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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

WRITER'S DIRECT DIAL  
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March 2, 1998

**BY HAND**

Ms. Magalie Salas  
Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

Re: **Ex Parte Communication in IB Docket 95-59 and CS Docket 96-83**

Dear Ms. Salas:

On March 2, 1998, Lawrence Sidman of Verner, Liipfert, Bernhard, McPherson & Hand, representing Philips Electronics North America Corporation ("Philips") and Thomson Consumer Electronics Corporation ("Thomson"), provided Darryl Cooper of the Cable Services Bureau the attached materials pertaining to the pending *Further Notice of Proposed Rulemaking* in the above-captioned proceedings.

In accordance with Section 1.1206 of the Commission's Rules, an original and one copy of this letter and the written ex parte presentation submitted on behalf of Philips and Thomson are being filed with your office.

Any questions concerning this matter should be directed to the undersigned.

Respectfully submitted,

*Lawrence R. Sidman*

Lawrence R. Sidman

Enclosures

cc (w/out enclosures): Darryl Cooper

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Darryl Cooper  
Attorney  
Cable Services Bureau  
Federal Communications Commission  
2033 M Street, N.W., Suite 700  
Washington, D.C. 20554

Dear Darryl:

As you requested during our February 13, 1998 meeting regarding the Commission's further implementation of Section 207 of the Telecommunications Act of 1996, I am attaching for your review the following materials:

- ▶ An expanded housing fact sheet (and supporting Census Bureau data) that provides additional information on multiple dwelling units. The Census Bureau defines multiple dwelling units (what it refers to as "multiple unit structures") as structures with 2 or more units. Its survey shows that most of these structures (12.7 percent) are those comprising 5 to 49 units. As this fact sheet illustrates, failure by the the Commission to extend Section 207's protections to renters and condominium dwellers will deny choice in video programming services to nearly 40% of all American households (more than 25% of all households live in multiple dwelling units). Such a policy decision would be particularly detrimental to minorities, the elderly and lower-income households, a substantial percentage of whom do not own their own homes.
- ▶ Copies of sources cited in footnotes 21 and 22 of the Joint Comments filed by Philips Electronics N.A. Corporation and Thomson Consumer Electronics Corporation. For the purposes of providing context for these citations, in addition to the specific pages cited, I have included relevent excerpts from each of these reference materials.

If there is any additional information I can provide, or if you have further questions, please feel free to contact me at 371-6211.

Sincerely,

*Lawrence R. Sidman*

Lawrence R. Sidman

Enclosures

## Fact Sheet on Housing in the U.S.

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### **In the United States, Nearly 40 Percent of the Nation's Households Either Rent Their Homes or Live in Condominiums or Co-ops; More Than 25% of All Households are in Multi-Unit Structures.**

- Of the 94.7 million occupied households in the United States, 38.3% (36.3 million) either rent their homes or live in owner-occupied condominiums or co-ops.<sup>1</sup>
- 35.2% (33.4 million) of all households are rentals; 64% (21.3 million) of all rental households live in multi-unit structures.<sup>1</sup>
- 26.1% (24.7 million) of all households are in multi-unit structures.<sup>1</sup>
- 4.6% (4.35 million) of all households are condominiums or co-ops (either owner- or renter-occupied).<sup>1</sup>

### **Minorities, Single Parents (Especially Single Mothers) and Low-Income Groups Are Disproportionately Affected by Laws Which Discriminate Against Renters and Persons Living in Multi-Unit Dwellings.**

#### *Minorities*

- 57% of all African American households are renters.<sup>1</sup>
- 57.8% of all Hispanic households are renters.<sup>1</sup>
- 47.4% of Native American households are renters.<sup>1</sup>
- 48.8% of Asian households are renters.<sup>1</sup>
- 31.4% of all Caucasian households are renters.<sup>1</sup>

#### *Single Parents*

- 64.8% of all single mothers rent their homes; 43.9% of single fathers rent their homes.<sup>1</sup>
- The median household income for non-married female renters is \$11,917; for non-married male renters, the median income is \$20,206.<sup>1</sup>

#### *Lower- and Low-Income Households*

- 50.8% of all renters are in lower-income groups (households with less than the median household income).<sup>2</sup>
- 25% of all renters are in low-income groups (households under the poverty level).<sup>1</sup>
- 91% of low-income households are rentals.<sup>1</sup>
- 13.2% of renters receive Welfare or SSI.<sup>1</sup>
- 17% of renters receive Food Stamps.<sup>1</sup>
- 15% of renters receive some form of housing assistance (i.e., public, subsidized or rent-controlled housing).<sup>1</sup>

### **Senior Citizens Also Comprise a Large Number of Renter Households**

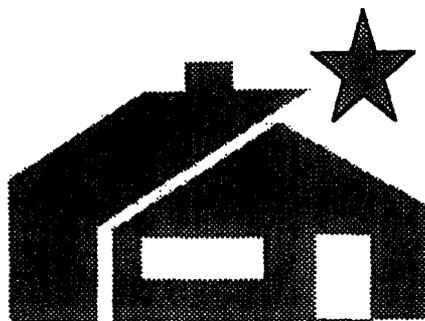
- 21% of all renters in the U.S. are above the age of 55<sup>2</sup>
- 19.3% of all renters receive Social Security.<sup>1</sup>

<sup>1</sup> *Our Nation's Housing in 1993*, U.S. Department of Commerce, Bureau of the Census

<sup>2</sup> *Housing Vacancy Survey - Second Quarter 1996*, U.S. Census Bureau, July 1996

CURRENT HOUSING REPORTS  
H121/95-2

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# Our Nation's Housing in 1993

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by Timothy S. Grall

Issued October 1995

**U.S. Department of  
Housing and Urban  
Development**  
Henry Cisneros,  
Secretary

**OFFICE OF POLICY  
DEVELOPMENT AND  
RESEARCH**  
Michael A. Stegman,  
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**Economics and Statistics  
Administration**  
Everett M. Ehrlich,  
Under Secretary for  
Economic Affairs

**BUREAU OF THE CENSUS**  
Martha Farnsworth Riche,  
Director

## Chapter 1. Housing Inventory Overview

There were 106.6 million housing units in 1993, 2 million more units than in 1991.

Most (76 percent) of our housing was located inside Metropolitan Statistical Areas (MSA's); 45 percent of homes were in the suburbs, and 31 percent were located in central cities of MSA's.<sup>2</sup> Roughly one-quarter of all U.S. housing (24 percent) was located in areas outside of MSA's (see table 1).

The largest proportion (36 percent) of the Nation's housing was in the South. The next largest segment was in the Midwest where approximately one-quarter (24 percent) of all U.S. housing was located. The remaining housing was nearly evenly split between the West (21 percent) and the Northeast (20 percent).

