledge of his life, character, and circumstances. Thus, it is reasonable to permit information provided by a police officer, whether or not on the basis of first-hand knowledge, to support a probationary search. All that is required is that

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

TO THE HOUSE OF REPRESENTATIVES

I am returning without my approval H.R. 278, the "Alaska Native Claims Settlement Act Amendments of 1987." This legislation would subvert the original settlement of Native claims in Alaska, raise serious constitutional questions, by violating individual property rights and expectations, and establish permanent racially-defined institutions. I cannot approve a measure which would so contradict the fundamental principles of this Administration.

In 1971, the United States Government, through the payment of nearly $1 billion and conveyance of over 44 million acres of land, settled longstanding individual and group Native land claims in Alaska. Corporations were established to control these settlement assets and ownership of the corporations was vested in individual Alaska Natives through the issuance of corporate stock. These stockholders were assured at the time of settlement that they could receive fair value for their corporate shares if they chose to exercise their right to sell, once restrictions on alienation of their stock were lifted in the year 1991. H.R. 278 would breach that promise, relied upon for over 16 years, by forbidding or grossly restricting such sales beyond 1991, and by ~~imposing punitive measures on~~ depriving those shareholders who would dissent from corporate action to deprive them of their legitimate settlement expectations.

Specifically, H.R. 278 would:

-- effect a compensable "taking" of property rights under the "Just Compensation" clause of the Fifth Amendment to the Constitution by diluting the value of the stock and restricting its sale or transfer, even to family members;

-- deprive many individual shareholders of Alaska Native corporations of rights taken for granted by shareholders of other corporations, through restrictions on voting power, election procedures, and compensation for dissenters;

-- perpetuate and create racial institutions and distinctions under Federal law by, among other things, placing special voting limitations on non-Native shareholders of Native corporations, a disturbing shift away from our country's movement toward a color-blind society;

-- unnecessarily override Alaska State corporate laws by legislating a whole new body of Federal corporate law with respect to Alaska Native corporations, contrary to the intent of the original Alaska Native Claims Settlement Act (ANCSA) and to my October 1987 Executive Order on Federalism;

-- permanently extend now-temporary real property immunities (i.e. protection from taxation, bad debt, bankruptcy, and adverse possession) for all undeveloped Native

corporation land, again in violation of the original intent of ANCSA; and

-- require that up to $2,000 per Native per year of ANCSA benefits (e.g. stock dividends) be disregarded in determining eligibility for means-tested federal services.

The effect of these provisions would be to undermine greatly the Native corporate system and push the Native community further towards dependency, thereby defeating ANCSA's original goals of Native self-sufficiency and self-determination. H.R. 278 would also place additional burdens on the Federal budget and the Nation's taxpayers, including potentially enormous liability for the "taking" described above, increased welfare costs, and many years of litigation expense.

Individually or taken as a whole, these provisions are the antithesis of good public policy and compel my disapproval of this bill. Especially troublesome is the inability of Natives to get value for their settlement stock and the unfair dilution of the value of the original shares by permitting the issuance of new shares, without consideration, to persons born after 1971 and people over 65. It is unacceptable that one could wake up one day and find out that Congress had legislated away the value of a personal nest egg.

Finally, I must disagree with those who say this is just an Alaska issue. Aside from the obvious financial exposure to all taxpayers from the provisions of the bill, it is unacceptable to me that we would afford lesser protection to those who hold

shares in Alaska Native corporations than we would to other American citizens.

I respect the fact that the members of the Alaska congressional delegation support H.R. 278 and are sincerely committed to doing what, in their judgment, they believe is in the best interests of their constituents. However, the flaws in H.R. 278 are too numerous and too substantial. Whatever problems may be perceived with the original settlement, they are discrete and much narrower in scope than the provisions of this bill.

With nearly four years remaining prior to any change in the status of Native corporation stock, there is ample time to reach a consensus on new, more limited amendments that are consistent with the broad policies enunciated by the Congress in ANCSA. In section 2(b) of that Act, the Congress declared:

> "the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the

legislation establishing special relationships between the United States Government and the State of Alaska . . . ."

I pledge the best efforts of my Administration to assist the Congress in crafting ANCSA amendments that advance these worthy goals.

January 31, 1988

DRAFT -- DRAFT -- DRAFT -- DRAFT -- DRAFT -- DRAFT -- DRAFT -- DRAFT

MEMORANDUM FOR THE DEPARTMENT OF JUSTICE

SUBJECT: H.R. 278 AS EFFECTING A COMPENSABLE TAKING

INTRODUCTION AND SCOPE NOTE

The purpose of this memorandum is to outline some thoughts on the issue of whether H.R. 278 effects, in one or more respects, a compensable taking of property within the meaning of the Just Compensation clause of the Fifth Amendment. We appreciate your willingness to consider our views.

Other constitutional issues

We should note at the outset that our focus on the "takings" issue should not be viewed as implying that H.R. 278 is immune from attack based on other provisions of the Constitution. For example, the bill permits inter-vivos gifts of stock only to Natives and descendants of Natives (both of which are terms defined by statute) who bear specified familial relationships to the shareholder, and it deprives stock of voting rights when it is owned by a person who is not a Native or a descendant of a Native. We are convinced that these provisions offend this Administration's commitment to a "color-blind society," one which neither grants nor denies rights and privileges on the basis of race. We have not reviewed the case law to determine whether the bill's perpetuation and establishment of distinctions among shareholders based on racial classifications offend provisions of the Constitution in addition to the Just Compensation clause.

Congressional powers over Indians

Those supporters of H.R. 278 who have argued in favor of its constitutionality typically rely on a line of cases where the United States government has deprived Indians in the "lower 48 states" of what generally would be considered "property rights," but where the courts sometimes have refrained from holding that the federal action constituted a compensable taking under the Constitution. The persuasiveness of those cases, at best, is highly suspect in view of Hodel v. Irving, 107 S.Ct. 2076 (1987), which held that there was taking of property without just compensation even though the Congress' deprivation of the right of Indians to devise certain property was "pursuant to its broad authority to regulate the descent and devise of Indian trust lands . . . ." Id. at 2081.

We previously have furnished the Department of Justice with excerpts from the aforesaid cases which make plain that their rationale has no applicability to a bill relating to Alaska Natives. The cases which allow the federal government to deprive Indians in the "lower 48 states" of property rights without regard to the Just Compensation clause are premised either on (1) the federal government's holding land in trust for the Indians and having the power and duty, as trustee, to do what it thinks best for the beneficiaries or (2) the notion that such Indians are dependents of the United States and, as long as the relationship of guardian and ward exists, the federal government is free to adjust the rights and expectations of such dependents. Neither concept is applicable to the relationship between the federal government and Alaska Natives.

For these reasons, this memorandum does not examine the invalidity of the argument that H.R. 278 is constitutionally permissible because it is pursuant to the power of the United States over Indians.

Breach of contract claims

The purpose of the Alaska Native Claims Settlement Act (ANCSA) was to settle certain individual and group claims held by Alaska Natives to lands in Alaska. Those claims posed a serious roadblock to construction of the Trans-Alaska Pipeline, a prerequisite to development of Prudhoe Bay.

An innovative approach was used to settle the land claims. Congress agreed to pay $962 million in cash and to grant 44 million acres of federally owned Alaska land to newly formed Alaska Native corporations, to be organized under Alaska state corporation law, with each Alaska Native receiving 100 shares of stock in a "regional corporation" and in a "village corporation" with which he or she was identified.

The property rights of shareholders in Alaska Native corporations which are taken away by H.R. 278, we believe, were vested in the shareholders by ANCSA. ANCSA expressly provided that, with two stated exceptions, stock issued pursuant to its provisions "shall vest in the holder all rights of a stockholder in a business corporation organized under the laws of the State of Alaska . . . ." 43 U.S.C. sec. 1606(h)(1).

Repeatedly, the congressional findings and declarations refer to a "settlement" of the land claims. 43 U.S.C. sec. 1601. As the statutory scheme makes clear, the quid pro quo for the federal cash and land, and for the stock in the corporations into which the money and lands were placed, was the extinguishment of all of the Natives' land claims, both individual and group. 43 U.S.C. secs. 1601 et seq.

This memorandum does not examine whether, in light of the settlement, Alaska Natives deprived by H.R. 278 of important rights as shareholders could contend successfully that the United States was in material breach of what, in effect, was a contract of settlement. Neither do we examine whether, in such circumstances, a suit for rescission would lie.

General comments

Our review of cases on the "takings" issue does not purport to be exhaustive. If we have overlooked cases which the Department of Justice believes are pertinent to the issues under consideration, we shall appreciate your calling them to our attention.

This memorandum will focus on Andrus v. Allard, 444 U.S. 51 (1979). That case upheld federal regulations which forbade the sale of certain birds or their parts. The Court's holding was quite precise: "We hold that the simple prohibition on the sale of lawfully acquired property in this case does not effect a taking in violation of the Fifth Amendment." Id. at 67-68 (emphasis added).

That case raises two questions insofar as H.R. 278 is concerned:

(1) In what circumstances does federal deprivation of one, important, but discrete, right of a shareholder, such as the right to sell the stock, constitute a compensable taking?

(2) Does federal deprivation of multiple, important rights of a shareholder constitute a compensable taking?

I. IT IS QUESTIONABLE WHETHER ANDRUS V. ALLARD REFLECTS PREVAILING LAW, AND, IN ALL EVENTS, ITS HOLDING LIKELY WOULD (AND SHOULD) BE LIMITED TO ITS FACTS.

On its face, Andrus v. Allard stands for the proposition that "the denial of one traditional property right [the right of sale in that case] does not always amount to a taking." 444 U.S. at 65 (emphasis added). The Court gave no indication in its opinion as to the circumstances which would be required for it to conclude that deprivation of a single right would constitute a taking. All it said was that "at least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' is not a taking, because the aggregate must be viewed in its entirety." Id. at 65-66.

Two weeks after deciding Andrus v. Allard, the Court decided Kaiser Aetna v. United States, 444 U.S. 164 (1979). That case concerned the issue of whether, by reason of a private pond's subsequently being connected to a navigable bay, the pond's owner could be compelled to permit public access to the pond, which had been developed by the

owner as a private marina. The opinion by Justice Rehnquist cited deprivation of only one "strand" in the "bundle" of property rights as the basis for concluding that, if the United States wanted to force the owner to permit public access to his property, it had to pay just compensation under the Constitution.

> "In this case, we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." Id. at 179-80.

As in Andrus v. Allard, save for deprivation of one particular type of property right, all of the rest of the attributes of property rights appeared to remain intact in Kaiser Aetna. For example, although the Court said "this is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioner's private property," id. at 180, there was no indication in the opinion that the waterfront lot lessees and boatowners who had been paying fees to the owner for pond maintenance and enforcement of boating regulations would cease doing so.

Deprivation of the single right of excluding others also was the underlying basis for the Court's holding in Nollan v. California Coastal Commission, 107 S.Ct. 3141 (1987), that there has been a compensable taking of property when the state imposed as a condition to approval of a rebuilding permit a requirement that owners of beach property provide access to the public to pass and repass across the property. Writing for the Court, Justice Scalia observed in the first instance that "we have no doubt there would have been a taking" if the state simply had required the owners to grant a public easement across the property. Id. at 3145. It went on to say that conditioning the rebuilding permit on grant of such easement would have been a proper exercise of land use regulatory powers if it "'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land," id. at 3146, but concluded there were no legitimate public purposes for the condition. Id. at 3149.

The right to exclude others from one's property is not the only "strand" in the "bundle" of property rights which, standing by itself, has been the basis for upholding a claim of compensable taking. Hodel v. Irving, 107 S.Ct. 2076 (1987), held there was a compensable taking when a federal statute effected "virtually the abrogation of the right to pass on a certain type of property -- the small undivided interest -- to one's heirs." Id. at 2083.

In a concurring opinion joined by the Chief Justice and Justice Powell, Justice Scalia stated that the statute in Hodel v. Irving

> "insofar as concerns the balance between rights taken and rights left untouched, is indistinguishable from the statute that was at issue in Andrus v. Allard [citation omitted]. Because that comparison is determinative of whether there has been a taking [citations omitted], in finding a taking today our decision effectively limits Allard to its facts." Id. at 2084-85.

Justices Brennan, Marshall and Blackmun disagreed with that conclusion. Id. at 2084.

It certainly does not seem prudent to assume that the Court is saying in these cases that the right to exclude others from one's property or the right to pass property to heirs somehow is a more important property right, insofar as the Just Compensation clause is concerned, than is the right to sell one's property and, for that reason, are rights which, unlike the right to sell, give rise to a claim under the Fifth Amendment when they are eliminated by federal law even though the claimant retains other "strands" in the "bundle" of property rights.

We suggest that one or both of two conclusions is reasonable in light of the conflict between Andrus v. Allard, on the one hand, with Kaiser Aetna v. United States, Nollan v. California Coastal Commission, and Hodel v. Irving, on the other:

- The Court is evidencing a clear, although not expressly articulated determination, not to deny takings claims on the ground stated by Andrus v. Allard that only one aspect of property rights has been taken away.

- Especially in light of the two most recent cases, the Court is willing to declare a compensable taking has occurred when there is doubt in the Court's mind as to the reasonable need for the government's deprivation of the single property right or when the consequences of such deprivation are unusually harsh upon the property owner.

The latter possibility has its roots in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). There, the Court observed: "It is, of course, implicit in Goldblatt [v. Hempstead, 369 U.S. 590 (1962)] that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantional public purpose [citations omitted], or perhaps if it has an unduly harsh impact upon the owner's use of the property. Id. at 127. See Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)("The application of a general zoning law to particular property effects a taking if the

ordinance does not substantially advance legitimate state interests [citation omitted]. . . .")

It will be recalled that, in Nollan v. California Coastal Commission, the Court determined there was a compensable taking, even though only one type of property right was involved, when it determined there was no reasonable nexus between the permit condition required (allowing public access along private beach property) and proper land use regulation. 107 S.Ct. at 3146-50. Justice Scalia tartly observed that compliance with the Just Compensation clause of the Fifth Amendment involves "more than an exercise in cleverness and imagination." Id. at 3150. Similarly, in Hodel v. Irving, the Court held there was a compensable taking by reason of federal deprivation of a single right -- prohibition against devise or descent of small landholdings -- when the passing of such property to heirs actually might accomplish the federal purpose of consolidating small landholdings, as when the heir already owns another undivided interest in the property. 107 S.Ct. at 2083-84.

With these concepts in mind, we now examine some of the major prohibitions of H.R. 278 for the purpose of analyzing whether each, standing by itself, constitutes a compensable taking. We discuss in Part III of this memorandum the combined effects of the individual prohibitions.

Issue of new stock without consideration

H.R. 278 permits Native corporations to issue stock to Natives who were born after November 18, 1971 (the effective date for enrollment of persons eligible to become shareholders), to persons who were eligible for such enrollment but did not enroll, and to persons who have attained age 65 -- for no consideration.

We are under the impression that the Department of Justice has devoted considerable attention to the constitutionally infirm dilution of existing shareholder rights which results from such provision. Although we are prepared to discuss this particular issue with the Department, no good purpose would be served by elaborating our thoughts in this memorandum.

