his property as he had been reasonably using in connection with his land, and found that the government's use of this airspace resulted in the imposition of a servitude on the chicken farm.

If government agents or employees intentionally destroy or take a person's property, there should be no question that there has been a "taking" for which just compensation is due, although there may be questions in any given case regarding the adequacy of state administrative or judicial procedures for determining the amount of compensation.[89] The Supreme Court added confusion to the taking of property concept when it ruled that mere negligence by government agents, which resulted in harm to a prisoner in a penal institution, did not constitute a taking of liberty without due process, even though state tort law and state sovereign immunity doctrines precluded any compensation for the prisoner.[90] In so doing, the Court reversed its earlier holding that a government agent's negligent destruction of a prisoner's property could constitute a violation of due process.[91] In *Daniels v. Williams*,[92] the Court found that a state's tort law and sovereign immunity law could deny all compensation to an inmate of a penal institution who slipped on a pillow that a state employee negligently left on a stairway. In so ruling, the majority opinion by Justice Rehnquist stated: "We conclude that the due process clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property." The Court in *Daniels* left open the question of whether any type of action by government agents short of an intentional destruction of property (such as the destruction of property though grossly negligent or reckless conduct) could constitute a taking of property.

If taken literally, the quoted statement from *Daniels* would mean that an individual had no constitutional right to just compensation when agents of the state negligently destroyed his property, regardless of the extent of loss or the nature of the state activity. For example, assume that a state employee negligently drove a truck filled with flammable liquids off the highway and crashed into a house, destroying the house and all persons therein. Could any surviving members of the family that owned the house be denied all compensation for the loss of their property and the lives of their family members due to a state sovereign immunity law? Literal application of the statement in *Daniels* would mean that a state doctrine of sovereign immunity could totally defeat any claim for just compensation in such a case. Perhaps the judiciary could avoid such a problem by finding that the government agent (in our hypothetical, the truck driver) had engaged in reckless or grossly negligent conduct. It would be better, in the authors' view, if the Supreme Court were to rule that the judiciary should use a case-by-case approach to determine whether the negligence of government employees had so unfairly shifted social costs (such as the cost for the societal benefit from the state agency that employed the truck driver) to an individual or a limited group of individuals (the property owners and family members in our hypothetical) that the unintended harm to the individual or group of individuals constituted a taking for which just compensation was required. This type of case-by-case approach would eliminate turning all minor tort suits into constitutional issues, while requiring just compensation for those persons who have been severely injured by negligent government actions. Such a construction of the prisoner's rights cases may be

89. See Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), on remand 744 F.2d 22 (4th Cir. 1984). Regarding the procedural due process issues inherent in such cases see §§ 13.4, 13.9.

90. Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) (due process clause is not violated by a state official's lack of due care in leaving a pillow on stairway that resulted in personal injury to a prisoner); Davidson v. Cannon, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986) (the failure to protect an inmate from attack from fellow prisoners, though the result of the negligence of prison officials, did not violate the due process clause).

91. Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), overruled by Daniels v. Williams, 474 U.S. 662, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

92. 474 U.S. 327, 106 S.Ct. 662. 88 L.Ed.2d 662 (1986).

possible, because the Supreme Court in *Daniels* stated: "We need not rule out the possibility that there are other constitutional provisions that would be violated by mere lack of care in order to hold, as we do, that such conduct [causing the minor injury to the prisoner in this case] does not implicate the due process clause of the fourteenth amendment."[93]

(e) Summary

The taking issue presents a most difficult conceptual problem. Damaging private property may be a taking, but in certain instances even total destruction does not require compensation. Physical occupation of private property normally will require compensation but the government was allowed to restrict a shopping center owner's ability to exclude persons without the payment of compensation. Regulation generally may be done without compensation; yet a regulation may be so restrictive as to warrant a finding that a taking has occurred. The term "taking," therefore, is best viewed not as a literal description of the governmental action.

Professor Michelman, in his outstanding analysis of the philosophy and principles of adjudication in this area, described the term "taking" as "constitutional law's expression for any sort of publicly inflicted private injury for which the Constitution requires judgment of compensation."[94] In connection with this analysis, Professor Michelman has described four factors, any one of which is normally determinative in evaluating whether compensation is constitutionally due:

(1) Whether or not the public, government or one of its agents have physically used or occupied something belonging to the claimant.

(2) The size of the harm sustained by the claimant or the degree to which his affected property has been devalued.

(3) Whether the claimant's loss is or is not outweighed by the public's commitant gain.

(4) Whether the claimant has sustained any loss apart from restriction of his liberty to conduct some activity considered harmful to other people.[95]

93. 474 U.S. at 666, 106 S.Ct. at 344.

The Supreme Court has held that the heirs of an individual who died when he was being chased by police at high speeds, and whose death was caused by running his automobile into a police road block (which consisted of a tractor trailer placed across a road shortly after a curve in the road), could bring suit against the government under 42 U.S.C.A. § 1983 based on the allegation that the death was caused by a seizure that violated the fourth amendment, which applies to state and local governments through the fourteenth amendment. Brower v. County of Inyo, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989). To maintain this action, the heirs would have to prove that the "seizure" was unreasonable and violated fourth amendment standards. The majority opinion, by Justice Scalia, stated that, for there to be a fourth amendment issue, the seizure must be an intentional termination of the individual's freedom. 489 U.S. at 597, 109 S.Ct. at 1381. (Thus, if a parked and unoccupied police car slips its brake and pins a passerby against the wall, it is likely that a tort has occurred, but not a violation of the fourth amendment in the majority's view). Four Justices, concurring in the judgement in *Brower*, believed that the statements of the majority regarding "unintentional" terminations of freedom of movement constituted only dicta and that the majority was unwise to discuss whether unintentional acts might or might not violate the fourth amendment. 489 U.S. at 600, 109 S.Ct. at 1383 (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ., concurring in the judgment). Thus, it appears that the fourth amendment is not violated by unintentional, negligent actions of government officials.

94. Michelman, Property, Utility, and Fairness: Commentaries on the Ethical Foundations of "Just Compensation" Law, 80 Harv.L.Rev. 1165, 1165 (1967).

95. 80 Harv.L.Rev. at 1184.

For Professor Michelman's comments on recent Supreme Court decisions and the conflict between self-governance and property interests, see, Michelman, Takings 1987, 88 Columbia L.Rev. 1600 (1988). Compare with Michelman's views, Kmiec, The Original Understanding of the Takings Clause is Neither Weak Nor Obtuse, 88 Columbia L.Rev. 1630 (1988).

When the government takes physical possession of money or property which otherwise would accrue to the benefit of a private person, the private person's claim for just compensation is established unless the government can demonstrate that its action in fact constituted only a regulation of the property use, or payment of an amount lawfully owed to the government. See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980), on remand 394 So.2d 1009 (Fla.1981) (A taking occurred when a county took the interest earned on funds deposited with the clerk of the county court in an interpleader action. Since a state statute authorized a separate clerk's fee for services rendered, the taking of the interest could not be justified as payment of an obligation to the government.)