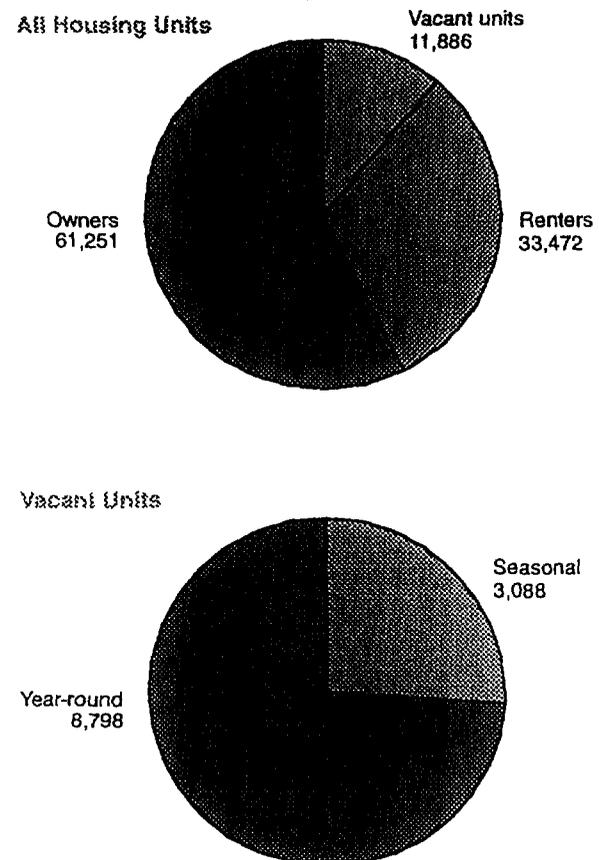
There were 94.7 million occupied units and about 12 million vacant units. The latter included 8.8 million vacant units intended for year-round use and 3.1 million seasonal vacants — those intended to be occupied only part of the year in 1993 (see figure 1).

About 30 percent of all year-round vacant units were for rent — not significantly different from the proportion that were for occasional use or for use by a householder who usually resides elsewhere (usual residence elsewhere (URE)).<sup>3</sup> Approximately 20 percent were for sale or already rented or sold, while the remaining were other types of vacant units. These other vacant types include those held for settlement of an estate, occupied by a caretaker or janitor, or held for personal reasons of the owner (see table 2).

Most seasonal vacant units were located outside MSA's (66 percent), and only 5 percent were in central cities of MSA's. Year-round vacant units were more concentrated in MSA's (72 percent), with a fairly even mix between central cities and suburbs.

The typical year-round vacant housing unit was 29 years old and had 1,300 median square feet of living space with over four rooms, including two bedrooms.

Figure 1.  
Occupancy of U.S. Housing Units: 1993  
(In thousands)



About one-half (47 percent) of the 8.8 million year-round vacant units were in single-unit structures. This included 40 percent that were single-family detached units and 7 percent that were single attached units. The proportion that multi-unit structures represented among year-round vacant units (44 percent) was not significantly different from the proportion of single-family homes. The remainder, or 9 percent, consisted of vacant mobile homes or trailers. Most vacant units that were only for sale were single-unit structures (78 percent). About 10 percent of all year-round vacant units were cooperatives or condominiums, which could be any structure type (table 2).

Year-round vacant units had a median age of 29 years, not statistically different from the age of all occupied units that had a median age of 28 years (table 4). Vacant units

<sup>2</sup>See appendix A of Current Housing Report, *American Housing Survey for the United States*, Series H150, for a specific and complete discussion of many of the terms and definitions used throughout this report.

<sup>3</sup>Vacant units in this category include those held for occasional use such as occupancy for weekends throughout the year. The intent of the survey question is to identify homes reserved by their owners as second homes. Because of the difficulty in distinguishing between this category and seasonal vacancies, it is possible that some second homes are classified as seasonal and vice versa.

classified for occasional use/URE were the newest type of vacant unit, but they did not differ significantly in age from vacant units already rented or sold and awaiting occupancy.

There were 4.4 rooms and 2.0 bedrooms among all year-round vacant housing units. Occupied units were generally larger, with medians of 5.5 rooms and 2.7 bedrooms. Vacant units on the housing market that were for sale only were not statistically different from occupied units and had more rooms than any other type of vacant unit (5.4 median rooms). Units for rent had the fewest number of median rooms (3.9).

The median living area of vacant single-family and mobile homes was 1,286 square feet. Again, units that were occupied had more living area, with 1,725 median square feet. Vacant units that were rented or sold awaiting occupancy or for sale only had the most living space among vacants (approximately 1,600 square feet) and did not differ significantly from the square footage of all occupied units. Year-round vacant units that were sold and awaiting occupancy had a median value of \$86,906 — not statistically different from the median value of all occupied units.

Table 4. Selected Physical Characteristics of Occupied Units, by Tenure and Household Type: 1993

[Numbers in thousands, except dollar amounts, percents, and derived measures]