Prohibition against sale

We assume the Department of Justice agrees that the right to sell property is one of the inherent attributes of ownership and that no citations for that particular proposition are necessary. Even Andrus v. Allard recognized by clear implication that the right to sell property is "one traditional property right . . . ." 444 U.S. at 65.

Attempts to take away a shareholder's right to sell his stock do not fare well in the courts. See, e.g., Sandor Petroleum Corp. v. Williams, 321 S.W.2d 614, 618-19 (Tex.Civ.App. 1959)("The right of the

corporation to regulate and to manage its affairs does not include the power to impair the vested contractual right and to take from holders of unrestricted stock the value of their stock. The amended bylaw . . . restricting the sale of its previously unrestricted stock was, therefore, unauthorized and invalid in so far as it denied appellee's right to sell at a price which he could have secured on the open market."); B & H Warehouse, Inc. v. Atlas Van Lines, Inc., 490 F.2d 818, 826 (5th Cir. 1974)(restriction on sale of stock imposed after stock was acquired contravenes "rule that restraints on alienation are disfavored generally.")

Surely, a prohibition against any sale of stock by a shareholder should be scrutinized carefully under the abovementioned line of cases, beginning with Penn Central Transportation Co. v. New York City, that the governmental restriction against use may constitute a taking "if not reasonably necessary to the effectuation of a substantial public purpose." 438 U.S. at 127. H.R. 278 goes far beyond that which is necessary to protect or further any legitimate public interest.

Time and again, the proponents of the bill have stated that the purpose of the prohibition against sale of stock is to avoid hostile takeovers by "outside interests," meaning non-Natives. (Typically, they cite an alleged fear of takeover of energy-rich Native corporations by oil companies). But, H.R. 278 prohibits sale to anybody, whether Native or non-Native. Moreover, if the proponents of the bill should contend (which they have not, to our knowledge) that the purpose of the prohibition against sale also is to prevent one Native corporation being taken over by another Native corporation or by Natives who live outside the geographic boundaries in which the corporation has its situs, that objective could have been attained by conferring upon each Native corporation a right of first refusal to purchase the stock at the price and on the terms the shareholder was willing to sell to a third person. The total ban on any sale to anybody is wholly unnecessary.

Moreover, as the proponents of H.R. 278 well understood from conversations with the Department of the Interior, Alaska corporation law already provides for voting trusts. See Alaska Stat. sec. 10.05.171, which permits voting trusts for up to ten years. If, as Native leaders consistently represent, Alaska Natives "overwhelmingly" favor restraints against sale, the managements of the corporations should have no trouble having huge numbers of shareholders, a large majority in most instances, agree to enter into a voting trust under Alaska law. That would "lock up" voting control, or at least effective voting control, and thereby make it pointless for outsiders to attempt a takeover. Such arrangement, of course, has the virtue of being voluntary.

When ANCSA was established, a 20-year restraint on sale of the stock was included. The statute made plain that the restraint ended in 1991. 43 U.S.C. sec. 1606(h)(1). Secretary of the Interior Morton explained to the Congress that "we see no justification for forever

prohibiting individual native disposition of ownership in the agency [i.e., Native corporations]." House Report No. 92-523, _____ U.S. Code Cong. & Admin. News 2210 (_____). He went on:

> "The Department, however, feels that the structure established to administer the cash contributions, as well as receive the mineral rights [the Native corporations], should be a permanent and legally established structure and that there should be *no* incentive for liquidation. Therefore, at the *end* of the initial 20-year period a native should be free to transfer his stock in the event he wants to do so." Ibid.

The original legislative scheme necessarily created a reasonable expectation on the part of the Natives whose claims were settled by ANCSA that they would be able to sell their stock after 1991. Assuming, for the sake of argument, that protection of the corporations against hostile takeovers by "outside interests" is a legitimate public purpose, it seems to us that some effort should have been made by the Congress at this late date to be sure that the imposition upon such expectations was no greater than that which is reasonably necessary to accomplish the stated objective.

Since the total prohibition of sale greatly exceeds that which is necessary to accomplish the stated public purpose, Andrus v. Allard, especially in light of the other cases cited, is a very slim reed on which to base a conclusion that the prohibition against any sale is not, by itself, a compensable taking.

Prohibition against voting of stock by non-Natives

For many years, it has been the law in this country that the right to vote stock is an essential attribute of the ownership of the stock. See, e.g., Lord v. Equitable Life Assurance Society, 194 N.Y. 212, 228, 87 N.E. 443, 448 (1909)("The right to vote for directors, therefore, is the right to protect property from loss and make it effective in earning dividends. In other words, it is the right which gives the property value and is part of the property itself, for it cannot be separated therefrom."); Securities & Exchange Commission v. Vesco, 571 F.2d 129, 130 (2nd Cir. 1978)(quoting Lord, supra, and stating that "in the absence of a compelling reason, a court should not preclude shareholders from the full exercise of this right."); DuVall v. Moore, 276 F.Supp. 674, 679 (N.D.Iowa 1967)("Deprivation of a stockholder's right to vote takes away an essential attribute of his property.").

In Alaska, the right to vote is considered so important that, even though a shareholder holds non-voting stock (which a corporation is permitted to issue in the first instance), the corporation code allows him to vote on certain critical issues. See Alaska Stat. secs. 10.05.282 (non-voting stock can vote on certain amendments to articles), 10.05.390 (non-voting stock can vote on mergers), 10.05.441

(non-voting stock can vote on proposal to sell or mortgage assets other than in regular course of business).

H.R. 278 would change all this with respect to stock held by a non-Native. They lose all voting rights, even though they lawfully acquired the stock prior to enactment of this bill, as, for example, pursuant to decree of divorce or by inheritance.

We suggest that deprivation of a shareholder's right to vote his or her stock is just as much a "taking" of a valuable property right as is the right to exclude others from one's property, which was recognized in the Kaiser Aetna and Nollan cases, supra. In both instances, the right is essential to protect the corpus of the property.

Moreover, if the bill's provisions concerning prohibition against sale are valid, there surely is no need to deprive non-Natives of the right to vote their shares as a means to attain the stated objective of preventing hostile corporate takeovers by "outside interests." Similarly, there is no reason to deprive non-Natives of their voting rights in view of the availability of voting trusts, whereby the corporations can lock up voting control by the voluntary participation of those Native shareholders who are so concerned about "outsiders."

In all events, the bill's provisions concerning voting are nothing but racism. They run counter to the declaration of public policy in ANCSA that the settlement be accomplished "without establishing any permanent racially defined institutions, rights, privileges, or obligations . . . ." 43 U.S.C. sec. 1601(b). H.R. 278 does not purport to change that statement of public policy. The voting provisions also are anathema to the public policy of the United States government, under this Administration, that we have a "color blind" society in which "whatever is done to or for someone is done neither in spite of nor because of their religion or their color, their difference in ethnic background, or anything else; . . . ." Ronald Reagan, Public Papers of the Presidents, p. 904 (1984). It is impossible to square the racial provisions of H.R. 278 with the President's views:

> "I am particularly proud of our successes in moving America closer to the constitutional ideal of a color-blind society open to all without regard to race." R. Reagan, 1988 Legislative and Administrative Message to the Congress (January 25, 1988).

In light of the cases previously discussed, it is difficult to imagine how much more clear an invasion of a property right has to be in order to be regarded as a compensable taking.

Prohibition of other shareholder rights

In the supposed effort to protect against hostile takeovers by "outside interests," H.R. 278 deprives shareholders of various other rights which have nothing to do with the stated objective.

The bill prohibits involuntary transfers of stock to satisfy creditor claims, bona fide pledges of stock to lenders, awards of stock to non-Natives in divorce proceedings, and gifts of stock to a non-Native spouse. It is extremely difficult to understand how, in the real world, any of those types of tranfers would increase beyond de minimis level the risk of hostile corporate takeovers. That is especially true since the prohibition against sale (if constituionally permissible) would be sufficient by itself to preclude such transferees from selling stock to those whose takeover of the corporations supposedly is feared.

Certainly, a shareholder's pledge or assignment of dividends has nothing to do with the avowed purpose of the bill. Yet, they, too, are prohibited under H.R. 278.

In light of the cited cases which require a reasonable nexus between the governmental prohibition and a substantial public policy, it is reasonable to conclude that these specific prohibitions also constitute compensable takings.

II. IN VIEW OF THE HIGH VALUE THIS ADMINISTRATION HAS PLACED ON THE ECONOMIC RIGHTS OF INDIVIDUALS, WE SHOULD REJECT ANALYSIS BASED ON ANDRUS V. ALLARD.

We need not cite examples of the Department of Justice taking a position on constitutional issues which is at variance with "prevailing law" because the Department believes it is bad law. We believe that consideration of the constitutionality of H.R. 278 requires just that approach with respect to Andrus v. Allard, assuming, for the sake of argument, that one believes it reflects prevailing law on the issue of whether federal deprivation of an important property right is a compensable taking when other property rights remain.

H.R. 278 sacrifices the economic rights of individual shareholders on the altar of the purported good of the group. That approach is wholly inconsistent with the principles of this Administration. For example, President Reagan has said:

> "Our party must be the party of the individual. It must not sell out the individual to cater to the group. No greater challenge faces our society today that insuring that each one of us can maintain his dignity and his identity in an increasingly complex, society." R. Reagan, A Time for Choosing, p. 200 (1983).

The passage of time has not changed the President's commitment to these principles, as is evident from the third-listed of "America's Economic Bill of Rights," announced by him in his Independence Day speech on July 3, 1987:

> "The freedom to own and control one's property -- to trade or exchange it and not to have it taken through threat or coercion."

We suggest that, in keeping with the principles of this Administration, it should have no trouble regarding Andrus v. Allard as just bad law insofar as it is relied upon to deny that a compensable taking occurs when the federal government deprives individual shareholders of their right to sell their stock, or their right to give or bequeath their stock to whomever they choose, or to vote their stock.

III. EVEN IF ANDRUS V. ALLARD IS REGARDED AS AN ACCEPTABLE STATEMENT OF PREVAILING LAW, THE MULTIPLE DEPRIVATIONS OF SHAREHOLDER RIGHTS EFFECTED BY H.R. 278 COMPEL THE CONCLUSION THAT IT EFFECTS A TAKING.

Andrus v. Allard held "that the simple prohibition of the sale of lawfully acquired property in this case does not effect a taking in violation of the Fifth Amendment." 444 U.S. at 67-68 (emphasis added). The Court's reasoning emphasizes the importance to its holding of the fact that the regulations in question only took away one right -- the right of sale -- and that the remaining property rights of the owner of the property remained intact.

After observing that "there is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate," 444 U.S. at 65, the Court stated that "resolution of each case, however, ultimately calls as much for the exercise of judgment as for the application of logic." Ibid. It then reasoned:

> "The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety. [citations omitted]. In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds. 444 U.S. at 65-66 (emphasis added).

Quite unlike the regulations in Andrus v. Allard, H.R. 278 deprives the owner of property of multiple rights. The prohibition against sale is accompanied by a whole list of prohibitions. It cannot be said that H.R. 278 merely effects a "restriction . . . on one means of disposing" of the stock; or that there is only "denial of one traditional right;" or that H.R. 278 leaves the owner of stock with with anything near "a full 'bundle' of property rights;" or that the bill effects only "the destruction of one 'strand' of the bundle."

H.R. 278 expressly prohibits sale of stock and also:

- prohibits pledge of the stock;

- prohibits the stock's being available as an asset to judgment creditors or to creditors in bankruptcy or similar proceedings;

- prohibits award of the stock in a divorce, separation or child support case to a non-Native spouse;

- prohibits pledging or assigning the right to dividends or other distributions in respect of the stock;

- prohibits inter-vivos gift of the stock except to a child, grandchild, great-grandchild, niece, or nephew who is a Native or descendant of a Native; and

- prohibits a bequest of voting stock except to a Native or to a descendant of a Native.

These multiple deprivations of rights shear away the vast bulk of the "bundle" of rights that normally inhere in stock ownership. Consider the impacts of these prohibitions upon the shareholder.

Present Economic Value to the Shareholder:

Stock in the hands of a shareholder provides economic value in more ways than providing the opportunity for profit as a consequence of sale. Normally it can be pledged as security for a loan, which, assuming that the pledge is made in good faith and not as a sham substitute for a sale, provides current economic value to the shareholder without his having to part with ownership. Similarly, a pledge or assignment of future dividends or other distributions in respect of the stock can enable the shareholder to receive current economic value in the form of credit. H.R. 278 deprives the shareholder of these economic values which are very different from his mere right of sale of the stock.

"Sales" of property presuppose they are volitional on the part of the owner. Involuntary transfers of property, while quite different from voluntary sales, also can provide current economic benefit to the owner. For example, satisfaction of a judgment by means of execution upon the stock could mean the shareholder would not be vulnerable to subsequent garnishment of wages. Ability of a divorce court to award stock to a non-Native spouse enhances the size of the marital estate, so that, when the court makes an equitable division of the estate, both the Native and the non-Native spouse benefit. H.R. 278 deprives the shareholder of these economic values.

Gifts:

H.R. 278 severely limits the class of persons to whom a shareholder may make an inter-vivos gift of the stock. Only children, grandchildren, great-grandchildren, nieces and nephews who are Natives or descendants of Natives may be donees. Under the bill, a shareholder is prohibited from giving any stock to his or her spouse or parent (whether or not a Native), much less to a charitable organization or to a friend.

This deprivation of the right to make a gift of the stock is particularly significant in light of Andrus v. Allard, which, while upholding the prohibition against sale of property, stated that "in this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds." 444 U.S. at 66 (emphasis added).

Bequests and Inheritance:

Under H.R. 278, stock inherited by a non-Native or by a person who is not a descendant of a Native automatically becomes non-voting stock. The applicable provisions of the bill operate both prospectively and retrospectively, i.e., a non-Native who inherited stock prior to enactment of the proposed statute also loses the right to vote such stock.

One cannot reasonably doubt that the right to vote stock is one of the major "strands" in the "bundle" of rights that inhere in the ownership of stock. See discussion in Part I of this memorandum. And experience teaches that, all other things being equal, non-voting stock has less economic value than does voting stock in the same corporation.

The passage from Andrus v. Allard quoted earlier is instructive, because it saw fit to state that "it is crucial" that the owner of the subject property retained the right, among others, to "devise" the property. 444 U.S. at 66. The more recent decision in Hodel v. Irving emphasizes the importance in "takings" cases which the Supreme Court places on the right to pass on property at death. While the restrictions of H.R. 278 against the ability of a shareholder to bequeath stock are not total, they surely constitute a most substantial impact upon the traditional right of a citizen to confer upon the natural objects of his affection such valuable property as he may have at death.

Importance of the Cumulative Deprivations of Property Rights

Given that H.R. 278 deprives the shareholder of not only the right to sell the stock, but also the rights to pledge the stock, to pledge or assign the right to dividends, to have the stock available to satisfy claims of creditors, to make inter-vivos gifts of the stock (except to a limited group of Natives or descendants of Natives), and

to bequeath stock without its value and rights being reduced if the recipient is not a Native or descendant of a Native, the question arises as to what is left, as a consequence of the bill, of the "bundle of property rights" we normally associate with stock ownership.