The legislative termination of a property interest should be considered a taking for which just compensa-

While these four factors will not answer the question of whether a court will find compensation due in a specific case, they do help courts to set the parameters for argument.[96]

The Supreme Court has indicated that three factors are of particular importance in determining whether a government regulation of economic activity in interest constitutes a taking of property. These factors are: (1) the economic impact of the regulation [on the individual, group, or entity that suffers an economic loss]; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action.[97] These three considerations, when viewed in light of the cases discussed in this section, are quite compatible with Professor Michelman's analysis and four-part inquiry. Indeed, it may be that Professor Michelman's analysis is a more precise way of looking into all of the factors that the Supreme Court considers when making a determination as to whether an economic regulation constitutes a taking of property for which compensation is due.

§ 11.13 The "Public Use" Limitation

The government is not entirely free to take a person's property whenever it is willing to compensate him. The individual may not wish to part with his property, and, under both the fifth and fourteenth amendments, property may not be taken by the government, even upon payment of just compensation, unless the property is taken for a public use. Like the requirement that a landowner be compensated when his property is taken by the state, the "public use" limitation also has its roots in natural as well as constitutional law.[1] The early interpretation of this public use test was broadly viewed as properly exercisable for "the public good, the public necessity or the public utility".[2]

tion is due in most circumstances, at least when the value of the property interest is not so minimal as to be considered de minimis. In Hodel v. Irving, 481 U.S. 704, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987), the Supreme Court found that a federal statute requiring an escheat to an Indian tribe of a fractional interest in Indian tribal lands, owned by an individual member of the tribe, consisting of less than two percent of the total acreage in the land tract and producing less than $100 of income in the year preceding the death of the owner was of the fractional interest. Although the government might have been able to adjust these property interests and regulate their passing so as to avoid continued fractionation of the ownership interest in the tribal lands. However, the complete abolition of a property interest that has some value requires just compensation.

Federal Government Taking of State Property. The fifth amendment limits the ability of the federal government to take property belonging to state or local governments without just compensation, even though the tenth amendment does not prohibit such federal acts. However, no person or entity may sue the United States without its permission. Legislation imposing a twelve year statute of limitations on suits challenging the taking of property by the federal government could be applied to bar state government suits against the United States. Block v. North Dakota ex rel. Board of University and School Lands, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983), on remand 711 F.2d 118 (8th Cir. 1983), appeal after remand 789 F.2d 1308 (1986).

State and local governmental property, just as private property, may be taken by the federal government, if the federal government pays just compensation to the owner of the property. State and local governments are only entitled to the same compensation as private persons for the federal taking of property. There is no constitutional requirement that the federal government pay for the cost of a substitute facility which is taken from a state or local government. The state is only entitled to the market value of the property taken, just as a private owner would be, if that value is ascertainable and not clearly unjust. United States v. 50 Acres of Land, 469 U.S. 24, 105 S.Ct. 451, 83 L.Ed.2d 376 (1984).

96. See generally, Blume & Rubinfeld, Compensation for Taking: An Economic Analysis, 72 Calif.L.Rev. 569 (1984).

Professor John Costonis has proposed that the Court use presumptions rather than per se rules regarding the taking of property in order that the Court might, analyze openly the conflicts between welfare and indemnification concerns and the fairness of the governmental action. Costonis proposes a "sliding scale" to establish the government's burden of proof in justifying particular measures. Costonis, Presumptive and Per Se Takings: A Decisional Model for the Taking Issue, 58 N.Y.U.L.Rev. 465 (1983).

97. Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 225, 106 S.Ct. 1018, 1026, 89 L.Ed.2d 166 (1986) quoting Penn Central Transportation Co. v. New York, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978), rehearing denied 439 U.S. 883, 99 S.Ct. 226, 58 L.Ed.2d 198 (1978).

§ 11.13

1. Lenhoff, Development of the Concept of Eminent Domain, 42 Colum.L.Rev. 596, 598-99 (1942).

2. Comment, The Public Use Doctrine: "Advance Requiem" Revisited, 1959 Law and the Social Order 689, 689.

The broad interpretation of the public use limitation was abandoned in the later half of the nineteenth century, however, in order that the courts might better control the exercise of eminent domain by private enterprises to whom the power had been delegated.[3] The state courts developed, therefore, the "use by the public" test for determining when a public use existed. Under the "use by the public" test the public had to have a right to use or enjoy the property taken. Early in the twentieth century, however, the Supreme Court repudiated the narrow "use by the public" test [4] and returned to the broad public benefit test for determining when a use was public.

The leading modern case defining the scope of the public use limitation is the unanimous 1954 Supreme Court decision in *Berman v. Parker*.[5] This case involved the constitutionality of the 1945 District of Columbia Redevelopment Act. Under section 2 of that Act, Congress declared it the policy of the United States to eliminate all substandard housing in Washington, D.C. because such areas were "injurious to the public health, safety, morals, and welfare." The Act also created the District of Columbia Redevelopment Land Agency and granted that agency the power to assemble real property for the redevelopment of blighted areas of the city through the exercise of eminent domain. After assembling the necessary real estate, Congress authorized the Agency to lease or sell portions of the land to private parties upon an agreement that the purchasers would carry out the redevelopment plan.

The appellant in *Berman* held property within the redevelopment area upon which a department store was located. The appellants argued that their property could not constitutionally be taken for the project, first, because the property was commercial and not residential or slum housing, and second, because, by condemning the property for sale to a private agency for redevelopment, the land was being redeveloped for a private and not a public use as required by the fifth amendment. The Supreme Court, in an opinion by Justice Douglas, disagreed and upheld the use of the eminent domain power.

The opinion noted that Congress has a "police power" as to the city of Washington, D.C., which is equivalent to the police power of the individual states, to legislate as necessary for the health, safety and welfare of its residents. Congress was exercising this "police power" in *Berman*.[6] This use of the term "police power" by Justice Douglas did not indicate that the government could take property without compensation but only that the federal government is not of limited, enumerated powers when it legislates concerning the District of Columbia.

The significance of the *Berman* opinion is that it confirms that the public use limitation of the fifth and fourteenth amendment is as expansive as a due process police power test.[7] The Court reaffirmed the rule that once the legislature has declared a condemnation to be for a public use, the role of the courts is an extremely narrow one.[8] The Court approved the concept of area redevelopment by holding that property which, standing by itself, was innocuous could be taken as part of the overall plan.[9] As for the power of the legislature to condemn areas for the purpose of renovation, the Court stated that "[i]t is within the power of the legislature to determine that the

3. Comment, The Public Use Limitation on Eminent Domain: An Advance Requiem, 58 Yale L.J. 599, 602–03 (1949).

4. See Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30, 36 S.Ct. 234, 60 L.Ed. 507 (1916). See also Sachman, The Right to Condemn, 29 Albany L.Rev. 177, 183 (1965).

5. 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954).

6. 348 U.S. at 31, 75 S.Ct. at 101–02.

7. Costonis, Fair Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 Colum.L.Rev. 1021, 1036 (1975).

8. Berman v. Parker, 348 U.S. 26, 32, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954). See also, Rindge Co. v. Los Angeles County, 262 U.S. 700, 709, 43 S.Ct. 689, 693, 67 L.Ed. 1186 (1923); Old Dominion Land Co. v. United States, 269 U.S. 55, 66, 46 S.Ct. 39, 40–41, 70 L.Ed. 162 (1925); and United States ex rel. Tennessee Valley Authority v. Welch, 327 U.S. 546, 551–52, 66 S.Ct. 715, 717–18, 90 L.Ed. 843 (1946).