Characteristic	All occupied units				Owner-occupied units				Renter-occupied units			
	Total	Household type			Total	Household type			Total	Household type		
		Married couples	Other male	Other female		Married couples	Other male	Other female		Married couples	Other male	Other female
Total.....	94,724	50,085	16,855	27,784	61,251	39,990	7,504	13,757	33,472	10,095	9,351	14,027
Units in Structure												
Percent.....	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
1 unit, detached.....	62.2	76.9	44.1	46.7	82.4	86.6	74.7	74.6	25.2	38.4	19.6	19.4
1 unit, attached.....	5.7	4.4	6.4	7.5	4.6	3.5	6.6	6.9	7.6	8.1	6.2	8.2
2 to 4 units.....	9.8	5.8	14.4	14.2	2.9	2.2	4.4	4.1	22.4	20.3	22.4	24.0
5 to 49 units.....	12.7	5.7	22.8	19.4	1.8	1.0	2.9	3.5	32.8	24.1	38.8	35.0
50 units or more.....	3.6	1.4	5.8	6.4	0.9	0.5	1.6	1.9	8.5	4.8	9.1	10.8
Mobile home or trailer.....	6.0	5.9	6.5	5.8	7.3	6.3	9.8	9.0	3.5	4.3	3.9	2.6
Cooperatives and Condominiums												
Percent cooperative or condominium.....	4.6	3.2	5.7	6.5	4.8	3.0	7.5	8.5	4.2	3.7	4.3	4.5
Year Structure Built												
Median age in years.....	27.7	25.4	29.4	31.2	26.9	24.5	28.4	33.3	29.4	29.1	30.3	28.9
Standard error.....	0.2	0.3	0.5	0.4	0.2	0.3	0.7	0.5	0.3	0.6	0.6	0.5
Percent new construction.....	5.3	6.7	4.4	3.2	6.6	7.7	6.4	3.7	2.8	2.7	2.8	2.8
Rooms in Unit												
Median rooms.....	5.5	6.1	4.6	4.9	6.1	6.4	5.6	5.6	4.2	4.8	3.9	4.2
Standard error.....	0.01	0.02	0.03	0.02	0.01	0.02	0.04	0.03	0.01	0.03	0.03	0.02
Bedrooms in Unit												
Median bedrooms.....	2.7	2.9	2.1	2.3	3.0	3.1	2.7	2.7	1.9	2.3	1.6	1.9
Standard error.....	0.01	0.01	0.02	0.01	0.01	0.01	0.02	0.02	0.01	0.02	0.02	0.02
Complete Bathrooms												
Percent.....	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
None.....	0.6	0.2	1.7	0.6	0.3	0.2	0.7	0.4	1.1	0.2	2.5	0.7
One.....	46.4	33.0	61.8	61.2	32.0	25.9	42.4	44.2	72.7	61.2	77.3	77.9
More than one.....	53.1	66.8	36.6	38.2	67.7	74.0	56.9	55.4	26.2	38.6	20.2	21.3
Persons Per Room:												
1.01 or more persons per room.....	2,386	1,571	293	522	883	687	71	125	1,503	884	222	397
Percent of total.....	2.5	3.1	1.7	1.9	1.4	1.7	1.0	0.9	4.5	8.8	2.4	2.8
Square Footage of Unit												
Single detached and mobile homes.....	59,794	38,672	7,853	13,268	51,249	34,817	5,884	10,548	8,544	3,855	1,969	2,721
Median square footage.....	1,725	1,855	1,487	1,463	1,805	1,908	1,612	1,554	1,273	1,378	1,166	1,187
Standard error.....	8	10	20	13	8	10	25	20	15	22	37	26
Median square feet per person.....	689	619	905	921	723	644	982	1,037	489	406	674	544
Standard error.....	4	4	16	13	5	4	16	19	7	9	22	19
Percent of Units With Selected Equipment and Amenities												
Complete kitchen facilities.....	98.8	99.4	97.2	98.8	99.2	99.4	98.6	99.0	98.1	99.1	96.1	98.7
Clothes washer.....	77.2	90.2	57.0	66.1	94.3	97.0	86.6	90.4	46.1	63.3	33.1	42.2
Clothes dryer.....	71.2	86.0	52.1	56.3	88.7	93.3	79.9	80.0	39.2	56.7	29.7	33.0
Telephone.....	93.4	96.2	88.6	91.2	96.9	97.7	94.6	96.0	86.8	90.2	83.8	86.4
All selected equipment.....	67.8	82.8	48.1	52.6	85.7	90.7	76.1	76.6	34.9	51.3	25.7	29.1

# CONSTITUTIONAL LAW

FOURTH EDITION

By

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*Professor of Law  
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HORNBOOK SERIES®



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interferences with private property.<sup>20</sup> In 1868 the fourteenth amendment was made part of the federal Constitution; its due process clause specifically protects property rights.<sup>21</sup> The fourteenth amendment, however, does not expressly require either that state "takings" of private property be for a public use or that the property owner receive just compensation for the loss.

In *Davidson v. New Orleans*<sup>22</sup> the Supreme Court stated that "it is not possible to hold that a party has, without due process of law, been deprived of his property, when, . . . he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."<sup>23</sup> The Court in *Davidson* also noted that the just compensation clause of the fifth amendment was omitted from the fourteenth amendment.<sup>24</sup> At this early stage, therefore, it appears as though the justices contemplated the due process clause as merely requiring that the state act with procedural fairness, with no requirement that state takings of private property be for a public use and only on payment of just compensation.

If indeed this was the Court's early view, it was short-lived. In two 1896 cases,<sup>25</sup> the Supreme Court held that the due process clause did require that land taken by the state be used for a public purpose. Finally, in 1897, in *Chicago, Burlington & Quincy R.R. Co. v. Chicago*,<sup>26</sup> the Court, in an opinion by the elder Justice Harlan, held that following prescribed

procedure did not mean that the requirements of due process were met, for the clause regulated the "substance" as well as the form of such a taking.<sup>27</sup> The Court held that due process required both that the property be taken for a public use and that the owner of the property be compensated by the state for his loss.

Although some cases and commentators have viewed these Supreme Court decisions as incorporating the compensation clause into the fourteenth amendment, this view does not appear strictly correct. Rather the Court appears to have found independent public use and just compensation requirements inherent in the definition of due process. That the Court would find these limitations to exist in the concept of due process is easily understood when viewed in the light of the substantive due process doctrine prevalent at this time.<sup>28</sup> Today, the Supreme Court itself cites the *Chicago, Burlington & Quincy R.R. Co. v. Chicago* decision as incorporating the compensation clause into the fourteenth amendment.<sup>29</sup>

## § 11.12 The "Taking" Issue

### (a) Introduction

The fifth amendment provides that private property may not be "taken" by the federal government without just compensation. The central issue in many eminent domain cases is whether the governmental interference

(Lively, J., citing an earlier edition of this work). See also §§ 11.5-11.7, *supra*.

29. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159, 101 S.Ct. 446, 450, 66 L.Ed.2d 358 (1980) citing *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897). In *Webb's Fabulous Pharmacies*, the Supreme Court held that a Florida county's taking of the interest earned on an interpleader fund while such fund was temporarily held by the county court, in addition to a fee for the county's services for holding such fund, constituted a taking violative of the fifth and fourteenth amendments.

See *Blue Cross and Blue Shield of Michigan v. Milliken*, 422 Mich. 1, 367 N.W.2d 1, 25 (1985) (citing an earlier edition of this treatise); *Lone Star Industries, Inc. v. Secretary of the Kansas Dept. of Transportation*, 234 Kan. 121, 671 P.2d 511, 515 (1983) (citing an earlier edition of this treatise).

20. See *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 250-51, 8 L.Ed. 672 (1833); *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 532, 12 L.Ed. 535 (1848).

21. "(N)or shall any State deprive any person of life, liberty, or property without due process of law; . . . ." U.S.Const. Amend. 14, § 1.

22. 96 U.S. (6 Otto) 97, 24 L.Ed. 616 (1877).

23. 96 U.S. (6 Otto) at 105.

24. *Id.*

25. *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 17 S.Ct. 56, 41 L.Ed. 369 (1896); *Missouri Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 17 S.Ct. 130, 41 L.Ed. 489 (1896).