Voting power for all shareholders is diluted substantially, without offsetting compensation, by reason of ability of the corporation to issue huge numbers of new shares without consideration. And, shareholders who are neither Natives nor descendants of Natives have no right to vote as a result of H.R. 278.

Dividends, the declaration of which is discretionary with the Board of Directors in any event, will be diluted by reason of the issue of new shares without consideration.

We can think of no rights in regard to the stock which are left intact by the bill.

H.R. 278 simply makes a shambles of the property rights inhering in ownership of Native corporation stock. While the prohibition against sale, the deprivation of non-Native voting rights, and the dilution of stock may be the most dramatic of the wrongs effected by the bill, and, each of which, we believe, constitutes by itself a compensable taking, it is the total reach of the broad range of deprivations of shareholder rights that, even under Andrus v. Allard, compels the conclusion that the bill effects a compensable taking under the Just Compensation clause of the Fifth Amendment.

As Chief Justice Rehnquist reminded us just a few months ago:

> "It has also been established doctrine at least since Justice Holmes' opinion for the Court in Pennsylvania Coal Co. v. Mahon [citation omitted] that '[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'" First English Evangelical Lutheran Church v. County of Los Angeles, 107 S.Ct. 2378, 2386 (1987).

The Draconian sweep of H.R. 278 "goes too far" -- way too far. This is not an instance when just one provision of a bill overreaches. The bill reflects an integrated savaging of the multiple, fundamental rights of shareholders. It is inconceivable to us that this Administration should allow it to become law.

Thank you for considering our views.

Document No. 536354

WHITE HOUSE STAFFING MEMORANDUM

DATE: 01/22/88 **ACTION/CONCURRENCE/COMMENT DUE BY:** C.O.B. Tuesday 01/26

SUBJECT: H.R. 278 -- ALASKA NATIVE CLAIMS SETTLEMENT ACT OF 1987 and VETO MESSAGE

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	GRISCOM	☑	☐
BAKER	☐	☑	HOBBS	☐	☐
DUBERSTEIN	☐	☑	HOOLEY	☐	☐
MILLER - OMB	☐	☐	KING	☐	☐
BALL	☑	☐	POWELL	☐	☐
BAUER	☑	☐	RANGE	☑	☐
CRIBB	☑	☐	RISQUE	☑	☐
CRIPPEN	☐	☐	RYAN	☐	☐
CULVAHOUSE	☑	☐	SPRINKEL	☐	☐
DAWSON	☐P	☑SS	TUTTLE	☐	☐
DONATELLI	☑	☐	CLERK	☐	☑
FITZWATER	☐	☑	_____	☐	☐

REMARKS:

Please provide any comments/recommendations directly to my office by close of business on Tuesday, January 26th on the attached enrolled bill memo and the veto message. Thank you.

RESPONSE:

88 JAN 22 P1:03

Rhett Dawson
Ext. 2702

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

JAN 22 1988

MEMORANDUM FOR THE PRESIDENT

SUBJECT: Enrolled Bill H.R. 278 - Alaska Native Claims Settlement Act of 1987
Sponsor - Rep. Young (R) Alaska

Last Day for Action

February 3, 1988 - Wednesday

Purpose

Makes numerous amendments to the Alaska Native Claims Settlement Act of 1971.

Agency Recommendations

Office of Management and Budget	Disapproval (Veto Message attached)
Department of the Interior	Disapproval (Veto Message attached)
Department of Justice	Disapproval (Veto Message attached)
Department of the Treasury	No objection (Informally)
Securities and Exchange Commission	No comment (Informally)

Discussion

In Department of the Interior reports and testimony, and a Statement of Administration Policy, the Administration has repeatedly advised Congress that H.R. 278 was unacceptable, because it would expand upon the intended permanent settlement of Alaska Native Claims established in 1971, create permanent racially-defined special economic and property rights, and sacrifice individual Native rights for the benefit of Native groups thereby generating potential Federal liability in the hundreds of millions of dollars. For these reasons this Office, along with the Departments of the Interior and Justice, recommend disapproval of H.R. 278.

Background

In 1971 Congress enacted the Alaska Native Claims Settlement Act (ANCSA), to settle Native aboriginal land claims so that Alaska land titles could be cleared for oil exploration and development. The Act was crafted to avoid creating a Federal reservation system in Alaska, and explicitly directed that claims be settled without creating a Federal wardship or trusteeship, categories of property or institutions enjoying special tax privileges, or any other permanent racially defined institutions, rights, privileges or obligations.

Specifically, the settlement gave the Natives 44 million acres of public land and $963 million, in exchange for the extinguishment of all existing and potential claims. The land and money were conveyed to "Alaska Native Corporations" established under Alaska State law. Twelve regional and some 200 village corporations were established, and each Native received 100 shares of stock in a regional and an additional 100 shares in a village corporation. However, Natives were barred by ANCSA from selling ("alienating") the stock for 20 years (until 1991).

Since implementation of ANCSA, the performance of the Native corporations has been uneven. While some have been consistently profitable, many village corporations have had to merge with regional or other village corporations to avoid bankruptcy. The Native corporations' difficulties were relieved in some measure by the Tax Reform Act of 1986, which allowed them to sell their losses to profitable non-Native corporations for tax purposes. The resulting taxpayer-financed windfall allowed certain village corporations to make $10,000 per shareholder dividend payments.

Even so, some Natives assert that the ANCSA corporate model does not adequately protect Native interests and should be replaced by a reservation system. As 1991 approaches, there is growing concern that the lifting of the restriction on the sale of stock could result in many Natives "selling out" control over their corporations, and by extension, over their land.

The Enrolled Bill

H.R. 278, which passed the Senate by voice vote and the House by a vote of 397 to 9, is intended to address these concerns. However, the bill goes far beyond what is needed to protect Native lands and interests.

Specifically, H.R. 278 would:

-- indefinitely extend the prohibition on the sale of Alaska Native Corporation stock unless shareholders of a

corporation vote otherwise (while the bill establishes procedures for taking such a vote, the procedures are so complex, burdensome, and restrictive -- e.g., they require submission of a petition signed by 25 times as many stockholders as SEC rules would require -- that a vote is unlikely to occur);

-- provide inadequate protection to Natives favoring sale of stock (these Natives could receive compensation for their stock only if a majority of shareholders voted to provide such compensation, and the amount of compensation would be set by the corporation);

-- permit corporations to issue new stock for no consideration to Natives born after 1971 and to Natives age 65 or older, thus diluting the value of existing corporate shares;

-- create racially defined classes of stock ownership by depriving non-Natives of the right to vote their stock;

-- insulate corporate management from the consequences of their decisions by facilitating the transfer of lands from failing Native Corporations to a "Settlement Trust;"

-- amend the Alaska National Interest Lands Conservation Act to permanently extend now-temporary real property immunities (i.e., protection from taxation, bad debt, bankruptcy, and adverse possession) for all undeveloped Alaska Native Corporation and Settlement Trust land (the bill would also expand the definition of undeveloped land); and

-- expand upon the ANCSA settlement by requiring that up to $2,000 per Native per year in ANCSA benefits (e.g. stock dividends) be disregarded in determining eligibility for means-tested federal services.

Congressional Views

Congressional supporters of H.R. 278 argue that in the 17 years since ANCSA has been enacted, it has not met its sponsors' expectations of creating a viable Native Alaskan corporate structure, and that amendments are needed not to change the basic policy of the Act, but to allow it to work as intended.

In House floor colloquy, Representative Udall stated, "It is apparent that it [ANCSA] did not wholly satisfy the real economic, social and cultural needs of Native people . . . these amendments are intended to respond to a real concern in rural Alaska and to maintain the intent of the Alaska Native Claims Settlement Act. Nothing more, nothing less."

In his colloquy, Senator Murkowski noted that, "ANCSA is a 'living' settlement. It is not a fixed formula which is cast in stone and incapable of adopting to changing reality. . . . the key to making ANCSA succeed is flexibility . . . flexibility that permits Native shareholders to adapt their corporations to ever changing reality. The . . . amendments provide that flexibility."

Administration Position on H.R. 278

A Statement of Administration Policy, sent to the House on March 26, 1987, opposed H.R. 278 and stated that the President's senior advisers would recommend its disapproval. On August 3, 1987, Secretary Hodel advised the Senate Energy and Natural Resources Committee that he and the President's senior advisers would be obliged to recommend disapproval of H.R. 278.

Agency Views

In his enrolled bill views letter, Secretary of the Interior Donald Hodel strongly urges a veto of H.R. 278 as he notes "This memorandum . . . deals only with the most serious of our objections, any one of which would warrant veto and all of which, taken together, compel the conclusion . . . that veto is a necessity if the fundamental principles of the Administration are to be preserved."

Interior's views letter describes, in exacting detail, how H.R. 278 would deprive Alaska Native individuals of their rights, create an unconstitutional Fifth Amendment taking, establish permanent racial institutions, violate Federalism principles, and place an unwarranted burden on the Federal budget. Each of these concerns are discussed below.

Deprivation of individual rights -- Interior makes the case that, contrary to ANCSA, which conferred specific property rights (stock) upon individuals, H.R. 278 would permanently deprive individual shareholders of the right to sell or pledge stock, dilute the worth of existing shareholders, and strip non-Natives who have received stock through inheritance or by court decree (under a divorce, separation or child suppport judgment) of their voting rights. Secretary Hodel writes:

> "It is my belief that . . . the individual shareholders in any corporation should have the rights during their lives to seek value for their stock when they want to and, upon death, to pass it to their heirs without value-lessening restrictions. It hardly is conceivable that this Administration . . . would countenance the federal government's forbidding individual shareholders from selling or pledging their stock, or the federal government's depriving inherited stock of a portion of

its inherent value. Those of us who believe in individual property rights would be outraged by a proposal whereby, for example, Congress, out of purported fear of corporate takeovers, forbade the shareholders of America's corporations from selling their stock unless fellow shareholders approved. We should not subject Alaska Native shareholders to a lesser standard of individual rights. . . . The restraints against such actions created by H.R. 278 are the antithesis of this Administration's endeavors to encourage economic self-sufficiency on the part of the Nation's American Indian and Alaska Native populations."

Unconstitutional taking -- Citing a 1987 U.S. Supreme Court ruling (Hodel v. Irving), Interior contends that the deprivation of individuals' property rights (as discussed above) would constitute a taking under the Just Compensation Clause of the Fifth Amendment of the Constitution. Interior notes that in Hodel v. Irving the Court invalidated a statute which barred certain Indian land owners from transferring their land to their descendents, because the Court found such a restriction "virtually an abrogation of the right to pass on . . . property . . . [which has been a] part of the Anglo-American system since feudal times."

Interior acknowledges Congress' attempt to deflect constitutional concerns by declaring H.R. 278 "Indian legislation" and thus within Congress' plenary authority to regulate Indian affairs, but concludes the Hodel v. Irving decision demonstrates that "the concept of Indian legislation has its limits, and must yield to the fundamental obligation of the government to pay just compensation when there is a taking of property within the meaning of the Fifth Amendment."

Interior further states that Congress' attempt to limit Federal liability for such a taking, by declaring that no money judgment may be entered against the United States in an action challenging the constitutionality of the statute, would not have the intended effect "because either the provision in question [limiting Federal liability] is a nullity and the Federal Government is exposed to potentially gigantic monetary liability, or the provisions of the bill depriving shareholders of their property rights are constitutionally impermissible in the absence of just compensation."

Establishment and perpetuation of racial institutions -- Interior discusses how, contrary to ANCSA, which declared as a matter of policy that the settlement of Alaska Native land claims be accomplished without establishing any permanent racially defined institutions, H.R. 278 would deliberately "facilitate by

federal law corporations whose ownership insofar as possible is limited to Alaska Natives," and in the process "convert corporations that offered Alaska Natives an opportunity to become part of the mainstream in the American economy into corporate ghettoes." Secretary Hodel states, "Our concern about the overt racial policies of H.R. 278 is based upon their conflict with both the original intent of ANCSA and the wise principles articulated by the President." Interior then cites your remarks during a June 25, 1984, White House briefing for Administration appointees: "And we won't have finished the job until, in this country, whatever is done to or for someone is done neither in spite of nor because of their religion or their color, their difference in ethnic background, or anything else . . . ."

Federalism concerns -- Interior notes that ANCSA expressly provided that Alaska Native Corporations were to be incorporated under and (except for a 20-year restriction on stock alienation and non-Native voting of inherited stock) subject to Alaska State law. Interior argues that H.R. 278 "entirely overlooks the ability -- and the desirability -- of dealing with the ownership and control issue through existing state law mechanisms. . . ." Interior then describes one such State mechanism (voting trusts) which is available to protect against non-Native takeovers without sacrificing individual rights. Interior concludes this discussion by quoting from your October 28, 1987, Executive Order on Federalism:

> "In most areas of governmental concern, the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly. In Thomas Jefferson's words, the States are 'the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies.'"

Unwarranted burden on the Federal Budget -- Interior notes that, not only could H.R. 278 subject the Federal Treasury and all American taxpayers to enormous costs if the Federal Government is held liable to pay just compensation for the taking of individual shareholders' rights, but it would also expand the value of benefits provided under ANCSA. Specifically, it would require that such benefits (e.g., dividend payments), up to a maximum of $2,000 per Native per year, be disregarded in determining a Native's eligibility for means-tested federal services (i.e., food stamps and benefits based on need under the Social Security Act).

Interior states that such federal largesse is wholly unconnected with the bill's primary purpose. While the cost of this particular provision has not been calculated, Interior notes that, "in view of the Administration's belief in the need for increased effort at federal budget restraint, one would have to make a compelling case to justify the potential burdens on the federal budget and on America's taxpayers before this provision could be regarded as wise public policy."

(We also note that the issue of expanding the value of ANCSA benefits was addressed in the President's signing statement on the Haida Land Exchange Act of 1986, P.L. 99-664, which stated, "I will oppose any future efforts to provide additional compensation to Alaska Natives for the extinguishment of their land claims.")

Finally, in concluding his letter and reiterating his veto recommendation, Secretary Hodel states, "if there are problems with the original ANCSA settlement which . . . only can be remedied by federal amendment, nearly four full years remain within which to seek accommmodation of the different points of view which exist. There is no excuse to succumb to pressure to sign a bad, and likely unconstitutional, bill."

In its enrolled bill letter, the Department of Justice, in recommending veto, concurs with Interior's assessment as to the ultimate effect of H.R. 278. Justice advises that:

> "[It] effectively forecloses any future alienability of native stock by extending the current 1991 deadline automatically and indefinitely. It permits the dilution in value of all shares and greatly inhibits those natives wishing to sell their stock after 1991 with no ultimate assurance that they may ever do so at a fair price. Other provisions establish ethnic distinctions between natives and non-natives, and shield any management accountability by allowing corporate assets to be placed beyond corporate control. The aggregate effect of these retreats from the promises of ANCSA paralyzes corporate growth and actively encourages its decline. But denying any native option of redeeming their investments portends even more ominous legal consequences . . . under the Takings Clause of the Fifth Amendment, which threaten to expose the United States to enormous financial liability."

Justice acknowledges (as did Interior) that Congress has included language in the bill that is intended to shield the

Federal Government from such liability. Justice asserts, however, that a recent Supreme Court ruling (First English Evangelical Lutheran Church of Glendale v. County of Los Angeles) establishes the precedent that "once a taking is found, sovereign immunity is no bar to the 'award [of] money damages against the government' since 'it is the Constitution that dictates the [just compensation] remedy for interference with property rights amounting to a taking.'"