9. Berman v. Parker, 348 U.S. 26, 35, 75 S.Ct. 98, 103–04, 99 L.Ed. 27 (1954).

community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." [10]

After *Berman*, the public use limitation is easily met whenever eminent domain is exercised by either the state or federal government as a means of realizing any object within its authority. For the state governments, and for the federal government when acting within federal territory, this means that eminent domain may be exercised whenever the purpose of the action is for the benefit of the health, safety and welfare of its citizens. For the actions of federal government concerning land within the states, this public use limitation is met whenever the object of the exercise bears any reasonable relationship to one of its implied or enumerated powers.

The Supreme Court followed the broad public benefit test of *Berman* in upholding the Hawaii Land Reform Act of 1967. The state legislature in Hawaii, through this Act, created a system for taking title and residential real property from lessors, and—after providing the lessors with just compensation—transferring title to the lessee of the property in order to reduce the concentration of land ownership in the state. In *Hawaii Housing Authority v. Midkiff*,[11] the Court found that this exercise of the eminent domain power was rationally related to the public purpose of correcting deficiencies in the real estate market and social problems attributed to land oligopoly. The fact that the property was transferred to private individuals did not invalidate the taking. The Court found that the public use requirement is "coterminous with the scope of a sovereign's police powers." This rule does not mean that a state can deprive an owner of the value of his land or take his property without just compensation or for a purely private reason. But, so long as the government is willing to pay fair market value for the property interest taken, the governmental act should be upheld whenever it is "rationally related to a conceivable public purpose. ..." The transfer of ownership in this case was not merely for the private benefit of the lessees but was rationally related to social and economic problems caused by the historic land oligopoly which had existed in Hawaii.[12]

§ 11.14 A Note on the Amount of Compensation and Compensable Property Interests

The fifth and fourteenth amendments require that a person receive "just compensation" for property that has been taken by the state or federal government. The Supreme Court has said that the constitutional guarantee of just compensation is not a limitation on the power of eminent domain, but only a condition of its exercise.[1] In determining what is "just compensation" the courts have developed various standards of valuation.[2]

The most basic principle for determining the amount due an individual whose property

10. 348 U.S. at 33, 75 S.Ct. at 102–03.

11. 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984).

12. Justice O'Connor delivered an opinion for a unanimous court (Justice Marshall did not participate). Her opinion stated: "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void. But no purely private taking is involved in this case. The Hawaii Legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii—a legitimate public purpose. Use of the condemnation power to achieve this purpose is not irrational. Since we assume for purposes of this appeal that the weighty demand of just compensation has been met, the requirements of the Fifth and Fourteenth Amendments have been satisfied." 467 U.S. at 243–245, 104 S.Ct. at 2331–32, 81 L.Ed.2d at 200.

§ 11.14

1. Long Island Water-Supply Co. v. Brooklyn, 166 U.S. 685, 689, 17 S.Ct. 718, 720, 41 L.Ed. 1165 (1897). See E. Freund, The Police Power 541 (1904) where the author concludes that the compensation requirement has always been an element of the exercise of eminent domain in civilized societies.

2. For an analysis of the compensation and valuation issue see, L. Orgel, Valuation Under the Law of Eminent Domain (2d ed.1953); Risinger, Direct Damages: The Lost Key to Constitutional Just Compensation When Business Premises Are Condemned, 15 Seaton Hall L.Rev. 483 (1985).

For an analysis of the special valuation problems that arise in inverse condemnation proceedings see, Note, Inverse Condemnation: Valuation of Compensation in Land Use Regulatory Cases, 17 Suffolk U.L.Rev. 621 (1983).

has been taken is contained in the often-quoted statement by Justice Holmes that the test is "what has the owner lost, not what has the taker gained".[3] Thus determination of what the injured property owner has lost fixes the amount for which the state is liable. Here the courts normally look to the market value of the property that has been taken.[4] Moreover, in determining the market value of the land, the court will normally look to the value of the property as if land were applied to its "highest and best" use. The highest and best use of a piece of property is determined by the value of the property in light of its present and potential uses if those uses can be anticipated with reasonable certainty.[5]

The market value test is not, however, a definitive test. In *United States v. Fuller*,[6] the Supreme Court stated that the overall standard is governed by basic equitable principles of fairness. In *Fuller*, the Court held that the government as a condemnor was not required to pay for elements of the property's market value that the government had created by granting the landowner a revocable permit to graze his animals on adjoining Federal lands.[7]

When the Taking Occurs. Because the government may take property in several ways, it is not always easy to determine the point in time when the government took an individual's property. The fair market value of property must be determined on the date of the taking in order to compensate fully the owner in accordance with the guarantee of the just compensation clause. If there is a difference in value between the date of the taking and the date on which the government will tender payment, the individual will be entitled to interest on the value of the property from the date of the taking or a new valuation of the property if during the delay the value of the property changed materially.[8] Even when the government seeks to secure title to the property through a judicial "condemnation" proceeding against the property, or through legislative action taking the property, it may be difficult to determine the exact date on which the taking occurred. Government actions prior to the formal transfer of title may have made the property virtually valueless to the individual. The Supreme Court has found that the same considerations used to determine whether a taking has resulted from government actions are to be considered in determining when the taking

3. Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195, 30 S.Ct. 459, 460, 54 L.Ed. 725 (1910).

4. Note, Valuation of Conrail Under the Fifth Amendment, 90 Harv.L.Rev. 596, 598 (1977).

5. Super-Power Co. v. Sommers, 352 Ill. 610, 618, 186 N.E. 476, 479 (1933).

6. 409 U.S. 488, 93 S.Ct. 801, 35 L.Ed.2d 16 (1973).

7. See also, United States ex rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266, 63 S.Ct. 1047, 87 L.Ed. 1390 (1943), mandate conformed 138 F.2d 343 (4th Cir. 1943), certiorari denied 321 U.S. 773, 64 S.Ct. 612, 88 L.Ed. 1067 (1944), where the Supreme Court held that in condemning land the federal government need not take into consideration in valuing the property the loss of business opportunity dependent on the owner's privilege to use the state's power of eminent domain.

Appraisal Fees. In United States v. Bodcaw Co., 440 U.S. 202, 99 S.Ct. 1066, 59 L.Ed.2d 257 (1979) (per curiam) the Court unanimously held that appraisal fees incurred by the owner of land in connection with a condemnation proceeding were not constitutionally compensable interests in connection with the taking of land by the federal government. While a particular legislative body might grant such costs to property owners as a part of condemnation proceedings, the government was not required by the Constitution to reimburse these costs. The Court also held that such expenses were not to be repaid under applicable federal acts.

Replacement Cost. In keeping with the requirement that condemned land be paid for at market value, absent unusual circumstances, the Court, in United States v. 564.54 Acres of Land, 441 U.S. 506, 99 S.Ct. 1854, 60 L.Ed.2d 435 (1979), found that a private nonprofit organization whose recreational camp was condemned by the government, was not entitled to the replacement cost for the camp. In this case the replacement cost would have been higher than the market value because the reestablishment of the camp was subject to new regulations which had not applied to the first facility. The Court ruled that this case did not present a unique situation where there was no ascertainable market value for the property or where the use of market value would create manifest injustice to the owner.