26. 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

27. 166 U.S. at 234-35, 17 S.Ct. at 583-84.

28. See E. Freund, *The Police Power* 541 (1904); *Gordon v. Warren*, 579 F.2d 386, 390 n. 2 (6th Cir. 1978)

amounts to a "taking". Although the concept of a taking may originally have contemplated only physical appropriation,<sup>1</sup> it is plain today that non-acquisitive governmental action may amount to a taking in a constitutional sense.<sup>2</sup> A "taking", therefore, may be found when governmental activity results in significant physical damage to property that impairs its use.<sup>3</sup> Although the state possesses the power

to regulate property without payment of compensation, if the regulation goes too far, a taking may also be found.

Furthermore, a taking may occur as to an intangible property interest where the owner had a reasonable expectation that such property would not be used by the government and such expectation was impaired.<sup>4</sup>

#### § 11.12

1. F. Bosselman, D. Callies, J. Banta, *The Taking Issue* 51 (1973).

2. See e.g. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922); *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), both discussed later in this section. *Lenoir v. Porters Creek Watershed District*, 586 F.2d 1061, 1093 (6th Cir. 1978) (Engle, J., quoting an earlier edition of this work).

3. *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. (13 Wall.) 166, 179-80, 20 L.Ed. 557 (1871).

4. **Intangibles.** Intangibles, such as trade secrets, and other nontraditional types of property may be protected by the taking clause of the fifth amendment. The existence of the property right will be determined with reference to state law. Once it has been determined that a property interest exists in an intangible, the Court will inquire whether the holder of the interest had a reasonable investment-backed expectation that the property right would be protected. If the Court finds such a reasonable investment-backed expectation, the Court will determine whether governmental action impaired that expectation. If so, the Court will find that a compensable taking has occurred.

The Supreme Court, in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) was faced with the issues of whether trade secrets were a property right protected by the taking clause of the fifth amendment and whether the data-consideration and data-disclosure provisions of the Federal Insecticide, Fungicide, and Rodenticide Act involved a taking of such property interests. The Court first held that state law created a property interest in trade secrets and Monsanto's nondisclosure of these data to others confirmed its interest in maintaining this information as a trade secret. Therefore, this intangible interest was protected by the taking clause of the fifth amendment.

In determining whether the government action in using the submitted data to consider subsequent applications for registration and in disclosing this data to the public involved a taking, the Court in *Monsanto* sought to determine whether there was a reasonable investment-backed expectation in the privacy of this property interest under the Act. Prior to 1972, the Act was silent with respect to the EPA's use and disclosure of the health and safety data submitted. Therefore, the Court held that an applicant could not have a reasonable investment-backed expectation in the secrecy of the data, and that there could be no taking of property during the pre-1972 period. After 1972 the Act explicitly provided for use of the submitted data by the government. The Court held that an applicant could not have a reasonable investment-backed expectation in the secrecy of the information after

1972. Because there was prior notice of the use to be made of the data, and because this use was rationally related to a legitimate governmental interest, the Court found that submission of the data in exchange for registration was not a taking. The corporation could decide whether to submit the information under these conditions. However, under the terms of the Act in effect between 1972 and 1978, a submitter was given the opportunity to protect its trade secrets from consideration and disclosure by designating the data as a trade secret upon application. The applicant was guaranteed that these trade secrets would remain confidential. This guarantee formed the basis of a reasonable investment-backed expectation in the privacy of the data, making consideration and disclosure of such trade secret data by the government a compensable taking under the fifth amendment.

See also *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985) in which the Court held that Article III of the Constitution did not prohibit Congress from establishing a system of binding arbitration, with only limited judicial review, for resolving disputes regarding the use of data and compensation under the Act previously reviewed in the *Monsanto* decision.

**Limits on Remedies.** Legislative limitations on statutory or common law remedies for injuries may raise substantive due process, taking of property, and equal protection issues.

In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978), the Court upheld the federal limitation on the liability of nuclear power plants for damages and injuries resulting from possible accidents or disasters at such plants against a due process clause challenge. A legislative limitation on a preexisting remedy would raise a question of whether the limitation is so arbitrary as to violate due process, limits the economic interests of a specific group so as to violate equal protection, or constitutes the termination of a preexisting property right in violation of the taking of property clause.

In *Fein v. Permanente Medical Group*, 474 U.S. 892, 106 S.Ct. 214, 88 L.Ed.2d 215 (1985), the Supreme Court, by an eight to one vote of the Justices, "dismissed for want of a substantial federal question" an appeal from a decision of the Supreme Court of California upholding a statute that established a \$250,000 maximum limitation in medical malpractice actions for "noneconomic" damages. Justice White was alone in his dissent to the dismissal of the appeal. Justice White pointed out that the state courts were split over the questions of whether statutory limitations on the amount of damage that could

*Connolly v. Pension Benefit Guaranty Corporation*,<sup>5</sup> upheld federal legislation that required an employer who was withdrawing from a multiemployer pension plan to pay a share of the plan's unfunded vested benefits even though this liability had not been established in the original pension plan trust agreement.<sup>6</sup> The Court held that this was not a taking of property but only a reasonable economic regulation, even though the law required the payment of money to a pension benefit system in order to help specific workers. The majority opinion by Justice White noted that many types of economic regulations result in economic costs being imposed on one class of persons or businesses and economic benefits being awarded to another group. However, these laws normally will not constitute a taking of property because they are really economic regulations in the public interest.<sup>7</sup>

In determining whether a regulation was taking of property, the majority opinion found that three factors were of particular importance: "(1) 'the economic impact of the regu-

be recovered in medical malpractice cases violated federal or state constitutions. See 474 U.S. at 892-93, 106 S.Ct. at 214-15 (White, J., dissenting).

**Welfare Payments.** The statutory or administrative termination of benefits provided to individuals by the government (commonly referred to as welfare benefits) have not been examined by the Court as a taking of property problem. Instead, judicial examination of the termination of benefits has focused on whether the individual was provided with sufficient process in terms of the procedures used to determine that he or she no longer qualified for a continued receipt of the government benefit. See §§ 13.5, 13.8.