On the issue of whether the enrolled bill would constitute a taking, Justice concludes: "Each of the elements of H.R. 278 which we have identified, and certainly their aggregate, pose . . . 'takings' risks, and the United States must expect that passage of H.R. 278 would bring down on it an array of such claims."

Conclusion and Recommendations

The case for veto put forth by the Departments of the Interior and Justice is a most compelling one. I fully share their substantive concerns, as set forth above, and I join them in urging that you veto H.R. 278. The bill contradicts the most fundamental principles of your Administration. It threatens to engender years of litigation and exposes the Treasury to enormous liability. Contrary to the claims of its proponents, it is not "just Alaska legislation," since all Americans would pay the price of its abrogation of individual Alaska Natives' rights.

We believe that if the bill is vetoed there is ample opportunity to address Native concerns before the 1991 deadline, in a manner less repugnant to your principles and to the policies underpinning the original ANCSA settlement.

We have prepared for your consideration a veto message (attached) which draws upon the veto messages submitted by Interior and Justice, and which has been reviewed and approved by these two departments.

James [redacted] III
Director

Enclosures

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO	Pat Bryan Rm 112 EOB	Take necessary action ☐ Approval or signature ☐ Comment ☐ Prepare reply ☐ Discuss with me ☐ For your information ☐ See remarks below ☐
FROM	[illegible]	DATE 1/27/88

REMARKS

Per your request

OMB FORM 4
Rev Aug 70

P3-3(2)86.1

THE SECRETARY OF THE INTERIOR

WASHINGTON

August 3, 1987

Honorable J. Bennett Johnston
Chairman, Committee on Energy and
Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to your request for our views on H.R. 278 and S. 1145, amending the Alaska Native Claims Settlement Act. These bills are scheduled for markup in your Committee on Wednesday, August 5, 1987.

We strongly oppose enactment of this legislation in its present form.

H.R. 278 passed the House of Representatives on March 31, 1987. It would, as a matter of Federal law, mandate the automatic and indefinite extension of restrictions on the alienation of Native Corporation stock beyond the current statutory expiration date of 1991. Although H.R. 278 provides a mechanism for elimination of the restrictions at a later date, we believe that relief is largely illusory since it requires a vote of a majority of all issued and outstanding stock. Under the circumstances, such a removal of the restrictions would be hard to achieve if corporate management were opposed to that vote.

Furthermore, H.R. 278 would create new classes of property entitled to special treatment; lead to the creation of new, permanent racial institutions and distinctions by, among other things, differentiating between stock held by Natives and non-Natives with respect to inheritance and voting rights; lead to the dilution of the value of existing stock by expanding the membership base; and allow the formation of new legal entities with special privileges and immunities, raising a serious question of sovereignty over certain lands in Alaska.

S. 1145, as introduced, is substantially the same in its effect. While it would require regional corporations to hold a vote to extend stock restrictions beyond 1991, it still does not protect adequately individual rights and interests, in that, among other things, dissenters rights are discretionary, substantially undervalued, and contrary to the corporate laws of most States by not requiring cash payment to dissenters. The bill otherwise reflects the same inequities as set forth above for H.R. 278.

We understand that an amendment in the nature of a substitute to S. 1145 will be offered at this Wednesday's markup. It would, among other things, eliminate the section permitting transfer of corporate assets to qualified transferee entities (QTEs) and delete the requirement that regional corporations vote to extend stock restrictions beyond 1991. While the elimination of the section on QTEs lessens our concerns about the bill's impact on sovereignty in Alaska, the provision mandating the extension of stock restrictions for regional corporations is a further abridgement of individual shareholder rights under the terms of the original settlement. Therefore, we regret to advise you that these changes would not be sufficient to alter our strong opposition to these proposals.

We believe all of these proposals are fundamentally unfair to current Native and non-Native shareholders whose rights and expectations have been undisturbed for fifteen years. In some cases, these amendments raise serious Constitutional and policy questions, especially in light of the recent Supreme Court ruling in Hodel v. Irving. This legislation also undoubtedly would result in substantial litigation and risk the Federal government's financial exposure because, in our view, the legislation probably cannot insulate the Federal government from payment of just compensation in the event the courts were to determine various provisions constitute a "taking." These proposals would abridge the right to alienate stock, abridge the rights of non-Natives to vote stock, and result in the dilution of value mentioned above. All of these objections separately, but surely in combination, impact the bundle of rights which are inherent in stock ownership. Each set of amendments would clearly undermine the corporate structure in Alaska, the heart of the original Act.

As you may know, we have held numerous discussions with members of the Alaska delegation, Congressional staff, representatives of the Alaska Federation of Natives, and other interested Native parties in an attempt to resolve this important Alaskan issue. We do not believe that dealing with our differences "at the margins", however, would be sufficient in view of what are profound differences as to the proper Constitutional and policy approaches to the future of Natives in Alaska. During our discussions, we offered what we believed was a constructive proposal to deal with the issue of perpetuation of Native control by means of voluntary voting and/or ownership trusts. The advantage of this would have been that, if there is as much sentiment among Alaska Natives in favor of continued Native control of the corporations as has been represented to us, the leadership of the corporations would have been able to achieve that objective without doing violence to the rights of individuals. Moreover, our proposal would avoid many of the possible Constitutional infirmities of the pending legislation.

In summary, we are unable to support any bill which does not protect vital Native, non-Native, and Federal interests, particularly the rights and/or federally-created expectations of individual Natives and non-Natives. Unfortunately, H.R. 278 and S. 1145, as presently drafted or as proposed to be amended by the substitute, do not meet this requirement. Moreover, the Office and Management and Budget has advised us that, in addition to the other problems with the legislation, they cannot support the provisions which affect the income eligibility requirements for Federal welfare programs.

Thank you for the opportunity to present you with our views. The Office of Management and Budget has advised that enactment of this legislation would be contrary to the program of the President. In the event of its passage by the Congress, I and the President's senior advisors would be obliged to recommend disapproval of the measure to the President.

Sincerely,

Donald Paul Hodel

DONALD PAUL HODEL

STATEMENT OF STEVE BRITT, ASSISTANT TO THE SECRETARY OF THE INTERIOR FOR CONGRESSIONAL AND LEGISLATIVE AFFAIRS, BEFORE THE SUBCOMMITTEE ON PUBLIC LANDS, NATIONAL PARKS AND FORESTS, SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES, ON H.R. 278 AND S. 1145, AMENDING THE ALASKA NATIVE CLAIMS SETTLEMENT ACT.

May 19, 1987

Mr. Chairman and members of the Subcommittee, I am pleased to be here with you today to give you the views of the Department of the Interior on H.R. 278, as passed by the House of Representatives, and S. 1145, the "Alaska Native Claims Settlement Act Amendments of 1987." This legislation is intended in part to resolve what are known as the "1991" issues -- those issues related to expiration in the year 1991 of the restrictions on the alienation of Native Corporation stock in Alaska.

P3-3(2)/86.1

As you well know, Mr. Chairman, the Alaska Native Claims Settlement Act of 1971 (ANCSA) is a unique statute. It provided a complex settlement of long-standing individual and group Native land claims in Alaska by use of an unusual corporation system, including individual stock ownership by Alaska Natives. Under the terms of ANCSA, these shares in Native corporations remain inalienable, except for a few special situations involving court decrees, until the end of 1991. As we move closer to this deadline, some have expressed concern that unrestricted sale of Native stock could result in widespread loss of Native lands and rights through loss of ownership and control of these corporations. Underlying this fear is the apparent belief that 20 years is not long enough to secure a solid future for Alaska Natives. As a result, these bills were introduced to provide for, among other things, continuation of the Native stock alienation restriction beyond 1991.

While we are sympathetic to the concerns that have given rise to these bills, and while we certainly support the goal of meaningful opportunity for continued Native control of Alaska Native lands, we cannot support either bill. Both go far

OMB

beyond what is necessary to achieve full and satisfactory participation by Alaska Natives in the settlement process and the corporate system. We disagree not only with the automatic extension of the restraints on alienation of Native corporate stock; we also disagree with many of the other proposed changes to ANCSA unrelated to the 1991 deadline. As to H.R. 278, the Administration has strongly opposed that measure, as reflected in the attached letter provided to the House of Representatives during recent hearings on that bill. While S. 1145 is better in some respects, the differences are not sufficient to overcome our strong opposition to its changes to ANCSA.

Both bills provide for some automatic extension of stock inalienability -- H.R. 278 automatically extends the deadline for all Native shareholders, and S. 1145 provides automatic extension for villages, with the option to block stock sales by vote in the regional corporations. We note that under the Senate bill, a vote to extend the stock restrictions may become effective with the approval of as little as 26% of the total voting power of the corporation, which is already greatly restricted. Both this voting mechanism and the automatic extension provisions, coupled with the speculative and burdensome nature of any right for dissenting shareholders to claim compensation for their loss, create an unfair abridgement of individual Native shareholder rights and expectations.

Other major issues common to both House and Senate bills also concern us:

1. Differentiating between stock held by Natives and non-Natives;
2. Issuing new stock without consideration;
3. Allowing the formation of new groups under ANCSA, including the so-called "qualified transferee entities," with new privileges and immunities; and
4. Extending the scope of ANCSA as Indian law.

Mr. Chairman, as you know, we worked with you and others during the 99th Congress to devise a compromise on these issues. We intensively reviewed the then-proposed amendments. We consulted with the State of Alaska, Native groups and other interested organizations. We searched through various policy options to come up with alternative proposals. We even conceded on certain key points, with the understanding that these concessions could only be offered in the context of an overall acceptable package.

We did all this because our concerns about legislation such as H.R. 278 and S. 1145 are very real, yet we are aware of the deep conviction of the proponents that ANCSA amendments are essential to the well-being of Alaska Natives. While we have tried to understand the fear of an unknown future that sparks this legislation, we also know that these bills will erode seriously the original Act. Enactment of this legislation would be a clear and unmistakable retrenchment from the corporate structure that formed the core of the Native claims settlement in the original ANCSA. These changes would lock the Natives into their current power structures, either in the current corporate format or worse, allow these legal entities to become mere shells or paper organizations, with all significant assets of the particular corporation transferred to the control of a tribal organization. These changes would remove the very flexibility that we believe is the only viable route to the future success of Alaska Natives. They could also result in significant future financial exposure by the Federal Government.

The original ANCSA recognized the importance of preserving Native culture, and we have always supported this goal. But ANCSA was more than a piece of social legislation -- it was a settlement of land claims, at least some of which had the potential of great economic value, and it was a legislative attempt to promote

Native economic self-sufficiency. The Natives who received stock in the corporations had the right to assume that, if the corporations were economically successful, they someday might be able to realize economic benefits from that stock. To strip away this expectation without some meaningful return of value for their settlement is wrong.

Mr. Chairman, other issues related to sovereignty over lands in Alaska and the declaration that ANCSA is to be considered Indian law also trouble us greatly. We continue to believe that we must preserve, insofar as possible, the intent and provisions of the original Act. This was an innovative settlement, and fear of the future should not push us down the slippery slope of converting the Alaska Native community into a reservation-type system, and the associated dependency status such a move would bring. Although we will work with you to perfect the original Act where necessary to achieve our mutual goals, we cannot support an approach which undoes the progress that has been made through this settlement. We also cannot support bills such as these which broadly and unnecessarily infringe upon individual rights and expectations in Alaska.

Let me address some of our specific concerns with H.R. 278 and S. 1145:

Section 2 of both bills contains findings and declarations of policy that we find inaccurate, misleading, and contrary to both the spirit and letter of the 1971 Act. We particularly object to citing a need to extend stock restrictions and declaring ANCSA to be Indian legislation under the Constitution. The thrust of these findings could place the Federal Government into an unwanted paternalistic role with regard to Alaska Natives, and open the door to a continuing, inextricable dependency relationship.

Section 3 of both bills creates a variety of new definitions for corporate stock and eligible stockholders. The purpose seems to be to draw more narrowly the category of those eligible to participate in the corporation and to create a maze of restricted stock.

Section 4 of both bills authorizes issuance of new stock for new Natives, and additional shares and classes with certain restrictions. This dilutes the value of existing corporate shares and creates racially-defined classes of ownership. Neither bill would compensate those whose stock value would be diminished by the dilution.

Sections 5 and 6 of the Senate bill, S. 1145, distinguish between a form of original issue stock called "Settlement Common Stock" and other "replacement stock," and list a variety of provisions designed to ensure that settlement stock remains forever in Native hands, or loses its voting rights in the corporation. This is far too restrictive to ensure a true market value for the corporate stock. It also creates a new class system in these corporations based on the type of stock held.

These issues cannot be ignored by merely calling this measure "Indian legislation." An increasingly significant amount of stock already is held legally by non-Natives through inheritance or court decree of separation, divorce, or child support. This level approaches 30% in some regions. Moreover, it is erroneous to think that there is complete unity of interest even among Natives. We know that in some corporations more than half of the shareholders live outside their region, calling into question the basic premise of these bills.

Moreover, we note that just yesterday, the U. S. Supreme Court handed down an opinion in the case of Hodel v. Irving that found a certain provision of a lands statute dealing with Indians unconstitutional. The question presented related to the "taking" of property without just compensation from the heirs of a decedent when such property escheated to the tribe under the law. The Court said, in part, that "...the right to pass on valuable property to one's heirs is itself a valuable right," and "In one form or another, the right to pass on property - to one's family in particular - has been part of the Anglo-American legal system since feudal times." Because these amendments may abrogate a similar right, we believe these are questions to be addressed in any proposed ANCSA amendments.

Sections 5 and 6 of the House bill, H.R. 278, automatically extend the restriction on alienation of what this bill calls "Native common stock" for all Native corporations except Bristol Bay. There is no automatic payment of dissenters' rights unless the corporation votes to provide. S. 1145 splits the alienability restrictions -- section 7 says that the restrictions continue indefinitely, unless terminated by vote, as to village, urban and group corporations (the latter two categories have been newly defined and created). As to regional corporations, section 10 says that restrictions on alienation will terminate unless extended by vote.

We cannot support extensions of stock restrictions which ignore the needs and rights of individual stockholders. These sections also limit valuation of stock and provide for denial of voting rights to non-Natives, both of which trouble us greatly. We believe the principal effect of these provisions will be to perpetuate current management in the corporations. These provisions, in particular, cause us some of our most substantial concerns and raise real questions of fairness and the fulfillment of the Federal Government's commitments.

First, the restrictions on alienation effectively would convert the Alaska Native corporations to membership associations. This is a fundamental change to the basic framework of ANCSA. We do not believe it is a prudent change.

Second, it would have an adverse effect on property interests and rights of stockholders under current law. ANCSA constituted a settlement of disputed claims, with each Alaska Native receiving certain rights in return for the release of both individual and group claims. The right to sell their stock after 1991 is one of these rights. To deprive Alaska Natives of this right to sell seems unfair and a violation of the Government's prior commitments. The unacceptable nature of this deprivation is not ameliorated by the fact that, by a majority vote of shareholders, the corporation may elect to "opt out" of the Federally-imposed prohibition against alienation of shares in the House bill, or the vote that could be taken by the regional corporations under the Senate bill.