State and local governments are only entitled to the same compensation as private persons for the federal taking of property. There is no constitutional requirement that the federal government pay for the cost of a substitute facility which is taken from a state or local government. United States v. 50 Acres of Land, 469 U.S. 24, 105 S.Ct. 451, 83 L.Ed.2d 376 (1985).

8. Kirby Forest Industries, Inc. v. United States, 467 U.S. 1, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984).

occurred. Thus, courts must determine the time at which the value of the property was so substantially reduced by the government's actions or announcement of intention to take title to the property that a taking occurred at that time.[9]

Inverse Condemnations. Particularly difficult problems arise when a property owner alleges that his property has been taken by the government by regulatory action or impairment of the value rather than by government agents physically taking possession of the property or court or legislative transfer of the title of the property to the government. In such situations, the property owner institutes an "inverse condemnation" suit against the government. The individual will be seeking a court determination that a taking of property has occurred so as to force the government to either pay just compensation to the property owner, cease the governmental actions, or rescind the governmental regulation that has caused the diminution of the value of the property and the taking.[10]

If an inverse condemnation proceeding results in a judicial determination that a governmental action or regulation has resulted in a taking of property, the government may seek to limit the property owner's remedy to invalidation of the government action which impaired the value of the property. Once it is determined that the government action constitutes a taking for which compensation is due, the government can choose to continue the action and pay fair market value for the permanent taking of the property. If the government chooses to end its action, a court must determine whether the governmental activity, which impaired the value of the property, constituted a taking of property for the time period between the initiation of the government action (or regulation) and the time when the government rescinded its action (at the conclusion of the inverse condemnation proceeding). If the court determines that there was a taking of property for that time period, and the government chooses not to exercise its eminent domain power and pay for a permanent taking of the property, the court must order appropriate just compensation for the temporary taking.[11]

9. The Court described the problem in Kirby Forest Industries, Inc. v. United States, 467 U.S. 1, 14, 104 S.Ct. 2187, 2196, 81 L.Ed.2d 1, 13 (1984), in the following way: ". . . while most burdens consequent upon government action undertaken in the public interest must be borne by individual landowners as concomitants of 'the advantage of living and doing business in a civilized community', some are so substantial and unforeseeable, and can so easily be identified and redistributed, that 'justice and fairness' require that they be borne by the public as a whole. These considerations are as applicable to the problem of determining when in a condemnation proceeding the taking occurs as they are to the problem of ascertaining whether a taking has been effected by a putative exercise of the police power." [Footnotes omitted].

10. See 6 P. Nichols, Eminent Domain § 25.41 (3d rev.ed.1984). The Supreme Court described the nature of inverse condemnation when it found that federal laws prohibited states from taking lands belonging to American Indians by any means other than formal judicial condemnation of the property; the purpose of the federal laws was to prohibit states from taking physical occupation of such land and forcing individuals or tribes to bring inverse condemnation suits for recovery of just compensation. See United States v. Clarke, 445 U.S. 253, 100 S.Ct. 1127, 63 L.Ed.2d 373 (1980).

11. After a series of cases in which the Court avoided ruling on the government's duty to pay for a temporary taking, the Supreme Court in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal., 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) ruled that just compensation is required for temporary takings of property. The government will not have to pay as much compensation for a temporary taking as for a permanent taking because the owner, in a temporary taking case, will eventually have the full use of his property returned to him.

In the *First English Evangelical Lutheran Church* case the Court assumed, without deciding, that a California property use regulation constituted a taking of property, and that the government would rescind its regulation rather than pay for a permanent taking. Chief Justice Rehnquist, writing for a six-Justice majority, found that a temporary regulatory taking, like a temporary physical appropriation of property by the government, would require compensation.

Prior to the *First English Evangelical Lutheran Church* case, the Supreme Court had avoided ruling on the temporary taking issue because the cases in which the issue had been raised had records that did not present the issue clearly, or the cases had presented another issue which prevented the Court from ruling on the temporary takings problem. The question was left open in Agins v. Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); San Diego Gas and Electric Co. v. San Diego, 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981); and MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986), rehearing denied 478 U.S. 1035, 107 S.Ct. 22, 92 L.Ed.2d 773 (1986).

When is Compensation to Be Paid? In Williamson County Regional Planning Commission v. Hamilton Bank

Related to determining the amount of compensation are issues concerning the interests that qualify as property for which any compensation is due. The power of eminent domain enables the government to take "property" for public uses and only requires compensation for such. When the federal government acts as the condemnor, or taker, of the property the issue of what may be taken and what must be paid for is a matter of federal law.[12] The Supreme Court, for example, has held that an Indian group had an insufficient interest in unrecognized Indian land to require that compensation be paid for divestiture of that interest.[13] The Court has held, however, that a lease interest is property and that an injured lessee had a property right requiring compensation.[14] In sum, the power of eminent domain extends to tangibles and intangibles, including choses in action, contracts and charters.[15] As with the basic determination of value, this "test" combines traditional property law interests and equitable principles of fairness.

Transferable Development Rights. One of the most significant eminent domain issues to have arisen for several decades focuses on the compensation concept. In an effort to protect historical landmarks from destruction, a system termed "transferable development rights" has been developed. Under such a system, the owners of designated landmarks are given "rights" to exceed building height restrictions in their building zones as compensation for the decreased value of the building because of regulations which prohibit the modification of the landmark. Whether the system takes property or provides adequate compensation remains open to dispute.[16]

of Johnson City, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), on remand 779 F.2d 50 (6th Cir.1985), the Court held that the takings clause does not require that compensation be paid in advance of, or contemporaneously with, a taking of property. A state could provide a procedure for seeking just compensation that would require a property owner to file for compensation and which would preclude the owner from claiming that the just compensation clause had been violated, until the owner had followed the procedure and been denied just compensation. In making this ruling, the Court avoided ruling on the temporary regulatory takings problem it addressed in the *First English Evangelical Lutheran Church* decision.

In Preseault v. Interstate Commerce Commission, 494 U.S. 1, 110 S.Ct. 914, 108 L.Ed.2d 1 (1990) the Supreme Court upheld a federal statute that preserved railroad right-of-ways that are not currently in service by allowing interim use of the land as recreational trails, without ruling on the question of whether the statute constituted a "taking" of the underlying property interest of persons who owned land adjacent to the railroad right-of-way and to whom the land would have reverted after the railroad abandoned it were it not for the federal statute. The landowners had failed to make use of federal statutes that would allow them to bring an action in the Court of Claims for a determination of whether there had been a taking of their property and, if so, the amount of compensation due to them. Even if the federal statute constituted a taking of property, the compensation system available under federal law complied with the fifth amendment. Compensation does not have to be granted contemporaneously with, or prior to, a taking of property.

When a state collects money from taxpayers with a tax that is unconstitutional under existing precedents of the United States Supreme Court, the state must provide some type of relief to the taxpayer. However, the state procedure by which a taxpayer can challenge a tax statute does not have to precede the taxpayer's payment of the tax. McKesson v. Division of Alcoholic Beverages and Tobacco, ___ U.S. ___, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990).

See also, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985) (finding that authority of the Corps of Engineers did not have to be narrowly construed to avoid a taking of property in this case; the ruling is based on the position that established compensation systems for any possible taking by the Corps of Engineers in the exercise of its power over wetlands meant that there was no taking clause barrier to the Corps' authority or actions).