The statutory reduction of welfare benefits for a class of persons should not constitute a taking of property in most situations because such an action is really a new decision regarding the amount of money that should be used for the welfare benefits rather than a taking of a property interest. In *Bowen v. Gilliard*, 483 U.S. 587, 107 S.Ct. 3008, 97 L.Ed.2d 485 (1987) the Supreme Court upheld a modification of the statutes governing the federal program of Aid to Families With Dependent Children (AFDC). The statutory change effectively reduced the amount of aid that would be paid to certain family units by requiring that the need level of a family unit be determined by including all parents, brothers, and sisters living in the same house and the income of each of those persons from whatever source derived. Prior to these modifications, a family seeking or receiving AFDC payments could have excluded from the determination of the family unit, and from the family unit's income, a child

lating on the claimant [the person who was required to pay money or whose property suffered a diminution in value]; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; (3) 'the character of the governmental action.'"<sup>8</sup> Because the imposition of liability on employers withdrawing from the pension plans was not a direct government use or taking of property but only the establishment of a program that "adjusted the benefits and burdens of economic life to promote the common good," it was not a direct interference with property rights. The economic obligation imposed on a withdrawing employer was not necessarily "out of proportion to its experience with the plan." The Court also ruled that employers who participated in the pension plans should have been aware that pension plans would be subject to government regulation to protect employees. Thus, the pension plan regulation was not a taking of property. More important than the Court's specific ruling in *Connolly* is its indication that the three listed factors should be of concern in all cases wherein judges must deter-

who was receiving support payments by a noncustodial parent. The new statute also had the effect of requiring that the support payments to the child from the noncustodial parent be given to the government and returned to the family unit in the form of an AFDC payment to the family unit. The Supreme Court found that this statute did not constitute a taking of property. The Court held that "the child receiving support payments holds no vested protectable expectation that his or her parent will continue to receive identical support payments on the child's behalf and that the child will enjoy the same rights with respect to them."

5. 475 U.S. 211, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986).

6. The Supreme Court had previously upheld other retroactive aspects of the federal multiemployer pension plan regulations. See, *Pension Benefit Guaranty Corp. v. R.A. Gray and Co.*, 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984).

7. The Supreme Court has upheld a variety of retroactive legislative provisions that are designed to promote societal interest in a manner that does not unjustifiably shift social cost to a few individuals. See the discussion of *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976) in § 15.9(a).

8. *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).

mine whether an economic regulation constitutes a taking of property.<sup>9</sup>

It should be easy to see why so much confusion surrounds the case law relating to the doctrine of eminent domain. A "taking" may result from non-acquisitive regulation, or a regulation may be held not to constitute a compensable taking because there was no actual appropriation. Damage to property caused as an incidental result of government activity may be a "taking." Or such damage might be held to be non-compensable even though the private property is totally destroyed. To a great extent, therefore, no general rule exists to describe what constitutes a compensable taking. Eminent domain cases tend to be decided on an ad hoc basis and are often decided a certain way because of the balance of equities involved. Yet the following cases illustrate factors found significant by courts in determining whether compensation is due the affected landowner.

The seminal, though conflicting, views of the elder Justice Harlan and Justice Holmes constitute the essence of Supreme Court theory on the exercise of eminent domain. Justice Harlan viewed literally the "taking" requirement and believed compensation was not due unless the state appropriated private property for its own use. Justice Holmes believed in requiring the government to compensate those on whose use of property the government imposed significant restriction.

In Harlan's view, taking differed qualitatively from regulation and, therefore, mere use regulation never necessitated compensa-

tion by the state. In 1887, in *Mugler v. Kansas*,<sup>10</sup> the Supreme Court followed Harlan's view in determining that a state statute prohibiting the manufacture of liquor did not amount to a taking of the property of a beer manufacturer. In 1880 the Kansas constitution was amended to prohibit the manufacture or sale of intoxicating liquors in Kansas for all but certain limited purposes. To give effect to the amendment, the Kansas legislature, in 1881, passed a statute banning the manufacture of intoxicating liquor. Mugler, who had been engaged in the manufacture of beer in Kansas for several years prior to 1880, continued in this practice after the passage of this prohibitory legislation without the required permit.

The opinion of the Court, written by Harlan, observed that, if the statute was enforced against Mugler, the value of the machinery and buildings constituting his brewery would be greatly depreciated.<sup>11</sup> But the opinion also found that the State possessed the power to regulate the sale of alcohol under its power to protect the health, morals and safety of its people.<sup>12</sup> Moreover, the Court held that the prohibitory legislation did not impair any constitutional liberty or property of alcohol manufacturers.<sup>13</sup> The Court, therefore, rejected Mugler's argument that the regulation was a taking of property without just compensation and that the regulation deprived him of property without due process of law. Justice Harlan stated that the regulation of the sale of alcohol in no sense involved the exercise of eminent domain.

9. The *Connolly* decision indicates that a court, in any taking of property case will have to assess both the nature and importance of the governmental interest and the nature and extent of the economic loss of the individual property owner or class of property owners. These general guidelines set out in *Connolly* will not provide a clear "test" for determining whether taking of property has taken place as a result of a governmental regulatory action.

For example, during the 1986-87 term, the Supreme Court held in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) that a state law restricting the previously lawful mining of coal by owners of mineral rights that might cause subsidence damage to the surface property owned by other persons was not a taking of property.

In the same term, in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) the Supreme Court ruled that a construction permit to expand an oceanfront house that would have required the owners of the house to grant a public easement across their property (to increase public access to the publicly owned segment of the beach) was a taking of property for which compensation was due. Both of these 1987 cases were decided by five to four votes of the justices; only Justice White was a member of the majority in both cases.

10. 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887).

11. 123 U.S. at 656-57, 8 S.Ct. at 294-95.

12. 123 U.S. at 661-62, 8 S.Ct. at 297-98.

13. 123 U.S. at 668-69, 8 S.Ct. at 300-01.

[A] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot in any sense, be deemed a taking or an appropriation of property for the public benefit.<sup>14</sup>

The Court held, therefore, that the prohibitory regulation did not constitute a taking because no property had actually physically been appropriated by the state. Although *Mugler* has never been overruled by the Supreme Court, and is, in fact, still precedent, the Court has judiciously ignored the broad language of *Mugler* in cases where non-acquisitive governmental action has been found to be a taking.

The leading exponent of a broader test of a compensable taking was Justice Holmes. Holmes, seeking a test of fairness, found the appropriation test applied by Harlan in *Mugler* inadequate.<sup>15</sup> Unlike Justice Harlan, Holmes viewed the distinction between taking and regulation as one of degree. In the view of Justice Holmes, if regulation reached a certain extreme, it became a "taking", though no property was actually taken in a literal sense.

In *Pennsylvania Coal Co. v. Mahon*,<sup>16</sup> a state statute prohibited the mining of coal in such a way as to cause the subsidence of certain types of improved property. The issue before the Court was whether, through the exercise of its police power, the state could destroy the coal company's mining rights without com-

ensation. The Supreme Court, per Justice Holmes, held that the rights of the coal company could not, consistent with due process, be so limited without payment of compensation.