Third, extending the restraints on alienation is inconsistent with the express, ultimate goal of self-determination for Alaska Natives. If individual Natives believe that they would be better off by selling their stock, the Federal Government should not make it possible for a minority of the shareholders to lose their fundamental right to decide for themselves whether or not to sell or to encumber their shares. If a family wants to liquidate its shares to finance the college education of its children, or if a young person wants to pledge his or her shares to obtain a loan to establish a small business, they should be able to do so.

Moreover, we must object to the permissive, rather than mandatory, nature of the provisions pertaining to the corporation's obligation to pay fair value for the stock

of dissenting shareholders. We oppose the notion that a dissenting shareholder's stock is to be valued as "restricted stock," given that the restriction was not consensual in origin and that many corporate assets do not count in valuing the stock.

Further, the voting standards for votes to remove these restrictions are far too limited. Only the board of directors or a shareholder petition under very limited circumstances can set up a vote. The standard for approval to remove the restrictions in the House bill is higher than other resolutions; under S. 1145, the extension of restrictions may occur by a vote of only 26% of the voting power of the corporation. Under such a system, those in power can practically assure their continued control of the corporation. We find particularly troublesome the authorization in S. 1145 for the directors to exclude information about the value of the corporation's land and other assets in preparation for these kinds of votes.

As for the stockholders who dissent with regard to these restraints, both bills provide only a cursory acknowledgement of their rights. Section 5 of H.R. 278 has no automatic payment of the dissenters' loss unless the corporation votes to pay. S. 1145 provides for two situations. Dissenters in village corporations may request payment from the corporation, with certain procedural and valuation limitations. Payment is by negotiable note. Dissenters in regional corporations get their rights only at the first extension of the alienability restrictions. After that, they're locked in. The corporation's board of directors can also decide simply to issue alienable stock for the original stock. The corporation can insist on its own right to repurchase this stock before any other transfer, and the stock would not have voting rights if transferred to non-Natives.

These are paper payments that do not constitute meaningful dissenters' rights. Furthermore, the restrictions on how the dissenters' stock may be valued would unfairly limit the shareholder's true interest. Most potentially valuable assets could be excluded. Even worse, the time allotted for dissenters to assert their rights is too short for meaningful participation. This is particularly troublesome in light of the significant lack of information provided to shareholders as to the value of the corporation's assets.

Because we are sensitive to the needs articulated by Native leaders that led to these measures, Mr. Chairman, we tried, during the last Congress, to come up with a concept that could achieve their stated aims consistent with the original Act. Alaska corporate law already provides for voting trusts, a long-recognized mechanism for assuring corporate control. We offered to support legislation which would make voting trusts a more useful device for minimizing or eliminating the risk that non-Natives might acquire control of the corporations.

If that were not considered sufficient protection for the corporations, the goal of continued Native control could be achieved by legislation to permit the establishment of voluntary stock ownership trusts. If a majority of Native shareholders would be willing to vote under the Senate bill in favor of restricting alienation, the same majority should be willing to place their shares in trust for some mutually-agreed period. Doing so certainly removes the Native corporation as a "target" for those persons or corporations who would wrest control from the Natives. Indeed, it is likely that the placement of a substantial, but non-majority, block of stock in a trust would make the Native corporation a less likely "target" for non-Native takeover. We believe that one or a combination of these approaches would meet the objectives stated by the proponents of the pending

legislation and, at the same time, avoid the serious problems we see in the legislation before you today.

Section 7 of H.R. 278 and section 12 of S. 1145 provide for the tax-free conveyance of corporate assets to so-called "qualified transferee entities" (QTEs). These are essentially shell transactions, designed to encourage the creation of tribal communities with power and control over the land and other assets. QTEs have nontransferable, limited membership and essentially replace the corporate structure with one that could more closely resemble a tribe or village structure. This essentially makes a sham of the corporate structure and pulls the Alaska Natives even closer to the reservation-type of system found in other states. It could also set the stage for the assertion of claims of Native sovereignty over certain lands in Alaska, which would contravene the intent of ANCSA as expressed in section 2(b) of the original Act.

Section 8 of H.R. 278 and section 21 of S. 1145 attempt to circumvent part of this problem with a sovereignty disclaimer, avowing that Native sovereignty or governmental power is not the intent of these amendments. While the Senate version appears braoder, we are not confident that this disclaimer would be given literal effect by the courts in light of the other provisions of these bills, all of which point to exclusive Native control of land and assets. This is particularly true when coupled with the Indian Law provision in section 2. Moreover, since the disclaimers apply only to ANCSA, they do nothing to prevent Native communities which acquire corporate lands pursuant to the QTE provisions from attempting to assert sovereignty under some theory unrelated to ANCSA.

Section 13 of both bills undercuts the existing Alaska Land Bank. Both authorize land transfers with new and automatic tax immunities that will defeat certain conservation goals by removing incentives to participate in the Alaska Land Bank Program. This eliminates the requirement that Native landowners manage their land compatible with the adjoining Federal estate.

Finally, section 17 of both bills excludes certain ANCSA benefits from consideration in qualifying Natives for Federal benefit programs. It has been suggested that, if Native corporation stock becomes freely tradeable by 1991, a great many of the shareholders really will not benefit from such sales of shares as they might make because they will lose, or at least suffer from, sharply reduced Federal or State welfare payments. This is because many welfare laws have a "means test," and, if stock can be sold, the value of the stock will be regarded as an asset for means test purposes, with the result that the Native might not receive the welfare benefits he would have received if his stock had been subjected to restraints against alienation.

We have no objection to a provision to simply provide that, whether or not Native stock is freely tradeable, the value of the stock in the hands of its original owner (or in the hands of his or her relative who acquired the stock by gift or inheritance) and the proceeds from the sale thereof shall not be regarded as an asset of the shareholder for the purposes of any means test under Federal or State welfare laws. However, we object to extending the reach of any such provision to include dividends or other income received by the shareholder in respect of stock he continues to own. We believe that there properly is a distinction between preserving the asset value of the shares the shareholder received under the settlement Act and the dividend income which he receives.

The cumulative effect of all of these provisions, Mr. Chairman, leads us to our strong opposition of this legislation.

While we are willing to continue our efforts to reach a satisfactory set of ANCSA amendments, we can only agree to changes which better protect the legitimate rights and expectations of individual shareholders.

That concludes my prepared remarks on this issue. I would be pleased to answer any questions you may have.

THE SECRETARY OF THE INTERIOR

WASHINGTON

MAR 4 1987

Honorable Morris K. Udall
Chairman, Committe on Interior
and Insular Affairs
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

We understand you have scheduled a hearing for Wednesday, March 4, 1987, on H.R. 278, a bill "To amend the Alaska Native Claims Settlement Act to provide Alaska Natives with certain options for the continued ownership of lands and corporate shares received pursuant to the Act, and for other purposes." Although we have not yet been asked to provide a formal report on this bill, due to our substantial interest and continuing involvement in this matter we wish to provide the Committee with our views. We ask that this letter be made a part of the official record.

We strongly oppose enactment of this legislation in its present form.

H.R. 278 is identical to legislation which passed the House of Representatives in the 99th Congress. It would, as a matter of Federal law, mandate the automatic and indefinite extension of restrictions on the alienation of Native Corporation stock beyond the current statutory expiration date of 1991. The bill would create new classes of property entitled to special treatment; lead to the creation of new, permanent racial institutions and distinctions by, among other things, differentiating between stock held by Natives and non-Natives, by taking away the rights of non-Natives to inherit stock through State laws of intestacy, and by depriving non-Natives of the right to vote their stock in certain circumstances; and allow the formation of new legal entities with special privileges and immunities, raising a serious question of sovereignty over certain lands in Alaska.

We believe these changes are fundamentally unfair to current Native and non-Native shareholders whose rights and expectations have been undisturbed for fifteen years. In some cases, these amendments raise serious legal and policy questions. This bill also undoubtedly would result in substantial litigation, involve the risk of the Federal government's financial exposure, and undermine the existing Native corporate structure in Alaska, the heart of the original Act.

As you may know, we worked with the Senate, the Alaska Federation of Natives (AFN), and other Alaska interests in the 99th Congress to modify the predecessor to this bill to reflect our concerns. At that time, we reluctantly agreed to a

tentative compromise on this proposal, subject to its acceptance by AFN, which involved major changes not reflected in H.R. 278. This compromise was rejected by AFN at its convention by nearly two to one. Therefore, we are no longer in a position to accept even that version of amendments to the original Act.

We would be pleased to work with the Committee and other interested parties to accommodate our concerns in order to resolve this important Alaskan issue. However, we are unable to support any bill which does not protect vital Native, non-Native, and Federal interests, particularly the rights and/or federally-created expectations of individual Natives and non-Natives. Unfortunately, H.R. 278 as presently drafted does not meet this requirement.

Thank you for the opportunity to present our views to the Committee. The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

Donald Paul Hodel

DONALD PAUL HODEL

STATEMENT OF ADMINISTRATION POLICY

March 26, 1987
(House)

H.R. 278 - Alaska Native Claims Settlement Act
(Rep. Young (R) Alaska)

The administration opposes enactment of H.R. 278 because it contains fundamental policy flaws. The bill would expand upon the intended permanent settlement of Alaska Native Claims established in 1971, establish permanent racially-defined special economic and property rights, and could generate substantial litigation.

If H.R. 278 should be enacted in its present form, the President's senior advisers would recommend that he dispprove it.

* * * * *

(Not to be Distributed Outside Executive Office of the President)

This draft position was prepared by LRD in consultation with NRD (Taylor, Leonard, Gibbons), Interior (Hodel), Treasury (Carro), and Justice (Cohen).

H.R. 278 would amend the 1971 Alaska Native Claims Settlement Act (ANCSA), which gave the Natives stock in "Native corporations" which received 44 million acres of public land and almost $1 billion in cash. Under current law the Natives' stock will become saleable in 1991. This has raised the concern that the free sale of stock by Natives could result in widespread loss of Native lands and rights through loss of ownership and control of the corporation. H.R. 278 attempts to prevent this from occurring by making significant changes in basic policies on which the 1971 Act was founded. For example, the bill would:

-- establish permanent racially-defined institutions, such as classes of stock that could only be owned by Natives;

-- entitle undeveloped Native corporation property to special title provisions (i.e., immunity from adverse possession, real property taxation, judgment resulting from any bankruptcy claim), and tax exemptions; and

-- allow involuntarily dissolved Native corporations to transfer their land and assets to recognized Native villages, thereby opening the door to a reservation system and permanent Federal trusteeship.

The bill would also undermine one of the primary purposes of ANCSA -- to promote Native economic independence -- by prohibiting the consideration of benefits rendered by the 1971 Act (e.g., stock dividends) in determining a Native individual's or household eligibility for benefits from Federal assistance programs.

LEGISLATIVE REFERENCE DIVISION DRAFT
3/26/87

limits his family to a fraction of the recovery they might otherwise have received. If our imposition of that sacrifice bore the legitimacy of having been prescribed by the people's elected representatives, it would (insofar as we are permitted to inquire into such things) be just. But it has not been, and it is not. I respectfully dissent.

Donald P. HODEL, Secretary of the Interior, Appellant,

v.

Mary IRVING et al.

No. 85–637.

Argued Oct. 6, 1986.

Decided May 18, 1987.

Designated heirs and devisees of three deceased members of Oglala Sioux Tribe brought action seeking declaration that section of Indian Land Consolidation Act was unconstitutional as authorizing a seizure of property without just compensation. The United States District Court for the District of South Dakota, Andrew W. Bogue, Chief Judge, denied relief and plaintiffs appealed. The Court of Appeals, 758 F.2d 1260, reversed and remanded. On appeal, the Supreme Court, Justice O'Connor, held that: (1) plaintiffs had standing to challenge provision, and (2) provision effected a "taking" of plaintiffs' decedents' property without just compensation.

Affirmed.

Justice Brennan filed concurring opinion in which Justices Marshall and Blackmun joined.

Justice Scalia filed concurring opinion in which Chief Justice Rehnquist and Justice Powell joined.

Justice Stevens filed opinion concurring in judgment in which Justice White joined.

1. Federal Courts ⇐12

Existence of case or controversy is jurisdictional prerequisite to federal court's deliberations.

2. Eminent Domain ⇐64

Members of Indian tribe who were deprived of fractional interests in trust land under escheat provision of Indian Land Consolidation Act had standing to challenge the provision as unconstitutional taking. U.S.C.A. Const. Art. 3, § 1 et seq.; Amend. 5; Indian Land Consolidated Act, §§ 203, 207, 210, as amended, 25 U.S.C.A. §§ 2202, 2206, 2209; 25 U.S.C.A. §§ 371–380.

3. Eminent Domain ⇐2(1.1)

"Escheat" provision of Indian Land Consolidation Act of 1983, providing for escheat to Indian tribe of small undivided property interests that are unproductive during year proceeding owner's death, effected "taking" of tribal members' decedents' property without just compensation: decedents lost right to pass on valuable property to their heirs. Indian Land Consolidated Act, § 207, as amended, 25 U.S.C.A. § 2206; U.S.C.A. Const.Amend. 5.

4. Constitutional Law ⇐81

Government has considerable latitude in regulating property rights in ways that may adversely affect owners. U.S.C.A. Const.Amend. 5.

5. Eminent Domain ⇐2(1.1)

Complete abolition of both descent and devise of particular class of property may be a taking. U.S.C.A. Const.Amend. 5.

6. Eminent Domain ⇐2(1.1)

States, and where appropriate, the United States, have broad authority to adjust rules governing descent and devise of property without implicating the guarantees of the just compensation clause. U.S.C.A. Const.Amend. 5.

Syllabus *

As a means of ameliorating the problem of extreme fractionation of Indian lands that, pursuant to federal statutes dating back to the end of the 19th century, were allotted to individual Indians and held in trust by the United States, and that, through successive generations, had been splintered into multiple undivided interests by descent or devise, Congress enacted § 207 (later amended) of the Indian Land Consolidation Act of 1983. As originally enacted, § 207 provided that no undivided fractional interest in such lands shall descend by intestacy or devise, but, instead, shall escheat to the tribe "if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat." No provision for the payment of compensation to the owners of the interests covered by § 207 was made. Appellees are members of the Oglala Sioux Tribe and either are, or represent, heirs or devisees of Tribe members who died while the original terms of § 207 were in effect and who owned fractional interests subject to § 207. Appellees filed suit in Federal District Court, claiming that § 207 resulted in a taking of property without just compensation in violation of the Fifth Amendment. The District Court held that the statute was constitutional, but the Court of Appeals reversed, concluding that appellees' decedents had a right, derived from the original Sioux allotment statute, to control disposition of their property at death, that appellees had standing to invoke such right, and that the taking of the right without compensation to decedents' estates violated the Fifth Amendment.