12. United States ex rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266, 63 S.Ct. 1047, 87 L.Ed. 1390 (1943), mandate conformed 138 F.2d 343 (4th Cir. 1943). See also, annot, 1 A.L.R.Fed. 479 (1969).

13. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 75 S.Ct. 313, 99 L.Ed. 314 (1955), rehearing denied 348 U.S. 965, 75 S.Ct. 521, 99 L.Ed. 753 (1955).

14. A. W. Duckett & Co. v. United States, 266 U.S. 149, 45 S.Ct. 38, 69 L.Ed. 216 (1924). See also Armstrong v. United States, 364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960), on remand 152 Ct.Cl. 731, 287 F.2d 577 (1961) (materialmen's liens held to be a compensable interest).

15. City of Cincinnati v. Louisville & Nashville R. Co., 223 U.S. 390, 400, 32 S.Ct. 267, 268–69, 56 L.Ed. 481 (1912). The Court in *City of Cincinnati* also held that the constitutional limitation on any state law impairing the obligation of contracts was not intended to limit the exercise of eminent domain. Id.

16. The adequate compensation issue remains undecided. The Supreme Court upheld the use of the landmark preservation—transferable development rights (TDR) system to limit the alteration of the Grand Central Station in New York on the basis that this land use "regulation" did not constitute a "taking." Penn Central Transp. Co. v. New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), rehearing denied 439 U.S. 883, 99

S.Ct. 226, 58 L.Ed.2d 198 (1978). The justices, in *Penn Central*, did not examine the question of whether TDR's constituted adequate compensation for a taking. See § 11.12(b), supra.

The primary intellectual proponent of the transferable development rights concept has been Professor (now Dean) John Costonis. He has been challenged as to the worth of transferable development rights by Professor Curtis Berger. Compare Costonis, Fair Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 Colum.L.Rev. 1021 (1975), with Berger, The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis, 76 Colum.L.Rev. 799 (1976). See generally, J. Costonis, Space Adrift (1974); Costonis, The Disparity Issue: A Context for the Grand Central Terminal Decision, 91 Harv.L.Rev. 402 (1977); Malone, The Future of Transferable Development Rights in the Supreme Court, 73 Kentucky L.J. 759 (1985).

THE LAW OF PROPERTY

AN INTRODUCTORY SURVEY

Fourth Edition

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21. Under state law, in most cases a city council may not, in enacting a rezoning ordinance, impose conditions and exact concessions in connection with the performance of its legislative functions. However, where the property owner voluntarily imposes restrictions and confers on the council the means of enforcing them, an amendment to the ordinance reclassifying land of the owner will not be invalidated on the ground that the action of the council constitutes zoning by contract. Such situations are carefully scrutinized. The legislative body must act in accordance with its conferred powers.

22. Flexible selective zoning or the use of "floating zones" has met with varied success. Under this plan no land at all is originally assigned to the zone in question, but such assignment is made when a landowner requests and is granted such a zone. When a plan of this type is invalidated it is done on the basis that the zoning is not pursuant to a comprehensive plan but is analogous to "spot zoning."

§ 12.2 Inadvertent Takings

1. A taking occurs when the government forces a private landowner to accommodate unwanted physical intrusions not necessary for the health and safety of occupants, regulates property so intensely as to substantially destroy its value, or imposes burdens unreasonably on the property of a small group of people for the benefit of society at large. A landowner can claim damages for injury to her property caused by an unconstitutional taking, or may be entitled to an injunction against enforcement of the unconstitutional ordinance or policy.

2. A thumbnail sketch of the law of takings:

a. *Trespassory Takings:* a trespassory, or "invasive," taking occurs when the government forces the landowner to accommodate an unwanted physical object, or forces the landowner to give up an easement so that other people may physically enter his property. Regulations that impose such trespasses, except in a very narrow range of circumstances, are *almost* always found to be takings, even if the actual damage to the landowner is slight.

b. *Nontrespassory Takings:* A nontrespassory taking occurs when the government "regulates" the use or value of property in such a way as to diminish its value. Nontrespassory takings are found much less frequently than trespassory takings, and no taking may occur even when the injury to the market value of the affected property is substantial, provided that the regulation is reasonable under the circumstances. A quick summary:

(1) Price regulation that permits the property owner to earn a reasonable (competitive) rate of return on her property is not a taking.

(2) Price regulation that requires the property owner to bear ongoing losses—i.e., that does not permit a reasonable rate of return—is generally found to be a taking.

(3) Health, safety, aesthetic and other regulations are generally not a taking unless the injury to the property is a very high percentage of its value, or it can be shown that the property can no longer be used profitably under the regulation.

(4) A statute that merely makes property nontransferable on the market does not in and of itself amount to a taking.[3]

(5) Statutes that permit the government forcibly to transfer title, occupancy rights, or security interests from a private landowner to the government or someone else, without compensation, are generally found to constitute a taking.[4]

c. If a taking is found, the government must compensate the property owner for reasonable damages incurred during the period that the property was subject to the statute or regulation found to be a taking.

§ 12.3 Eminent Domain

a. Public Use

1. Although the Fifth Amendment suggests that the government can seize property under its eminent domain power only if the property is to be put to a "public use," the courts have been extraordinarily deferential to legislative bodies' determinations that a particular class of takings is for a public use. If the legislative body could rationally have believed a use to be "public," the court will generally agree. Even takings of property intended for transfer to other private parties are generally upheld under the "public use" clause.

b. Just Compensation

1. As a basic premise the concept of "just compensation" means that a property owner whose land is condemned has the right to receive its fair market value as a damage award.

2. In most, but not all cases, fair market value is determined by looking at voluntary purchases of similar properties in the recent past.

3. The courts have developed several presumptive rules for dealing with interests whose market value may be difficult to measure. For example, the owners of future interests subject to conditions that may never occur are generally not entitled to compensation because it is difficult to place a value on their interests. Recently, however, some states have awarded compensation for such interests. Leasehold interests have presented some evaluation problems. As a basic matter, when only part of a parcel is condemned and the lease can stay in

3. E.g., Andrus v. Allard, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979) (upholding provision of federal Eagle Protection Act, 16 U.S.C.A. § 668(a), that made it illegal to buy and sell objects made from eagle feathers).

4. E.g., Shelden v. United States, 19 Cl.Ct. 247 (1990) (forfeiture of mortgaged property when mortgagor was convicted of racketeering, without compensation to mortgagee, constituted taking of mortgagee's property).

Since 1976 the Supreme Court has faced a series of cases involving zoning ordinances designed to exclude "adult" theatres or book stores from certain areas, or from communities altogether. In Young v. American Mini Theatres, Inc.,[60] it upheld a Detroit ordinance that limited the location of such theatres or book stores by requiring them to be located at least 1000 feet away from similar uses; however, the ordinance did not exclude them completely from any community. In Schad v. Borough of Mount Ephraim,[61] it struck down under the First Amendment an ordinance that excluded such establishments entirely from an entire community. However, in City of Renton v. Playtime Theatres,[62] the Supreme Court upheld an ordinance that effectively excluded such establishments from 95%, but not absolutely all, of the area of a community.