Although the opinion noted that values incident to property could be reduced by non-compensable use regulation, Holmes stated that, "when [regulation] reaches a certain magnitude, in most if not in all cases, there must be an exercise of eminent domain and compensation to sustain the act."<sup>17</sup> Under this view, the police power and eminent domain exist in a continuum. Once regulation went so far, there was a "taking" and compensation had to be made to the injured land owner. Here the Court found the extent of the regulation so great as to constitute a taking. "To make it commercially impracticable to mine certain coal has nearly the same effect for constitutional purposes as appropriating or destroying it."<sup>18</sup>

Rather than develop a single framework to define a taking, the Supreme Court, much to the consternation of commentators, has retained to some extent both the theories of Holmes and Harlan.<sup>19</sup> In its decisions on property use regulations and the extent of permissible government impairment of the value of private property interests the Court has issued rulings which follow no clear theoretical guidelines. The Supreme Court's decisions in "taking" issues may properly be viewed as a "crazy quilt pattern" of rulings.<sup>20</sup>

14. 123 U.S. at 668-69, 8 S.Ct. at 301.

15. *Sax, Takings and the Police Power*, 74 Yale L.J. 36, 41 (1964).

16. 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

17. 260 U.S. at 413, 43 S.Ct. at 159.

18. 260 U.S. at 414, 43 S.Ct. at 168.

The Supreme Court later determined that the Holmes majority opinion in *Pennsylvania Coal* only required the invalidation of a statute that unjustifiably shifted the cause of a private benefit from surface landowners to coal companies, for the Supreme Court upheld a later Pennsylvania statute that restricted coal companies from removing a percentage of coal that would cause subsidence damage to a variety of public and privately owned properties. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987). *Keystone* and other property use regulation cases are discussed throughout this section.

19. See *Sax, Takings and the Police Power*, 74 Yale L.J. 36, 37 (1964); *Rose, Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 So. Calif. L. Rev. 561 (1984).

20. *Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 Sup. Ct. Rev. 63, 63. Professor John Costonis has proposed a framework for analysis of taking issues that, if adopted by the judiciary, could provide much needed clarity to this area of constitutional law. Costonis would have the Court use presumptions rather than per se rules regarding the taking of property to 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).

When the government physically takes a person's property or allows someone other than the property owner to have permanent physical occupation of all or part of a definable piece of property, there is virtually a *per se* rule that such action constitutes a taking.<sup>21</sup> But many questions arise regarding government actions in the area of property use regulations, emergency actions taken by the government or physical actions that only impair the use of property; the questions focus on whether the government has engaged in a taking when it has altered the value of a person's property.<sup>22</sup>

### (b) Property Use Regulations

**The Early Cases.** In *Euclid v. Ambler Realty Co.*,<sup>23</sup> the Supreme Court dealt for the first time with the constitutionality of a comprehensive land use regulatory ordinance. In 1927 the Village Council of Euclid adopted a comprehensive zoning ordinance. The statute restricted the location of trades, industries, apartment houses, two-family houses, single-family houses and other land uses. The plan also regulated aspects of property use such as the size of lots and the size and heights of buildings.

For an examination of some of the problems faced by courts in "inverse condemnation" proceedings, where a property owner sues the government for a determination that regulation of the owner's property has so diminished its value as to constitute a taking and to require compensation, see, Note, *Inverse Condemnation: Valuation of Compensation in Land Use Regulatory Cases*, 17 *Suffolk U.L.Rev.* 621 (1983).

21. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (city ordinance requiring building owner to allow installation of cable television receiver on apartment building and denying to the owner the ability to demand payment in excess of one dollar constitutes a compensable taking because the ordinance allowed for "permanent physical occupation" of a small part of the building).

22. The following subsections of this chapter examine these problems. See generally, Blume & Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 *Calif.L. Rev.* 569 (1984); *The Jurisprudence of Takings*, 88 *Columbia L.Rev.* 1581 (1988) (a symposium on takings issues with articles by William Fischel, Frank Michelman, Douglas Kmiec, Margaret Jane Radin, Susan Rose-Ackerman, T. Nicolaus Tideman, Stewart Sterk, Gregory Alexander, and William Fisher); Humbach, *Economic Due Process and the Takings Clause*, 4 *Pace Environmental L.Rev.*, 311 (1987). See note 20, *supra*.

The zoning ordinance was attacked on the ground that it deprived the property owner of liberty and property without due process of law, and that the use classifications deprived him of equal protection of law. The issue, as framed by the Court, was whether the owner was unconstitutionally deprived of property "by attempted regulations under the guise of the police power, which are unreasonable and confiscatory?"<sup>24</sup> The Court premised its holding by stating that, if valid, the ordinance, like all similar regulatory laws, would have to find its justification in the police power.<sup>25</sup> The Court concluded that the statute was a valid police power regulation because there was a sufficient public interest in the segregation of incompatible land uses to justify the diminution of property values. The Court since *Euclid* has deferred to the zoning power against due process and equal protection challenges with few exceptions.<sup>26</sup>

In two cases, considered shortly after *Euclid*, the Supreme Court held land use regulation invalid as a violation of the due process clause of the fourteenth amendment. In *Washington ex rel. Seattle Title & Trust Co. v. Roberge*,<sup>27</sup> the Court struck down an ordinance that allowed for the issuance of use variances upon the two-thirds consent of sur-

The Court offer will interpret federal statutes to avoid the taking issue. See *United States v. Security Industrial Bank*, 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982) (Supreme Court interprets Bankruptcy Code not to eliminate property rights which existed before the law was enacted in order to avoid taking of property issues under the fifth amendment).

23. 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

24. 272 U.S. at 386, 47 S.Ct. at 118.

25. 272 U.S. at 387, 47 S.Ct. at 118.

26. The Court will allow the city to zone an area for "traditional" families, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974). Zoning must not intrude upon the functioning of traditional families, see *Moore v. East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (city cannot require family to subdivide and exclude blood relatives).

A city cannot exclude a group of persons from living together for no reason other than the fact that persons in the group are mentally retarded. Such an exclusion relates to no legitimate governmental interest. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

27. 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 (1928).

rounding landowners. The Court found the variance provision to be a due process violation because the surrounding landowners would be free to withhold consent for arbitrary and capricious reasons.<sup>28</sup> However, there is no due process violation when exemptions from zoning requirements are granted only by a general referendum.<sup>29</sup>

In *Nectow v. Cambridge*,<sup>30</sup> the Supreme Court faced squarely the issue of the authority of local governments to regulate land use without payment of compensation. The Court found some outer limit to the power and struck down a Cambridge zoning ordinance on the ground that it deprived the plaintiff landowner of property without due process of law. The Court held that a zoning restriction "cannot be imposed if it does not bear a substantial relation to the public health, safety, morals or general welfare."<sup>31</sup> The Court, after reviewing the factual circumstances, found that regulation of the plaintiff's land was not necessary in order to promote the general welfare of the city's inhabitants. Under this very narrow view of the operation of a comprehensive zoning plan, the Court struck down the ordinance. The Court in *Nectow* did not dispute the legitimate nature of the zoning power; it only found that an individual landowner was denied due process when his land was arbitrarily classified.