Held:

1. Appellees have standing to challenge § 207, which has deprived them of the fractional interests they otherwise would have inherited. This is sufficient injury-in-fact to satisfy the case-or-controversy requirement of Article III of the Constitution. Moreover, the concerns of the prudential standing doctrine are also satisfied, even though appellees do not assert that their own property rights have been taken unconstitutionally, but rather that their decedents' right to pass the property at death has been taken. For decedent Indians with trust property, federal statutes require the Secretary of the Interior to assume the general role of the executor or administrator of the estate in asserting the decedent's surviving claims. Here, however, the Secretary's responsibilities in that capacity include the administration of the statute that appellees claim is unconstitutional, so that he cannot be expected to assert decedents' rights to the extent that they turn on the statute's constitutionality. Under these circumstances, appellees can appropriately serve as their decedents' representatives for purposes of asserting the latters' Fifth Amendment rights. Pp. 2080–2081.

2. The original version of § 207 effected a "taking" of appellees' decedents' property without just compensation. Determination of the question whether a governmental property regulation amounts to a "taking" requires ad hoc factual inquiries as to such factors as the impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action. Here, the relative impact of § 207 upon appellees' decedents can be substantial. Even assuming, *arguendo*, that the income generated by the parcels in question may be properly thought of as *de minimis*, their value may not be. Although appellees' decedents retain full beneficial use of the property during their lifetimes as well as the right to convey it *inter vivos*, the right to pass on valuable property to one's heirs is itself a valuable right. However, the extent to which any of the appellees' decedents had investment-backed expecta-

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

tions in passing on the property is dubious. Also weighing weakly in favor of the statute is the fact that there is something of an "average reciprocity of advantage," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322, to the extent that owners of escheatable interests maintain a nexus to the Tribe, and consolidation of lands in the Tribe benefits Tribe members since consolidated lands are more productive than fractionated lands. But the character of the Government regulation here is extraordinary since it amounts to virtually the abrogation of the right to pass on property to one's heirs, which right has been part of the Anglo-American legal system since feudal times. Moreover, § 207 effectively abolishes both descent and devise of the property interest even when the passing of the property to the heir might result in consolidation of property—as, for instance, when the heir already owns another undivided interest in the property—which is the governmental purpose sought to be advanced. Pp. 2081–2084.

758 F.2d 1260 (CA 8 1985), affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and SCALIA, JJ., joined. BRENNAN, J., filed a concurring opinion, in which MARSHALL and BLACKMUN, JJ., joined. SCALIA, J., filed a concurring opinion, in which REHNQUIST, C.J., and POWELL, J., joined. STEVENS, J., filed an opinion concurring in the judgment, in which WHITE, J., joined.

Edwin S. Kneedler, Washington, D.C., for appellant.

Yvette Hall War Bonnett, Mission, S.D., for appellees.

Justice O'CONNOR delivered the opinion of the Court.

The question presented is whether the original version of the "escheat" provision of the Indian Land Consolidation Act of 1983, Pub.L. 97–459, Tit. II, 96 Stat. 2519, effected a "taking" of appellees' decedents' property without just compensation.

I

Towards the end of the 19th century, Congress enacted a series of land Acts which divided the communal reservations of Indian tribes into individual allotments for Indians and unallotted lands for non-Indian settlement. This legislation seems to have been in part animated by a desire to force Indians to abandon their nomadic ways in order to "speed the Indians' assimilation into American society," *Solem v. Bartlett*, 465 U.S. 463, 466, 104 S.Ct. 1161, 1164, 79 L.Ed.2d 443 (1984), and in part a result of pressure to free new lands for further white settlement. *Ibid.* Two years after the enactment of the General Allotment Act of 1887, ch. 119, 24 Stat. 388, Congress adopted a specific statute authorizing the division of the Great Reservation of the Sioux Nation into separate reservations and the allotment of specific tracts of reservation land to individual Indians, conditioned on the consent of three-fourths of the adult male Sioux. Act of Mar. 2, 1889, ch. 405, 25 Stat. 888. Under the Act, each male Sioux head of household took 320 acres of land and most other individuals 160 acres. 25 Stat. 890. In order to protect the allottees from the improvident disposition of their lands to white settlers, the Sioux allotment statute provided that the allotted lands were to be held in trust by the United States. 25 Stat. 891. Until 1910 the lands of deceased allottees passed to their heirs "according to the laws of the State or Territory" where the land was located, *ibid.*, and after 1910, allottees were permitted to dispose of their interests by will in accordance with regulations promulgated by the Secretary of the Interior. 36 Stat. 856, 25 U.S.C. § 373. Those regulations generally served to protect Indian ownership of the allotted lands.

The policy of allotment of Indian lands quickly proved disastrous for the Indians. Cash generated by land sales to whites was quickly dissipated and the Indians, rather

than farm the land themselves, evolved into petty landlords, leasing their allotted lands to white ranchers and farmers and living off the meager rentals. Lawson, Heirship: The Indian Amoeba, reprinted in Hearing on S. 2480 and S. 2663 before the Senate Select Committee on Indian Affairs, 98th Cong., 2d Sess., 82–83 (1984). The failure of the allotment program became even clearer as successive generations came to hold the allotted lands. Forty- eighty- and 160–acre parcels became splintered into multiple undivided interests in land, with some parcels having hundreds and many parcels having dozens of owners. Because the land was held in trust and often could not be alienated or partitioned the fractionation problem grew and grew over time.

A 1928 report commissioned by the Congress found the situation administratively unworkable and economically wasteful. L. Meriam, Institute for Government Research, The Problem of Indian Administration 40–41. Good, potentially productive, land was allowed to lie fallow, amidst great poverty, because of the difficulties of managing property held in this manner. Hearings on H.R. 11113 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 89th Cong., 2d Sess., 10 (1966) (remarks of Rep. Aspinall). In discussing the Indian Reorganization Act of 1934, Representative Howard said:

> "It is in the case of the inherited allotments, however, that the administrative costs become incredible.... On allotted reservations, numerous cases exist where the shares of each individual heir from lease money may be 1 cent a month. Or one heir may own minute fractional shares in 30 or 40 different allotments. The cost of leasing, bookkeeping, and distributing the proceeds in many cases far exceeds the total income. The Indians and the Indian Service personnel are thus trapped in a meaningless system of minute partition in which all thought of the possible use of land to satisfy human needs is lost in a mathematical haze of bookkeeping." 78 Cong. Rec. 11728 (1934) (remarks of Rep. Howard).

In 1934, in response to arguments such as these, the Congress acknowledged the failure of its policy and ended further allotment of Indian lands. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*

But the end of future allotment by itself could not prevent the further compounding of the existing problem caused by the passage of time. Ownership continued to fragment as succeeding generations came to hold the property, since, in the order of things, each property owner was apt to have more than one heir. In 1960, both the House and the Senate undertook comprehensive studies of the problem. See House Committee on Interior and Insular Affairs, Indian Heirship Land Study, 86th Cong., 2d Sess. (Comm.Print 1961); Senate Committee on Interior and Insular Affairs, Indian Heirship Land Survey, 86th Cong., 2d Sess. (Comm.Print 1961). These studies indicated that one-half of the approximately 12 million acres of allotted trust lands were held in fractionated ownership, with over three million acres held by more than six heirs to a parcel. *Id.*, at pt. 2, p. X. Further hearings were held in 1966, Hearings on H.R. 11113, *supra*, but not until the Indian Land Consolidation Act of 1983 did the Congress take action to ameliorate the problem of fractionated ownership of Indian lands.

Section 207 of the Indian Land Consolidation Act—the escheat provision at issue in this case—provided:

> "No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descedent *[sic]* by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat." 96 Stat. 2519.

Congress made no provision for the payment of compensation to the owners of the interests covered by § 207. The statute was signed into law on January 12, 1983 and became effective immediately.

The three appellees—Mary Irving, Patrick Pumpkin Seed, and Eileen Bissonette—are enrolled members of the Oglala Sioux Tribe. They are, or represent, heirs or devisees of members of the Tribe who died in March, April and June 1983. Eileen Bissonette's decedent, Mary Poor Bear-Little Hoop Cross, purported to will all her property, including property subject to § 207, to her five minor children in whose name Bissonette claims the property. Chester Irving, Charles Leroy Pumpkin Seed, and Edgar Pumpkin Seed all died intestate. At the time of their deaths, the four decedents owned 41 fractional interests subject to the provisions of § 207. App. 20, 22–28, 32–33, 37–39. The Irving estate lost two interests whose value together was approximately $100; the Bureau of Indian Affairs placed total values of approximately $2,700 on the 26 escheatable interests in the Cross estate and $1,816 on the 13 escheatable interests in the Pumpkin Seed estates. But for § 207, this property would have passed, in the ordinary course, to appellees or those they represent.

Appellees filed suit in the United States District Court for the District of South Dakota, claiming that § 207 resulted in a taking of property without just compensation in violation of the Fifth Amendment. The District Court concluded that the statute was constitutional. It held that appellees had no vested interest in the property of the decedents prior to their deaths and that Congress had plenary authority to abolish the power of testamentary disposition of Indian property and to alter the rules of intestate succession. App. to Juris.Statement 21a–26a.

The Court of Appeals for the Eighth Circuit reversed. *Irving v. Clark*, 758 F.2d 1260 (1985). Although it agreed that the appellees had no vested rights in the decedents' property, it concluded that their decedents had a right, derived from the original Sioux Allotment Statute, to control disposition of their property at death. The Court of Appeals held that the appellees had standing to invoke that right and that the taking of that right without compensation to decedents' estates violated the Fifth Amendment.[1]

II

[1, 2] The Court of Appeals concluded that appellees have standing to challenge § 207. 758 F.2d, at 1267–1268. The Government does not contest this ruling. As the Court of Appeals recognized, however, the existence of a case or controversy is a jurisdictional prerequisite to a federal court's deliberations. *Id.*, at 1267, n. 12. We are satisfied that the necessary case or controversy exists in this case. Section 207 has deprived appellees of the fractional interests they otherwise would have inherited. This is sufficient injury-in-fact to satisfy Article III of the Constitution. See *Singleton v. Wulff*, 428 U.S. 106, 112, 96 S.Ct. 2868, 2873, 49 L.Ed.2d 826 (1976).

In addition to the constitutional standing requirements, we have recognized prudential standing limitations. As the court below recognized, one of these prudential principles is that the plaintiff generally must assert his own legal rights and interests. 758 F.2d, at 1267–1268. That general principle, however, is subject to exceptions. Appellees here do not assert that their own property rights have been taken unconstitutionally, but rather that their decedents' right to pass the property at death has been taken. Nevertheless, we have no difficulty in finding the concerns of the prudential standing doctrine met here.

For obvious reasons, it has long been recognized that the surviving claims of a decedent must be pursued by a third party. At common law, a decedent's surviving claims were prosecuted by the executor or administrator of the estate. For Indians with trust property, statutes require the Secretary of the Interior to assume that general role. 25 U.S.C. §§ 371–380. The Secretary's responsibilities in that capacity, however, include the administration of the statute that the appellees claim is unconstitutional, see 25 U.S.C. §§ 2202, 2209, so that he can hardly be expected to assert appellees' decedents' rights to the extent that they turn on that point. Under these circumstances, appellees can appropriately serve as their decedents' representatives for purposes of asserting the latters' Fifth Amendment rights. They are situated to pursue the claims vigorously, since their interest in receiving the property is indissolubly linked to the decedents' right to dispose of it by will or intestacy. A vindication of decedents' rights would ensure that the fractional interests pass to appellees; pressing these rights unsuccessfully would equally guarantee that appellees take nothing. In short, permitting appellees to raise their decedents' claims is merely an extension of the common law's provision for appointment of a decedent's representative. It is therefore a "settled practice of the courts" not open to objection on the ground that it permits a litigant to raise third parties' rights. *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 406, 21 S.Ct. 206, 207, 45 L.Ed. 252 (1900).

III

[3] The Congress, acting pursuant to its broad authority to regulate the descent and devise of Indian trust lands, *Jefferson v. Fink*, 247 U.S. 288, 294, 38 S.Ct. 516, 518, 62 L.Ed. 1117 (1918), enacted § 207 as a means of ameliorating, over time, the problem of extreme fractionation of certain Indian lands. By forbidding the passing on at death of small, undivided interests in Indian lands, Congress hoped that future generations of Indians would be able to make more productive use of the Indians' ancestral lands. We agree with the Government that encouraging the consolidation of Indian lands is a public purpose of high order. The fractionation problem on Indian reservations is extraordinary and may call for dramatic action to encourage consolidation. The Sisseton-Wahpeton Sioux Tribe, appearing as *amicus curiae* in support of the United States, is a quintessential victim of fractionation. Forty acre tracts on the Sisseton-Wahpeton Lake Traverse reservation, leasing for about $1,000 annually, are commonly subdivided into hundreds of undivided interests, many of which generate only pennies a year in rent. The average tract has 196 owners and the average owner undivided interests in fourteen tracts. The administrative headache this represents can be fathomed by examining Tract 1305, dubbed "one of the most fractionated parcels of land in the world." Lawson, Heirship: The Indian Amoeba, reprinted in Hearing on S. 2480 and S. 2663 before the Senate Select Committee on Indian Affairs, 98th Cong., 2d Sess., 85 (1984). Tract 1305 is forty acres and produces $1,080 in income annually. It is valued at $8,000. It has 439 owners, one-third of whom receive less than $.05 in annual rent and two-thirds of whom receive less than $1. The largest interest holder receives $82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives $.01 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its estimated $8,000 value, he would be entitled to $.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at $17,560 annually. *Id.*, at 86, 87. See also Comment, Too Little Land, Too Many Heirs—The Indian Heirship Land Problem, 46 Wash.L.Rev. 709, 711–713 (1971).

1. The Court of Appeals, without explanation, went on to "declare" that not only the original version of § 207, but also the amended version not before it, 25 U.S.C. § 2206 (1982 ed., Supp. III), unconstitutionally took property without compensation. Since none of the property which escheated in this case did so pursuant to the amended version of the statute, this "declaration" is, at best, dicta. We express no opinion on the constitutionality of § 207 as amended.

[4] This Court has held that the Government has considerable latitude in regulating property rights in ways that may adversely affect the owners. See *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. ——, ——–——, 107 S.Ct. 1232, ——–——, 94 L.Ed.2d 472 (1987); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 125–127, 98 S.Ct. 2646, 2659–2661, 57 L.Ed.2d 631 (1978); *Goldblatt v. Hempstead*, 369 U.S. 590, 592–593, 82 S.Ct. 987, 988–989, 8 L.Ed.2d 130 (1962). The framework for examining the question of whether a regulation of property amounts to a taking requiring just compensation is firmly established and has been regularly and recently reaffirmed. See, *e.g., Keystone Bituminous Coal Assn. v. DeBenedictis, supra*, —— U.S., at ——, 107 S.Ct., at ——; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004–1005, 104 S.Ct. 2862, 2873–2874, 81 L.Ed.2d 815 (1984); *Hodel v. Virginia Surface Mining and Reclamation Assn., Inc.*, 452 U.S. 264, 295, 101 S.Ct. 2352, 2370, 69 L.Ed.2d 1 (1981); *Agins v. Tiburon*, 447 U.S. 255, 260–261, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 174–175, 100 S.Ct. 383, 389–390, 62 L.Ed.2d 332 (1979); *Penn Central Transportation Co. v. New York City, supra*, 438 U.S., at 124, 98 S.Ct., at 2659. As THE CHIEF JUSTICE has written:

"[T]his Court has generally 'been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.' [*Penn Central Transportation Co. v. New York City*, 438 U.S.], at 124 [98 S.Ct., at 2659]. Rather, it has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance. *Ibid.*" *Kaiser Aetna v. United States, supra*, 444 U.S., at 175, 100 S.Ct., at 390.