§ 12.2 *Inadvertent Takings*

PROBLEM 12.17: Arlene owns attractive beachfront property on the Pacific Ocean which she purchased some ten years ago. Although Arlene is not antisocial, she likes her privacy. The law forbids her from denying the public the right to use the "wet sand" area of the beach in front of her house, for that is not part of her property. However, that is not a big problem, for the beach is rocky and only the most adventurous can get to her part of the beach by crossing adjoining beachfront. In 1987, however, the state passes a statute declaring that beach property is in the "public trust," and sufficient provision for public access must be made. The statute empowers the state's Coastal Commission to find such access. During that same year Arlene decides to put an addition on her house. She files a petition with the Coastal

cise Clause, 84 Col. L. Rev. 1562 (1984); Cordes, Where to Pray? Religious Zoning and the First Amendment, 35 U. Kan. L. Rev. 697 (1987).

A zoning ordinance that purports to regulate speech on the basis of its *content* is much more likely to run afoul of the First Amendment. See Ackerley Communications of Massachusetts v. Somerville, 878 F.2d 513 (1st Cir. 1989), striking down ordinance that applied one set of provisions to commercial speech and another set to noncommercial speech.

60. 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976).

61. 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981). But see Executive Art Studio, Inc. v. Charter Township of Kalamazoo, 674 F. Supp. 1288 (W.D. Mich. 1987) (total exclusion of private video booths not necessarily too broad).

62. 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). But see 11126 Baltimore Boulevard, Inc. v. Prince George's County, 684 F.Supp. 884 (D. Md. 1988), striking down a similar regulation where the city had not collected sufficient evidence justifying its need to regulate adult bookstores or theatres; County of Cook v. Renaissance Arcade and Bookstore, 150 Ill. App.3d 6, 103 Ill. Dec. 112, 501 N.E.2d 133 (1986), which struck down an ordinance that permitted adult bookstores and theatres automatically only in industrial zones and required a special use permit in commercial zones, with no tolerance for pre-existing nonconforming uses: "When the effect of a zoning ordinance is that a medium for lawful speech is squeezed out of its desirable location to one that is undesirable, and public access to this communication is dramatically reduced, then the ordinance runs afoul of the First Amendment." Compare Town of Islip v. Caviglia, 73 N.Y.2d 544, 542 N.Y.S.2d 139, 540 N.E.2d 215 (1989), finding that an ordinance limiting adult book stores to industrial districts did not violate free speech rights.

Commission, which is required by law to evaluate all requests for beachfront construction. The Commission tells Arlene that they will grant her request to build the addition, but only if she provides a right of way across her property for the general public, so that they can have access to the beach in front of her home.

Arlene files a lawsuit claiming: (1) that the Commission's rule amounts to a taking; and (2) seeking damages that she has incurred because of the Commission's delay in granting her a building permit with no strings attached. Will she win on either or both?

Applicable Law: A taking occurs when the government forces a private landowner to accommodate unwanted physical intrusions not necessary for the health and safety of occupants, regulates property so intensely as to substantially destroy its value, or unreasonably imposes burdens on the property of a small group of people for the benefit of society at large. However, the government may impose certain burdens on property ownership in exchange for permission to do something that itself imposes burdens on nearby public facilities. The question is how close must the "fit" be between what the government imposes on the private owner's land, and the additional burden that the private owner's contemplated project will imposes on adjacent public facilities such as streets, etc. A landowner can claim damages for injury to her property caused by an unconstitutional taking.

Answer and Analysis

The answer is yes to both (1) and (2). As Justice Brennan put it:

> The phrase "inverse condemnation" generally describes a cause of action against a government defendant in which a landowner may recover ... for a "taking" of his property under the Fifth Amendment, even though formal condemnation proceedings in exercise of the sovereign's power of eminent domain have not been instituted by the government entity.... In an "inverse condemnation" action, the condemnation is "inverse" because it is the landowner, not the government entity, who institutes the proceeding.[63]

In Nollan v. California Coastal Commission,[64] the Supreme Court held that the California Coastal Commission acted unconstitutionally when it conditioned the Nollan's building permit on their providing a public easement across their beachfront property to the ocean. This kind of requirement is a taking because it forces a private property owner to accommodate unwanted "guests" without compensation; *and* because it unreasonably imposes a burden on the property of a small group of people (in the position of the Nollan's, or of Arlene in the Problem) for the benefit of the rest of society. The first of these might

63. San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 638 n. 2, 101 S.Ct. 1287, 1297 n.2, 67 L.Ed.2d 551 (1981).

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be called a "trespassory," or "invasive," taking," because it requires the landowner to accommodate an unwanted person or other physical object on her property. The second might be a form of "nontrespassory," or "regulatory" taking, which is a regulation that unreasonably reduces the value or usefulness of property.

As the Court noted in *Nollan*, California was essentially getting a valuable property interest—an easement in gross in favor of the public—without paying any compensation for it. Likewise, in Loretto v. Teleprompter Manhattan CATV Corp.,[65] the Supreme Court found an unconstitutional taking where the sovereign required Loretto, without meaningful just compensation, to accommodate a cable television installation on her roof.[66] The courts are very quick to find takings where the relevant statute requires the property owner actually to permit entry by the public or by some unwanted physical object, unless the object is clearly related to the health or welfare of the community.[67]

65. 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). See also Hodel v. Irving, 481 U.S. 704, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987), holding that the uncompensated destruction of fractional cotenancies in Indian Lands was an unconstitutional taking. In this case American Indian lands had been placed in trust and managed by the government for the benefit of various Indian individuals and their heirs. Over the years as the property was passed from one generation to the next the number of Indian owners grew larger, and most of the property was not particularly valuable to begin with. In some instances property valued at $8000 had more than 400 owners, each of whom received less than $1.00 annually in rentals. The cost of administering such interests was far greater than the income itself. Nevertheless, the Court held, the government could not simply provide that small fractional interests would escheat to the tribe without compensation, rather than passing to a deceased owner's heirs or devisees.

66. On remand, the New York Court of Appeals found that the "compensation" provided for in the statute, $1, was sufficient, because in nearly every case cable television increased a building's value. Loretto v. Teleprompter Manhattan CATV Corp., 58 N.Y.2d 143, 459 N.Y.S.2d 743, 446 N.E.2d 428 (1983). The effect of the Supreme Court and New York decisions, read together, would appear to be that (1) the forced placement of CATV hookups and transmission wires on a private building is a taking for which the eminent domain power must be asserted; this requires notice and opportunity to be heard to the building owner; but (2) the compensation to which a building owner is entitled is not very large. Presumably, a particular building owner who could show injury much greater than $1 would still have a right under federal law to contest the statutory damages.

See also Seawall Associates v. City of New York, 74 N.Y.2d 92, 544 N.Y.S.2d 542, 542 N.E.2d 1059 (1989) (moratorium on demolition of single room occupancy housing and requirement that owners restore such housing to habitable conditions, subject to rent control, constituted taking under both federal and state constitutions; *Nollan* forbad such "forced occupation by strangers."); Pinewood Estates v. Barnegat Township Leveling Board, 898 F.2d 347 (3d Cir. 1990) (plaintiff's stated taking claim in challenge to a set of ordinances that: (1) gave tenants of mobile home lots freedom from eviction, (2) regulated their rents, and (3) permitted them to sublet the lots to mobile home owners).