**Federal Judicial Review of Zoning Laws and Property Use Regulations as Takings of Property.** After these early zoning cases the Supreme Court withdrew from the area for an extended period and allowed the state courts to develop rules governing the permissible scope of zoning regulation. In 1962, however, in *Goldblatt v. Town of Hempstead*,<sup>32</sup> the Court reexamined the constitutionality of zoning regulation and described an expansive power of local government to regulate land use. In *Goldblatt*, the landowner held a thir-

ty-eight acre tract within the town of Hempstead. The land was used as a sand and gravel quarry and had been continuously so used since 1927. The town, having grown around the quarry, attempted through a series of ordinances to restrict the quarry's operation. In 1958, the town amended its zoning ordinance to prohibit any excavation below the water-line, which effectively prohibited continuance of the use to which the property had been devoted.<sup>33</sup>

Emphasizing that there was a presumption that the statute was constitutional, the Court upheld the ordinance, finding "no indication that the prohibitory effect of the [ordinance was] sufficient to render it an unconstitutional taking . . ."<sup>34</sup> The Court, quoting *Lawton v. Steele*,<sup>35</sup> stated a two-part test to determine whether the statute was valid. First it must appear that "the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."<sup>36</sup> After evaluating the nature of the menace caused by the quarry, the availability of less drastic steps, and the loss suffered by the landowner, the Court found the statute constitutional.

Only the most unusual and totally arbitrary zoning ordinance or property use regulation will require the granting of compensation to a property owner. So long as the zoning ordinance reasonably advances some arguable "police power" interest and does not literally transfer an existing property interest of the owner to the government or other parties, the zoning of property should not require compensation. Although the justices may "balance" public and private interests in these cases, it is assumed that the public interest will prevail unless a property use regulation enriches the government or the public by regulations which terminate or

28. 278 U.S. at 121-22, 49 S.Ct. at 51-52.

29. *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976).

30. 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928).

31. 277 U.S. at 188, 48 S.Ct. at 448.

32. 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962).

33. 369 U.S. at 592, 82 S.Ct. at 988-89.

34. 369 U.S. at 594, 82 S.Ct. at 990.

35. 152 U.S. 133, 137, 14 S.Ct. 499, 501, 38 L.Ed. 385 (1894).

36. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595, 82 S.Ct. 987, 990, 8 L.Ed.2d 130 (1962).

eliminate the primary economic value of a property interest.<sup>37</sup>

Although the Court has not found zoning ordinances to constitute a taking in recent years, opinions of the Court indicate that the justices perceive a legitimate judicial role in determining whether or not a zoning regulation is so unreasonable that it constitutes a taking. In *Agins v. Tiburon*,<sup>38</sup> the opinion of Justice Powell, for a unanimous Court, stated that the determination of whether property has been taken by a zoning ordinance requires a judicial weighing of private and public interest. *Agins* involved an "open space" zoning ordinance which required the owners of a five acre tract of land to build no more than five single-family residences on their property. Prior to the zoning the property owners might have been able to subdivide their land into smaller parcels and allow for the development of more single-family dwellings. However, the Supreme Court found that the government's interest in "assuring careful and orderly development of residential property with provision for open space areas" outweighed the property owner's interest in avoiding any diminution in the market value of their land. The Court engaged in a

balancing of the public and private interest and concluded that: "It cannot be said that the impact of general land use regulations has denied the appellants the 'justice and fairness' guaranteed by the fifth and fourteenth amendments."<sup>39</sup>

A zoning ordinance, or other property use regulation, will constitute a taking of property for which compensation is due, if the regulation unjustifiably shifts social costs to an individual property owner or a group of property owners. When a court upholds a zoning or property use statute "on its face", it is only holding that the statute does not constitute a per se taking of property from all persons whose property is regulated by the statute. A particular government statute regulating property use may not constitute a taking on its face but may still constitute a taking for which just compensation is due if the statute, as applied to an individual item of property or property owner, deprives a property owner of the value of the property.

In *Keystone Bituminous Coal Association v. DeBenedictis*<sup>40</sup> the Court held that a state statute and administrative regulatory system that required the owners of subsurface miner-

37. See cases cited in note 21, supra. For references to additional cases on this point, see 2 R. Rotunda, J. Nowak & J. Young, *Treatise on Constitutional Law: Substance and Procedure* § 15.12 (1986).

The state may define ownership interests in real or personal property so that they terminate or lapse without paying compensation, at least when the termination is based upon the action of the owner. See, *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982) (state statute may deem as abandoned and lapsed several mineral interests upon failure of owner to use interest for 20 years or to file claim preventing lapse).

In *United States v. Locke*, 471 U.S. 84, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985) the Court upheld the constitutionality of a federal law that terminated the interests of holders of unpatented mining claims on federal lands who failed to comply with annual filing requirements, although the law terminated otherwise valid claims to mining rights that had existed before the statute's enactment. The statute required that all such mining claims must be registered with the Bureau of Land Management within three years of the statute's enactment; the statute also required a yearly filing "prior to December 31". Failure to comply with either of these filing requirements "shall be deemed conclusively to constitute an abandonment of the mining claim ... by the owner." The Supreme Court interpreted the statute to require the annual filing prior to December 31 and found that no specific

evidence of intent to abandon the claim was necessary or relevant if the person failed to make a timely filing. This law did not constitute unconstitutional retroactive legislation because it was designed to further a legitimate state interest through reasonable, if severe, means. There was no unconstitutional taking because: "regulation of property rights does not 'take' private property when an individual's reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed." 471 U.S. at 107, 105 S.Ct. at 1799.

38. 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).

39. 447 U.S. at 262, 100 S.Ct. at 2142. See also *Hodel v. Indiana*, 452 U.S. 314, 100 S.Ct. 2376, 69 L.Ed.2d 40 (1981) (finding that "prime farmland" provisions of Surface Mining and Reclamation Control Act did not, on their face, deprive the property owner of economically beneficial use of his property without just compensation, even though the regulation restricted the amount, type, and profitability of mining operations).

For citations to additional decisions regarding this subject, see the multivolume edition of this treatise: R. Rotunda, J. Nowak & J. Young, *Treatise on Constitutional Law: Substance and Procedure* (3 volumes, 1986, with annual supplements).