There is no question that the relative economic impact of § 207 upon the owners of these property rights can be substantial. Section 207 provides for the escheat of small undivided property interests that are unproductive during the year preceding the owner's death. Even if we accept the Government's assertion that the income generated by such parcels may be properly thought of as *de minimis*, their value may not be. While the Irving estate lost two interests whose value together was only approximately $100, the Bureau of Indian Affairs placed total values of approximately $2,700 and $1,816 on the escheatable interests in the Cross and Pumpkin Seed estates. See App. 20, 21–28, 29–39. These are not trivial sums. There are suggestions in the legislative history regarding the 1984 amendments to § 207 that the failure to "look back" more than one year at the income generated by the property had caused the escheat of potentially valuable timber and mineral interests. S.Rep. No. 98–632, p. 12 (1984); Hearing on H.J. Res. 158 before the Senate Select Committee on Indian Affairs, 98th Cong., 2d Sess., 20, 26, 32, 75 (1984); Amendments to the Indian Land Consolidation Act: Hearing on H.J.Res. 158 before the Senate Select Committee on Indian Affairs, 98th Cong., 1st Sess., 8, 29 (1983). Of course, the whole of appellees' decedents' property interests were not taken by § 207. Appellees' decedents retained full beneficial use of the property during their lifetimes as well as the right to convey it *inter vivos*. There is no question, however, that the right to pass on valuable property to one's heirs is itself a valuable right. Depending on the age of the owner, much or most of the value of the parcel may inhere in this "remainder" interest. See 26 CFR § 20.2031–7(f) (Table A) (1986) (value of remainder interest when life tenant is age 65 is approximately 32% of the whole).

The extent to which any of the appellees had "investment-backed expectations" in passing on the property is dubious. Though it is conceivable that some of these interests were purchased with the expectation that the owners might pass on the remainder to their heirs at death, the property has been held in trust for the Indians for 100 years and is overwhelmingly acquired by gift, descent, or devise. Because of the highly fractionated ownership, the property is generally held for lease rather than improved and used by the owners. None of the appellees here can point to any specific investment-backed expectations beyond the fact that their ancestors agreed to accept allotment only after ceding to the United States large parts of the original Great Sioux Reservation.

Also weighing weakly in favor of the statute is the fact that there is something of an "average reciprocity of advantage," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922), to the extent that owners of escheatable interests maintain a nexus to the Tribe. Consolidation of Indian lands in the Tribe benefits the members of the Tribe. All members do not own escheatable interests, nor do all owners belong to the Tribe. Nevertheless, there is substantial overlap between the two groups. The owners of escheatable interests often benefit from the escheat of others' fractional interests. Moreover, the whole benefit gained is greater than the sum of the burdens imposed since consolidated lands are more productive than fractionated lands.

If we were to stop our analysis at this point, we might well find § 207 constitutional. But the character of the Government regulation here is extraordinary. In *Kaiser Aetna v. United States*, 444 U.S., at 176, 100 S.Ct., at 391, we emphasized that the regulation destroyed "one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others." Similarly, the regulation here amounts to virtually the abrogation of the right to pass on a certain type of property—the small undivided interest—to one's heirs. In one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times. See *United States v. Perkins*, 163 U.S. 625, 627–628, 16 S.Ct. 1073, 1074, 41 L.Ed. 287 (1896). The fact that it may be possible for the owners of these interests to effectively control disposition upon death through complex *inter vivos* transactions such as revocable trusts, is simply not an adequate substitute for the rights taken given the nature of the property. Even the United States concedes that total abrogation of the right to pass property is unprecedented and likely unconstitutional. Tr. of Oral Arg. 12–14. Moreover, this statute effectively abolishes both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property—as for instance when the heir already owns another undivided interest in the property.[2] Compare 25 U.S.C.

2. Justice STEVENS argues that weighing in the balance the fact that § 207 takes the right to pass property even when descent or devise results in consolidation of Indian lands amounts to an unprecedented importation of overbreadth analysis into our Fifth Amendment jurisprudence. *Post*, at 2085. The basis for this argument is his assertion that none of appellees' decedents actually attempted to pass the property in a way that might have resulted in consolidation. But the fact of the matter remains that before § 207 was enacted appellees' decedents had the power to pass on their property at death to those who already owned an interest in the subject property. This right too was abrogated by § 207; each of the appellees' decedents lost this stick in their bundles of property rights upon the enactment of § 207. It is entirely proper to note the extent of the rights taken from appellees' decedents in assessing whether the statute passes constitutional muster under the *Penn Central* balancing test. This is neither overbreadth analysis nor novel. See, *e.g., Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. ——, ——, 107 S.Ct. 1232, ——, 94 L.Ed.2d 472 (1987); (discussing, in general terms, the extent of the abrogation of coal extraction rights caused by the Subsidence Act); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 136–137, 98 S.Ct. 2646, 2665, 57 L.Ed.2d 631 (1978) (discussing extent to which air rights

§ 2206(b) (1982 ed., Supp. III). Since the escheatable interests are not, as the United States argues, necessarily *de minimis*, nor, as it also argues, does the availability of *inter vivos* transfer obviate the need for descent and devise, a *total* abrogation of these rights cannot be upheld. But cf. *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979) (upholding abrogation of the right to sell endangered eagles' parts as necessary to environmental protection regulatory scheme).

[5, 6] In holding that complete abolition of both the descent and devise of a particular class of property may be a taking, we reaffirm the continuing vitality of the long line of cases recognizing the States', and where appropriate, the United States', broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause. See, *e.g.*, *Irving Trust Co. v. Day*, 314 U.S. 556, 562, 62 S.Ct. 398, 401, 86 L.Ed. 452 (1942); *Jefferson v. Fink*, 247 U.S., at 294, 38 S.Ct., at 518. The difference in this case is the fact that both descent and devise are completely abolished; indeed they are abolished even in circumstances when the governmental purpose sought to be advanced, consolidation of ownership of Indian lands, does not conflict with the further descent of the property.

There is little doubt that the extreme fractionation of Indian lands is a serious public problem. It may well be appropriate for the United States to ameliorate fractionation by means of regulating the descent and devise of Indian lands. Surely it is permissible for the United States to prevent the owners of such interests from further subdividing them among future heirs on pain of escheat. See *Texaco, Inc. v. Short*, 454 U.S. 516, 542, 102 S.Ct. 781, 799, 70 L.Ed.2d 738 (1982) (BRENNAN, J., dissenting). It may be appropriate to minimize further compounding of the problem by abolishing the descent of such interests by rules of intestacy, thereby forcing the owners to formally designate an heir to prevent escheat to the Tribe. What is certainly not appropriate is to take the extraordinary step of abolishing both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property. Accordingly, we find that this regulation, in the words of Justice Holmes, "goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 415, 43 S.Ct., at 160. The judgment of the Court of Appeals is

Affirmed.

Justice BRENNAN, with whom Justice MARSHALL and Justice BLACKMUN join, concurring.

I find nothing in today's opinion that would limit *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979) to its facts. Indeed, largely for reasons discussed by the Court of Appeals, I am of the view that the unique negotiations giving rise to the property rights and expectations at issue here make this case the unusual one. See 758 F.2d 1260, 1266–1269, and n. 10 (CA8 1985). Accordingly, I join the opinion of the Court.

Justice SCALIA, with whom THE CHIEF JUSTICE and Justice POWELL join, concurring.

I join the opinion of the Court. I write separately to note that in my view the present statute, insofar as concerns the balance between rights taken and rights

abrogated by the designation of Grand Central Station as a landmark, noting that not all new construction prohibited, and noting the availability of transferable development rights).

Justice STEVENS' objections are perhaps better directed at the question of whether there is third-party standing to challenge this statute under the Fifth Amendment's Just Compensation Clause. But as we have shown, there is certainly no Article III bar to permitting the appellees to raise their decedents claims, *supra*, at ——, and Justice STEVENS himself concedes that prudential considerations do not bar consideration of the Fifth Amendment claim. *Post*, at 2085.

left untouched, is indistinguishable from the statute that was at issue in *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979). Because that comparison is determinative of whether there has been a taking, see *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 136, 98 S.Ct. 2646, 2665, 57 L.Ed.2d 631 (1978); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922), in finding a taking today our decision effectively limits *Allard* to its facts.

Justice STEVENS, with whom Justice WHITE joins, concurring in the judgment.

The Government has a legitimate interest in eliminating Indians' fractional holdings of real property. Legislating in pursuit of this interest, the Government might constitutionally have consolidated the fractional land interests affected by § 207 of the Indian Land Consolidation Act of 1983, 96 Stat. 2519, 25 U.S.C. § 2206 (1982 ed., Supp. III), in three ways: It might have purchased them; it might have condemned them for a public purpose and paid just compensation to their owners; or it might have left them untouched while conditioning their descent by intestacy or devise upon their consolidation by voluntary conveyances within a reasonable period of time.

Since Congress plainly did not authorize either purchase or condemnation and the payment of just compensation, the statute is valid only if Congress, in § 207, authorized the third alternative. In my opinion, therefore, the principal question in this case is whether § 207 represents a lawful exercise of the sovereign's prerogative to condition the retention of fee simple or other ownership interests upon the performance of a modest statutory duty within a reasonable period of time.

I

The Court's opinion persuasively demonstrates that the Government has a strong interest in solving the problem of fractionated land holdings among Indians. It also indicates that the specific escheat provision at issue in this case was one of a long series of congressional efforts to address this problem. The Court's examination of the legislative history, however, is incomplete. An examination of the circumstances surrounding Congress' enactment of § 207 discloses the abruptness and lack of explanation with which Congress added the escheat section to the other provisions of the Indian Land Consolidation Act that it enacted in 1983. See *ante*, at 2079.

In 1982, the Senate passed a special bill for the purpose of authorizing the Devils Lake Sioux Tribe of South Dakota to adopt a land consolidation program with the approval of the Secretary of the Interior.[1] That bill provided that the Tribe would compensate individual owners for any fractional interest that might be acquired; the bill did not contain any provision for escheat.[2]

When the Senate bill was considered by the House Committee on Indian Affairs, the Committee expanded the coverage of the legislation to authorize any Indian tribe to adopt a land consolidation program with the approval of the Secretary, and it also added § 207—the escheat provision at issue in this case—to the bill. H.R.Rep. No. 97–908, pp. 5, 9 (1982).[3] The Report on the

1. S. 503, 97th Cong., 2d Sess. (1982).

2. The Report of the Senate Select Committee on Indian Affairs described the purpose of the bill as follows:

"The purpose of S. 503 is to authorize the purchase, sale, and exchange of lands by the Devils Lake Sioux Tribe of the Devils Lake Sioux Reservation, North Dakota. The bill is designed to allow the Tribe to consolidate land ownership with the reservation in order to maximize utilization of the reservation land base. The bill also would restrict inheritance of trust property to members of the Tribe provided that the Tribe paid fair market value to the Secretary of the Interior on behalf of the decedent's estate." S.Rep. No. 97–507, p. 3 (1982).

3. The House additions were themselves an amended version of H.R. 5856, the Indian Land Consolidation Act. H.R.Rep. No. 97–908, p. 9

House Amendments does not specifically discuss § 207. In its general explanation of how Indian trust or restricted lands pass out of Indian ownership, resulting in a need for statutory authorization to tribes to enact laws to prevent the erosion of Indian land ownership, the Report unqualifiedly stated that, "if an Indian allottee dies intestate, his heirs will inherit his property, whether they are Indian or non-Indian." *Id.*, at 11.

The House returned the amended bill to the Senate, which accepted the House addition without hearings and without any floor discussion of § 207. 128 Cong.Rec.S. 15568–S. 15570 (Dec. 19, 1982). Section 207 provided:

> "No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall [descend] [4] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat."

In the text of the Act, Congress took pains to specify that fractional interests acquired by a tribe pursuant to an approved plan must be purchased at a fair price. See §§ 204, 205, and 206. There is no comparable provision in § 207. The text of the Act also does not explain why Congress omitted a grace period for consolidation of the fractional interests that were to escheat to the tribe pursuant to that section.

The statute was signed into law on January 12, 1983, and became effective immediately. On March 2, the Bureau of Indian Affairs of the Department of the Interior issued a memorandum to all its area directors to advise them of the enactment of § 207 and to provide them with interim instructions pending the promulgation of formal regulations. The memorandum explained:

> "Section 207 effects a major change in testate and intestate heirship succession for certain undivided fractional interests in trust and restricted Indian land. Under this section, certain interests in land, as explained below, will no longer be capable of descending by intestate succession or being devised by will. Such property interests will, upon the death of the current owner, escheat to the tribe....
>
> . . . . .
>
> "Because Section 207 of P.L. 97–459 constitutes a major change in Indian heirship succession, Area Offices and Agencies are urged to provide all Indian landowners under their jurisdiction with notice of its effects." [5]

The memorandum then explained how Indian landowners who wanted their heirs or devisees, rather than the tribe, to acquire their fractional interests could avoid the impact of § 207. It outlined three ways by which the owner of a fractional interest of

(1982). The House Committee on Interior and Insular Affairs had held hearings on H.R. 5856, but these hearings were not published. H.R. Legislative Calendar, 97th Cong., 2d Sess., 72 (1982).

The purposes of the legislation were summarized by the House Committee on Interior and Insular Affairs as (1) to provide mechanisms for the tribes to consolidate their tribal landholdings; (2) to allow Indian tribes or allottees to buy all of the fractionated interests in the tracts without having to obtain the consent of all the owners; and (3) to keep trust lands in Indian ownership by allowing tribes to restrict inheritance of Indian lands to Indians. H.R.Rep. No. 97–908, *supra*, at 2082–2083.

4. The word "descedent"—an obvious error— appears in the original text. The Act of Oct. 30, 1984, 98 Stat. 3171—which is not relevant to our consideration of this case—corrected the error by substituting the word "descend" for "descedent" in § 207. The Senate Report accompanying the Act described how "descedent" made its way into the 1983 statute: "[T]he bill actually voted on by the House and Senate was garbled in the printing. It was this garbled version of Title II that was signed by the President." S.Rep. 98–632, p. 2 (1984).

5. App. to Juris. Statement 38a–39a.

less than two percent of a tract could enlarge that interest to more than two percent.[6]

The three appellees—Mary Irving, Patrick Pumpkin Seed, and Eileen Bissonette—are enrolled members of the Oglala Sioux Tribe. They represent heirs or devisees of members of the tribe who died in March, April, and June 1983.[7] At the time of their deaths, the decedents owned 41 fractional interests subject to the provisions of § 207. App. 20, 22–28, 32–33, 37–39. The size and value of those interests varied widely—the smallest was a 1/3645 interest in a 320–acre tract, having an estimated value of only $12.30, whereas the largest was the equivalent of three and one-half acres valued at $284.44. *Id.*, at 22 and 23. If § 207 is valid, all of those interests escheated to the Tribe; if § 207 had not been enacted—or if it is invalid—the interests would have passed to the appellees.