67. See also Summa Corp. v. California ex rel. State Lands Com'n, 466 U.S. 198, 104 S.Ct. 1751, 80 L.Ed.2d 237 (1984), which struck down a state's attempt effectively to turn a privately-owned harbor and lagoon into public access. See Tabor, The California Coastal Commission and Regulatory Takings, 17 Pac. L.J. 863 (1986); Costonis, Presumptive and Per Se Takings: A Decisional Model for the Taking Issue, 58 N.Y.U. L. Rev. 465 (1983). A case noting the exception for public health: In re County of Nassau, 148 A.D.2d 553, 538 N.Y.S.2d 865 (1989) (no taking where the county imposed a temporary easement for installing sewer pipes).

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Several states have employed the "public trust" doctrine to create public rights in privately owned beach property, without compensation to the owner. The theory of such decisions is that certain natural resources have always been held for the public in a fictional public "trust." As a result, the deeds from the sovereign that transferred the lands to private parties implicitly excepted these resources.[68] Several states have employed the "public trust" doctrine to guarantee access to beach front property, and in the process burdened adjacent privately-owned land to one degree or another.[69] The Supreme Court has not yet held that all state applications of the "public trust" doctrine require beachfront property owners to make their property available to the public are unconstitutional. Indeed, the "public trust" doctrine itself is a creation of the Supreme Court.[70] Nonetheless, recent Supreme Court decisions such as *Summa*[71] and *Nollan*[72] cast the future of the "public trust" doctrine into doubt, at least in situations where the deed from the state to a private party clearly appears to convey the exclusive right to use beach front property up to a defined line.[73]

Not all forced physical invasions are takings. For example, in PruneYard Shopping Center v. Robins,[74] the Supreme Court held that a California state constitutional requirement that publicly owned shopping centers accommodate groups for purpose of peaceful political statements did not amount to a taking under the federal Constitution. Although the state requirement effectively forced an unwanted invasion of private property, the Court noted that the property in this case, a shopping mall, had a "quasi-public" character. Indeed, earlier United States Supreme Court decisions,[75] since overruled, had recognized a quasi-public character in shopping centers that required the owners to recognize First Amendment rights analogous to those recognized by municipalities or other governments.[76]

Michelman, Takings, 1987, 88 Colum. L. Rev. 1600 (1988); Kmiec, The Original Understanding of the Taking Clause is Neither Weak nor Obtuse, 88 Colum. L. Rev. 1630 (1988); Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967).

68. See Sax, Takings and the Policy Power, 74 Yale L.J. 36 (1964); Sax, Private Property and Public Rights, 81 Yale L.J. 149 (1971).

69. E.g., Matthews v. Bay Head Improvement Ass'n, 96 N.J. 306, 471 A.2d 355 (1984), cert. denied, 469 U.S. 821, 105 S.Ct. 93, 83 L.Ed.2d 39 (1984), declaring a public trust in beach front land owned by a homeowner's association and requiring them to make it available to the public on a nondiscriminatory basis. See also State ex rel. Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969), which relied on the common law doctrine of "custom" to reach a similar result.

70. Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

71. Note 67.

72. Note 64.

73. See Kiefer, The Public Trust Doctrine: State Limitations on Private Waterfront Development, 16 Real Est. L. J. 146 (1987).

74. 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980).

75. Principally, Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968), overruled by Hudgens v. National Labor Relations Board, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976).

76. The First Amendment, which protects various forms of peaceful communication, generally applies only to "state action," or to the government itself.

The facts of the Problem also suggest that a taking has occurred because the sovereign has required a small number of people to sustain injuries to their property for the benefit of the general public. This rationale is much "spongier" than the forced entry rationale, and yields far less determinate results. Most forms of property regulation place burdens on property owners for the benefit of others, but most such regulations are not takings. Some judgment must be made about when such regulations go too far. For example, in Penn Central Transportation Co. v. New York City,[77] a divided Supreme Court failed to find a taking in New York's historic preservation ordinance, which designated a relatively small number of "landmark" buildings, and made it very difficult for the owners of such buildings to tear them down or modernize them in ways that would interfere with their historical character. The ordinance also attempted to "compensate" the owners for their losses with "transferable development rights" (TDRs), which permitted the owners of historical buildings to transfer to other sites developmental capacity on the historical sites that could not be used as a result of the ordinance.[78]

In *Nollan* the Supreme Court did not need to decide whether the forced easement unreasonably singled out the Nollan's for a burden, for the benefit of society. The requirement fell as a trespassory taking, pure and simple.

Can the Nollan's, or Arlene in the problem, receive compensation for any injury that has accrued to their property as a result of sovereign activity later found to be an unconstitutional taking? The Supreme Court wrestled with this problem for more than a decade, refusing to decide the issue a number of times.[79] Finally, however, in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,[80] it answered in the affirmative. The Court noted that

77. 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

78. For example, if the zoning laws permitted structures 200 feet high in the area where a particular historical building was located, but the building was only 125 feet high and the historic preservation ordinance prevented its being raised, then the owner of the historic building received 75 feet (assuming the same width and depth) in unused developmental right that could be transferred to a different site. On that site he would be able to build a building *higher* than the height ordinance ordinarily permitted, although perhaps not by the full 75 feet. No TDR could be used to extend a building more than 20% beyond its ordinarily allowable size; however, TDRs could be divided and spread among several sites. On TDRs, see R. Epstein, Takings: Private Property and the Power of Eminent Domain 188–190 (1985); Ervin & Fitch, Evaluating Alternative Compensation and Recapture Techniques for Expanded Public Control of Land Use, 19 Natural Resources J. 21 (1979); Richards, Downtown Growth Control Through Development Rights Transfer, 21 Real Prop. Prob. & Tr. J. 435 (1986).

On the *Penn Central* case generally, see Krier, The Regulation Machine, 1 Sup. Ct. Econ. Rev. 1 (1982); Mandelker, Investment-Backed Expectations: Is There a Taking?, 31 Wash. U.J. Urb. & contemp. L. 3 (1987).

79. The principal problem was the "ripeness" requirement, requiring fairly strict exhaustion of state administrative and judicial remedies. See Mandelker & Blaesser, Applying the Ripeness Doctrine in Federal Land Use Litigation, 11 Zoning & Planning L. Rep. 49 (1988).

80. 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). On remand, the California court found that no taking had occurred. 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (1989).

lic facilities such as streets, etc. A landowner can claim damages for injury to her property caused by an unconstitutional taking.