II

I agree with the Court's explanation of why these appellees "can appropriately serve as their decedents' representatives for purposes of asserting the latters' Fifth Amendment rights." *Ante*, at 2081. But the reason the Court asserts for finding that § 207 effects a taking is not one that appellees press, or could press, on behalf of *their* decedents. A substantial gap separates the claims that the Court allows these appellees to advance from the rationale that the Court ultimately finds persuasive.

The Court's grant of relief to appellees based on the rights of hypothetical decedents therefore necessarily rests on the implicit adoption of an overbreadth analysis that has heretofore been restricted to the First Amendment area. The Court uses the language of takings jurisprudence to express its conclusion that § 207 violates the Fifth Amendment, but the stated reason is that § 207 "goes too far," see *ante*, at 2084, because it might interfere with testamentary dispositions, or inheritances, that result in the consolidation of property interests rather than their increased fractionation.[8] That reasoning may apply to some decedents, but it does not apply to these litigants' decedents. In one case, the property of Mary Poor Bear-Little Hoop Cross was divided among her five children. In two other cases, the fractional interests passed to the next generation.[9] I had

6. The memorandum stated:

> "To assure the effectiveness of a will or heirship succession under state law, any Indian owner within the above category (if he or she is concerned that the tribe rather than his or her heirs or devisees will take these interests) may purchase additional interests from coowners pursuant to 25 CFR 151.7 and thereby increase his/her ownership interest to more than two percent. Another alternative is for such an owner to convey his/her interest to coowners or relatives pursuant to 25 CFR 152.25 and reserve a life estate, thus retaining the benefits of the interest while assuring its continued individual, rather than tribal, ownership. A third alternative, if feasible, is to partition the tract in such a way as to enlarge the owner's interest in a portion of said tract.
>
> "Indians falling within the above category and who are presently occupying, or in any other way using, the tract in question should especially be advised of the aforementioned alternatives." *Id.*, at 39a–40a.

7. Mary Irving is the daughter of Chester Irving who died on March 18, 1983, see App. 18; Eileen Bissonette is the guardian for the five minor children of Geraldine Mary Poor Bear-Little Hoop Cross who died on March 23, 1983, see *id.*, at 21; and Patrick Pumpkin Seed is the son of Charles Leroy Pumpkin Seed who died on April 2, 1983, see *id.*, at 34, and the nephew of Edgar Pumpkin Seed who died on June 23, 1983.

8. The crux of the Court's holding is stated as follows:

> "What is certainly not appropriate is to take the extraordinary step of abolishing both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property. Accordingly, we find that this regulation, in the words of Justice Holmes, 'goes too far.'" *Ante*, at 2084.

9. Patrick Pumpkin Seed was a potential heir to four pieces of property in which both his father and his uncle had interests. However, because both his father and his uncle had other potential heirs, the net effect of the distribution of the uncle's and the father's estates would have been to increase the fractionalization of their proper-

dural safeguards, including an opportunity to appear, for those whose rights will be affected by the judgment. See 28 U.S.C. § 1335; Federal Rule of Civil Procedure 22. The statute before us, in contrast, contained no such mechanism, apparently relying on the possibility that appellees' decedents would simply learn about the statute's consequences one way or another.

While § 207 therefore does not qualify as an escheat of the kind recognized at common law, it might be regarded as a statute imposing a duty on the owner of highly fractionated interests in allotted lands to consolidate his interests with those of other owners of similar interests. The method of enforcing such a duty is to treat its nonperformance during the owner's lifetime as an abandonment of the fractional interests. This release of dominion over the property might justify its escheat to the use of the sovereign.

Long ago our cases made it clear that a State may treat real property as having been abandoned if the owner fails to take certain affirmative steps to protect his ownership interest. We relied on these cases in upholding Indiana's Mineral Lapse Act, a statute that extinguished an interest in coal, oil, or other minerals that had not been used for 20 years:

> "These decisions clearly establish that the State of Indiana has the power to enact the kind of legislation at issue. In each case, the Court upheld the power of the State to condition the retention of a property right upon the performance of an act within a limited period of time. In each instance, as a result of the failure of the property owner to perform the statutory condition, an interest in fee was deemed as a matter of law to be abandoned and to lapse." *Texaco, Inc. v. Short*, 454 U.S., at 529, 102 S.Ct., at 792.

It is clear, however, that a statute providing for the lapse, escheat, or abandonment of private property cannot impose conditions on continued ownership that are unreasonable, either because they cost too much or because the statute does not allow property owners a reasonable opportunity to perform them and thereby to avoid the loss of their property. In the *Texaco* case, both conditions were satisfied: The conditions imposed by the Indiana legislature were easily met,[12] and the two-year grace period included in the statute foreclosed any argument that mineral owners did not have an adequate opportunity to familiarize themselves with the terms of the legislation and to comply with its provisions before their mineral interests were extinguished. As the Court recognized in *United States v. Locke*, 471 U.S. 84, 106, n. 15, 105 S.Ct. 1785, 1799, n. 15, 85 L.Ed.2d 64 (1985), "[l]egislatures can enact substantive rules of law that treat property as forfeited under conditions that the common law would not consider sufficient to indicate abandonment." These rules, however, are only reasonable if they afford sufficient notice to the property owners and a reasonable opportunity to comply. *Ibid.*

The Due Process Clause of the Fifth Amendment thus applies to § 207's determination of which acts and omissions may validly constitute an abandonment, just as the Takings Clause applies to whether the statutory escheat of property must be accompanied by the payment of just compensation.[13] It follows, I believe, that § 207 deprived decedents of due process of law by failing to provide an adequate "grace period" in which they could arrange for the consolidation of fractional interests in order to avoid abandonment. Because the statutory presumption of abandonment is invalid under the precise facts of this case, I do not reach the ground relied upon by the Court of Appeals—that the resulting escheat of abandoned property would effect a taking of private property for public use without just compensation.[14]

Critical to our decision in *Texaco* was the fact that an owner could readily avoid the risk of abandonment in a variety of ways,[15] and the further fact that the statute afforded the affected property owners a reasonable opportunity to familiarize themselves with its terms and to comply with its provisions. We explained:

> "The first question raised is simply how a legislature must go about advising its citizens of actions that must be taken to avoid a valid rule of law that a mineral interest that has not been used for 20 years will be deemed to be abandoned. The answer to this question is no different from that posed for any legislative enactment affecting substantial rights. Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply. In this case, the 2–year grace period included in the Indiana statute forecloses any argument that the statute is invalid because mineral owners may not have had an opportunity to become familiar with its terms. It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property." 454 U.S., at 531–532, 102 S.Ct., at 793.[16]

Assuredly Congress has ample power to require the owners of fractional interests in allotted lands to consolidate their holdings during their lifetimes or to face the risk that their interests will be deemed to have been abandoned. But no such abandonment may occur unless the owners have

12. "It is also clear that the State has not exercised this power in an arbitrary manner. The Indiana statute provides that a severed mineral interest shall not terminate if its owner takes any one of three steps to establish his continuing interest in the property. If the owner engages in actual production, or collects rents or royalties from another person who does or proposes to do so, his interest is protected. If the owner pays taxes, no matter how small, the interest is secure. If the owner files a written statement of claim in the county recorder's office, the interest remains viable. Only if none of these actions is taken for a period of 20 years does a mineral interest lapse and revert to the surface owner." 454 U.S., at 529, 102 S.Ct., at 792.

It would appear easier for the owner of a mineral interest to meet these conditions than for appellees' decedents to meet the implicit conditions imposed by § 207. Paying taxes or filing a written statement of claim are simple and unilateral acts, but an Indian owner of a fractional interest cannot consolidate interests or collect $100 per annum from it without the willing participation of other parties.

13. The Fifth Amendment to the Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

14. I am unable to join the Court's largely inapposite Fifth Amendment takings analysis. As I have demonstrated, the statute, analogous to those authorizing the escheat of abandoned property, is rooted in the sovereign's authority to oversee and supervise the transfer of property ownership. Instead of analyzing § 207 in relation to our precedents recognizing and limiting the exercise of such authority, however, the Court ignores this line of cases, implicitly questions their validity, and appears to invite widespread challenges under the Fifth Amendment takings clause to a variety of statutes of the kind that we upheld in *Texaco v. Short*.

15. See n. 12, *supra*.

16. Earlier in the opinion we noted that in *Wilson v. Iseminger*, 185 U.S. 55, 22 S.Ct. 573, 46 L.Ed.2d 804 (1902), the Court had upheld a Pennsylvania statute that provided for the extinguishment of certain interests in realty "since the statute contained a reasonable grace period in which owners could protect their rights." 454 U.S., at 527, n. 21, 102 S.Ct., at 791, n. 21. We quoted the following passage from the *Wilson* case:

"It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action; though what shall be considered a reasonable time must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice." 185 U.S., at 62–63, 22 S.Ct., at 575.

a fair opportunity to avoid that consequence. In this case, it is palpably clear that they were denied such an opportunity.

This statute became effective the day it was signed into law. It took almost two months for the Bureau of Indian Affairs to distribute an interim memorandum advising its area directors of the major change in Indian heirship succession effected by § 207. Although that memorandum identified three ways in which Indian landowners could avoid the consequences of § 207, it is not reasonable to assume that appellees' decedents—who died on March 18, March 23, April 2, and June 23, 1983—had anything approaching a reasonable opportunity to arrange for the consolidation of their respective fractional interests with those of other owners.[17] With respect to these appellees' decedents "the time allowed is manifestly so insufficient that the statute becomes a denial of justice." *Wilson v. Iseminger*, 185 U.S. 55, 63, 22 S.Ct. 573, 575, 46 L.Ed. 804 (1902).[18]

While citizens "are presumptively charged with knowledge of the law," *Atkins v. Parker*, 472 U.S. 115, 130, 105 S.Ct. 2520, 2530, 86 L.Ed.2d 81 (1985), that presumption may not apply when "the statute does not allow a sufficient 'grace period' to provide the persons affected by a change in the law with an adequate opportunity to become familiar with their obligations under it." *Ibid.* (citing *Texaco, Inc.*, 454 U.S., at 532, 102 S.Ct., at 793.) Unlike the food-stamp recipients in *Parker*, who received a grace period of over 90 days and individual notice of the substance of the new law, 472 U.S., at 130–131, 105 S.Ct., at 2530, the Indians affected by § 207 did not receive a reasonable grace period. Nothing in the record suggests that appellees' decedents received an adequate opportunity to put their affairs in order.[19]

The conclusion that Congress has failed to provide appellees' decedents with a reasonable opportunity for compliance implies no rejection of Congress' plenary authority over the affairs and the property of Indians. The Constitution vests Congress with plenary power "to deal with the special problems of Indians." *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974). As the Secretary acknowledges, however, the Government's plenary power over the property of Indians "is subject to constitutional limitations." Brief for Appellant 24–25. The Due Process Clause of the Fifth Amendment required Congress to afford reasonable notice and opportunity for compliance to Indians that § 207 would prevent fractional interests in land from descending by intestate or testate succession.[20] In omitting any opportunity at all for owners of fractional interests to order their affairs in light of § 207, Congress has failed to afford the affected Indians the due process of law required by the Fifth Amendment.

Accordingly, I concur in the judgment.

17. The legislative history of the Indian Land Consolidation Act of 1983 is mute with respect to § 207. See n. 4, *supra*. This silence is illuminating; it suggests that Indian landowners cannot reasonably be expected to have received notice about the statute before it took effect and to have arranged their affairs accordingly. The lack of legislative history concerning § 207 also demonstrates that Congress paid scant or no attention to whether, in light of its long-standing fiduciary obligation to Indians, it was constitutionally required to afford a reasonable post-enactment "grace period" for compliance.

18. A statute which denies the affected party a reasonable opportunity to avoid the consequences of noncompliance may work an injustice similar to that of invalid retroactive legislation. In both instances, the party who "could have anticipated the potential liability attaching to his chosen course of conduct would have avoided the liability by altering his conduct." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17, n. 16, 96 S.Ct. 2882, 2893, n. 16, 49 L.Ed.2d 752 (1976) (citing *Welch v. Henry*, 305 U.S. 134, 147, 59 S.Ct. 121, 125, 83 L.Ed. 87 (1938)). See also *United States v. Hemme*, 476 U.S. ——, ——, 106 S.Ct. 2071, ——, 90 L.Ed.2d 538 (1986) (following *Welch v. Henry, supra*).

19. Nothing in the record contradicts the possibility that appellees themselves only became aware of the statute upon receiving notices that hearings had been scheduled for the week of October 24, 1983 to determine if their tribe had a right through escheat to any lands that might otherwise have passed to appellees. *Irving v. Clark*, 758 F.2d 1260, 1262 (CA8 1985). The notices were issued on October 4, 1983, after the death of appellees' decedents, and therefore afforded no opportunity for decedents to comply with § 207 or for appellees to advise their decedents of the possibility of escheat.

20. I need express no view on the constitutionality of § 207 as amended by the Act of Oct. 30, 1984, 98 Stat. 3171. All of the interests of appellees' decedents at issue in this case are governed by the original version of § 207. The decedents all died between January 12, 1983 and October 30, 1984, the period in which the original version of § 207 was in effect. The parties in this case present no case or controversy with respect to the application of the *amended* version of § 207.

John William RAY, Petitioner

v.

UNITED STATES.

No. 86–281.

May 18, 1987.

Defendant was convicted in the United States District Court for the Southern District of Texas, of one count of conspiracy to possess cocaine with intent to distribute and two counts of possession of cocaine with intent to distribute, and he appealed. The Court of Appeals for the Fifth Circuit, 791 F.2d 929, affirmed, and certiorari was granted. The Supreme Court held that defendant was not serving concurrent sentences, and Court of Appeals improperly applied "concurrent sentence doctrine" to decline to review second conviction for possession of cocaine with intent to distribute.

Vacated and remanded.

Criminal Law ⇐1177, 1216(2)

Defendant was not serving concurrent sentences and Court of Appeals improperly applied "concurrent sentence doctrine" to decline to review second conviction for possession of cocaine with intent to distribute, where district court imposed $50 assessment on each count, in addition to concurrent prison and parole terms, so that defendant's liability depended on validity of each of his three convictions.

PER CURIAM.

Petitioner was found guilty of one count of conspiracy to possess cocaine with intent to distribute, and two counts of possession of cocaine with intent to distribute. He was sentenced to concurrent 7-year prison terms on all three counts, and to concurrent special parole terms of five years on the two possession counts. The Court of Appeals affirmed petitioner's conspiracy conviction and one of his possession convictions. *United States v. Sandoval*, 791 F.2d 929 (CA5 1986). Applying the so-called "concurrent sentence doctrine," the court declined to review the second possession conviction because the sentences on the two possession counts were concurrent. We granted certiorari to review the role of the concurrent sentence doctrine in the federal courts. 479 U.S. ——, 107 S.Ct. 454, 93 L.Ed.2d 400 (1986).

It now appears, however, that petitioner is not in fact serving concurrent sentences. Title 18 U.S.C. § 3013 (1982 ed., Supp. III) provides that district courts shall assess a monetary charge "on any person convicted of an offense against the United States." Pursuant to this section, the District Court imposed a $50 assessment on each count, in addition to the concurrent prison and parole terms, for a total of $150. Since petitioner's liability to pay this total depends on the validity of each of his three convictions, the sentences are not concurrent. The judgment of the Court of Appeals is therefore vacated, and the cause is remand-