ANSWER AND ANALYSIS

Yes, it appears that a taking has occurred, although the law in this area is ambiguous. The problem is much like the previous problem, except that in this case there is some kind of "fit" between the parking servitude that the Board wants to impose on Sara's property, and the additional burden that Sara's proposed store will place on adjacent streets and public parking facilities. Sara's store will increase traffic congestion. If there is a dispute about the facts—how much traffic Sara's new store will attract—the Board is presumably not bound by Sara's prediction. The burden seems excessive if the Board requires Sara to give up property far in excess of any reasonable increase in the demand on public property.[83]

PROBLEM 12.19: By statute, a state requires firms mining coal in underground mines to provide sufficient support for the surface so that "subsidence," or settling or cave-ins, will not occur. Such support is generally created by leaving pillars of coal unmined at intervals that can be determined by engineers. Previously, however, coal miners and surface owners had negotiated with one another over support obligations. For example, a coal mining company could purchase from the owner the right to mine coal by itself, and in that case the surface owner retained a legal right to support; so the mining company had to make sure that no subsidence occurred. However, the coal mining company could also purchase both the coal and the support rights, presumably at a high price; and in this case the mining company was generally free to mine coal free of concern about surface subsidence (although it might still have its own concerns about cave ins below). State law had recognized the legitimacy of this latter bargain by even recognizing the "support rights" as a separate, marketable "estate in land." The statute, which now requires *all* firms to provide support, whether or not the surface owner owns the support rights, effectively deprives mining companies who have acquired the support rights of this valuable estate, with no compensation. One

83. See Hernando County v. Budget Inns, 555 So.2d 1319 (Fla. App. 1990) (county's requirement that developer's plans include frontage road as a condition of development, where no need for such road could be shown, constituted taking); William J. Jones Insurance Trust v. City of Fort Smith, 731 F.Supp 912 (W.D. Ark. 1990) (striking down city's refusal to build convenience store unless it were granted easement for street widening); Unlimited v. Kitsap County, 50 Wash. App. 723, 750 P.2d 651 (1988) (striking down county's requirement that developer give up public road easement in exchange for permit to build planned unit development, absent a showing that the development would make the road extension necessary); Front Royal, etc., Industrial Park v. Front Royal, 708 F.Supp. 1477 (W.D.Va. 1989) (city's delay in extending needed sewer lines to annexed parcels constituted "temporary" taking, for which damages were due). On the basic problem, see *Nollan*, note 64. See generally Epstein, Takings: Descent and Resurrection, 1987 S.Ct. Rev. 1 (1987).

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mining company seeks to enjoin the statute as an unconstitutional taking of his property. Will it succeed?

Applicable Law: A taking occurs when the government regulates property so intensely as to substantially destroy its value, or imposes unreasonably on a small group of people burdens, in the form of impositions on their property, for the benefit of society at large.

Answer and Analysis

Until 1987 the answer to the question was "yes," as determined by Justice Holmes in the venerable Supreme Court decision of Pennsylvania Coal Co. v. Mahon.[84] Justice Holmes noted that the statute (the Kohler Act) "purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate," and Pennsylvania could not do this without paying compensation to the owners for their loss.[85]

But in Keystone Bituminous Coal Ass'n v. DeBenedictis,[86] the Supreme Court distinguished *Pennsylvania Coal*, although the factual situation was remarkably similar. Justice Stevens concluded that the new Pennsylvania subsidence legislation was designed to protect the public, while the Kohler Act at issue in *Pennsylvania Coal* had been designed merely to protect individual landowners whose property might cave in because they or their predecessors in title had given the support rights to the coal mining company. Four Justices dissented.

The underlying theory of *Pennsylvania Coal*, and now of *Keystone*, has been subject to much dispute. Most importantly, how much of the defendant's "property" was taken? Holmes's opinion emphasizes that the support rights themselves were a distinct estate in land, and that the Kohler Act purported to take away this *entire* estate. Thus the Act amounted to total destruction of a property interest. On the other hand, the *Keystone* decision downplayed the existence of a "support estate" under Pennsylvania Law, stating that how Pennsylvania Law divided up property rights was not dispositive on federal takings issues. What was more important is that only a fraction of the coal itself had to be left in the ground in order to prevent subsidence. This fraction may, in some cases, have been as high as 50%, but it was not the entire estate. The property interest (i.e., the coal, not the support estate) had merely become marginally less valuable to its owner, but the public was much better off because they were exposed to less danger of subsidence. The *Keystone* majority found that the Pennsylvania legislature could have concluded that this was a favorable balance, and the regulation was accordingly justified. Ordinarily, a regulation is not a taking

84. 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

85. See also Nectow v. Cambridge, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928), finding a taking where a zoning statute made property worthless for virtually any purpose.

86. 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987).

merely because it imposes a financial burden on the landowner for the public benefit.[87]

When do such regulations go too far? That is hard to say. In some cases, such as *Hadacheck*, the Court has suggested that it is not a taking if what the plaintiff was doing constituted a nuisance, and the regulation merely abates the nuisance.[88] Perhaps under that rationale coal mining without providing adequate surface support is a "nuisance," and it can be regulated without compensation to the injured property owner. But what defines the law of nuisance? Evidently not pre-existing law, for mining without leaving support coal in place was not an actionable nuisance at the time the Pennsylvania support legislation was passed. The tests seem extraordinarily indeterminate.[89]

Note: Negligent Takings

Not all takings are the result of governmental policy, or even of its intentional conduct. Sometimes negligent governmental activities are successfully challenged as takings. For example, Aetna Life and Casualty Co. v. Los Angeles[90] held that a fire negligently set by a municipality could constitute a taking of private property.[91] Likewise, courts have held that injury caused by low flying airplanes could be a taking whether or not the airplanes actually invaded the property of the plaintiffs (i.e., whether or not the planes passed directly overhead).[92]

87. See Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (ordinance forbidding owner from building brick kiln on city property containing clay was constitutional, even though it was financially prohibitive to transport the clay elsewhere to make the bricks); Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) (upholding ordinance prohibiting excavation below water table). See generally Mandelker, Investment-Backed Expectations: Is There a Taking?, 31 J. Urban L. 3 (1987).

88. See note 87. Cf. Department of Agriculture v. Mid-Florida Growers, Inc., 521 So.2d 101 (Fla.1987), finding a taking when the state destroyed healthy privately owned citrus groves in order to eradicate a citrus disease. The court suggested there would be no taking if the trees had already been infected. See Michelman, Property, Utility, and Fairness: comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967): "The idea is that compensation is required when the public helps itself to a good at private expense, but not when the public simply requires one of its members to stop making a nuisance of himself." See also Berger, A Policy Analysis of the Taking Problem, 49 N.Y.U.L.Rev. 165 (1974).

89. See Rose, *Mahon* Reconstructed: Why the Takings Issue is Still a Muddle, 57 S. Cal. L. Rev. 561 (1984). See also the interesting decision in Department of Natural Resources v. Indiana Coal Council, Inc., 542 N.E.2d 1000 (Ind. 1989), cert. denied ___ U.S. ___, 110 S.Ct. 1130, 107 L.Ed.2d 1036 (1990), holding that an order forbidding a firm from strip mining its property until archeological sites had been explored did not constitute a taking because of the state's great interest in protecting ancient cultural artifacts.

90. 170 Cal. App.3d 865, 216 Cal. Rptr. 831 (1985). See also Robinson v. City of Ashdown, 301 Ark. 226, 783 S.W.2d 53 (1990) (city's negligent sewage overflow constituted taking); Wilson v. Ramacher, 352 N.W.2d 389 (Minn. 1984) (permitting inverse condemnation action for municipality's negligent diversion of surface water).

91. See also United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), holding that damage caused by low flying aircraft could constitute a taking.

92. Martin v. Port of Seattle, 64 Wash.2d 309, 391 P.2d 540 (1964), cert. denied 379 U.S. 989, 85 S.Ct. 701, 13 L.Ed.2d 610 (1965); Thornburg v. Port of Portland, 233 Or. 178, 376 P.2d 100 (1962) (persistent noise can constitute a taking). See also Baker v. Burbank-Glendale-Pasadena Airport Authority, 39 Cal.3d 862, 218