40. 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987).

al rights to leave 50% of the coal in the ground below certain types of structures and surfaces was not a taking of property for which just compensation was due. Sixty-five years earlier, in *Pennsylvania Coal Co. v. Mahon*,<sup>41</sup> the Supreme Court had found that a statute that severely restricted the mining of coal by persons who own subsurface mining rights did constitute a taking of property. In the *Keystone* case, the Supreme Court ruled that Justice Holmes' opinion in *Pennsylvania Coal* was based on the premise that the original state statute served only the interest of climate owners of surface land and that the statute made it impractical to profitably mine coal.<sup>42</sup> By a five to four vote, the Justices in the *Keystone* decision applied the modern balancing of interests test to determine whether the regulation constituted a taking of property. Under this approach, a court must examine the extent to which the regulation substantially advanced a legitimate state interest and the extent to which the regulation denies the property owner an economically viable use of the property.

In *Keystone*, the majority found that the requirement that the mining operators leave a certain percentage of coal in the ground and take steps to prevent or repair damage to surface interests was designed to protect a wide variety of public and private uses of surface property. The statute was not merely a wealth transfer from the coal owners to the private owners of surface property rights. The mining restriction was not declared a taking on its face because it did not make the mining of coal impractical or in any sense

unprofitable. Regardless of statutory restrictions, the technological state of the mining industry required a significant percentage of coal be left in the ground; the statute imposed, in the majority's view, only a slight and reasonable diminution in the value and investment-backed expectations of coal company operations. The Court was unwilling to find that a statute requiring a percentage of coal to be left in the ground was a physical appropriation of that coal; the majority examined the loss to the owners of the coal in terms of the diminution in the value of their mining business. The majority found that "our test for regulatory takings requires us to compare the value that has been taken from the property with the value that remains in the property ...". Because the statute promoted a significant public interest and resulted in only a slight diminution in value of mining operations, no taking was found.

However, the majority opinion in *Keystone* did not eliminate the possibility that an individual owner of subsurface coal rights might have his property taken. If an individual property owner could show that the application of the mining restriction to his property eliminated any economically viable use of the subsurface coal rights for that particular area, the Court might find that the property owner was owed just compensation by the government.<sup>43</sup>

**"Landmark" Zoning—The Penn Central Case.** In *Penn Central Transportation Co. v. New York*,<sup>44</sup> the Supreme Court held that the New York City Landmarks Preservation Law

41. 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

42. The competing views of Justices Harlan and Holmes, and their influence taking of property decisions are discussed at the start of this section.

43. If the government appropriates property for its own use or for the use of the general public, the owner will be entitled to just compensation. The state might be able to totally destroy the value of some pieces of property if the government action is narrowly tailored to stop a public nuisance or the property is being used to engage in activity which the state can lawfully proscribe. Thus, the state might totally prohibit the use of a narcotic substance which was once lawful to hold and possess in the state, and it might require the complete elimination of property uses that created health hazards to the community. In each case, the type of actual taking (appropriation or regulation) is important in determining whether just compensation is due for only a slight diminution in value or whether the Court should engage in the balancing test used in the property use and zoning cases. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 488 n. 18, 492 n. 22, 499 n. 27, 107 S.Ct. 1232, 1244 n. 18, 1246 n. 22, 1250 n. 27, 94 L.Ed.2d 472 (1987).

44. 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

In the remaining paragraphs of this section, we will examine property regulations that affect only a few pieces of property (the landmark preservation problem) and physical occupations of property (including proper use regulations that restrict an owner's right to exclude the use of his property by other persons).

might be employed, consistently with due process, to limit building rights in the vicinity of the historic Grand Central Station. The Court ruled that the limitation imposed by New York's Landmarks Preservation Commission did not constitute a "taking" or otherwise require exercise of the eminent domain power. Under the New York law, the Landmark Preservation Commission was empowered to designate property as a "landmark," and "landmark site," or a "historic district;" such designation was then approved by higher administrative authority in light of New York's overall zoning plan, and was ultimately subject to judicial review. Designation carried with it certain restrictions on the use of designated property, among which were that the owner must keep the property in "good repair," and that alterations of the external appearance of the property were subject to prior approval by the commission. Denial of approval was subject to judicial review. New York law also provided, however, for certain benefits to owners of property designated by the commission. Chief among these was the right of the owner to transfer unused development rights from restricted property to nearby property which had not been restricted by the commission. The effect of this allowance was to permit owners of both non-historic property and property designated as historic to exceed existing zoning regulations on the development of their non-historic property to the extent that development had been curtailed by the Landmark Law on their nearby historic property. This allowance was intended to mitigate much of the economic deprivation which would inevitably result from development restrictions on historic property.

In *Penn Central*, the Landmark Preservation Commission had denied Penn Central permission to build a multi-story office build-

ing above Grand Central Station. The Commission concluded that "to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke . . . ." <sup>45</sup> Rather than refrain from the endeavor and transfer its unused building rights to its other adjacent property, however, Penn Central sought review of the commission's decision.

The Supreme Court in *Penn Central* ruled that there had been no "taking" of property. A majority of the justices found the regulations a reasonable means of promoting important general welfare interests in environmental control and historic preservation. The majority opinion found the existence of an allowance for transfer of development rights supportive of its determination of the law's reasonableness, but did not indicate that, absent such allowance, the restrictions imposed on Penn Central's property would have amounted to a "taking" for which compensation would be required. <sup>46</sup> The Court did, however, specifically note that the allowance of transfer rights mitigated the loss to owners of historic property, and was thus a factor both in the finding that the law itself was a reasonable exercise of the police powers and in the finding that the magnitude of Penn Central's loss did not rise to the level of a "taking." <sup>47</sup>

**Physical Occupations, as Per Se Takings.** Today the Court will allow governmental entities to regulate either real or personal property for the public good without the requirement of compensation so long as the action is not an unreasonable infringement of the rights of the private property owner. The government, however, is not free to transfer property rights from one group of owners to another or to take and use private property for the public good (1) unless the action is

45. 438 U.S. at 117-18, 98 S.Ct. at 2656.

46. 438 U.S. at 137, 98 S.Ct. at 2666. The "adequate compensation" issue, as well as the taking issue, had been the focus of modern analysis of prospects for "transferable development right" (TDR) programs. See § 11.14, *infra*.

The dissenting justices would have held that the restrictions on property use constituted a "taking" because those restrictions destroyed valuable property rights.

The dissenting justices would not have reached the question of whether TDR's constituted adequate compensation; they would have remanded the case to the New York Court of Appeals for an initial determining of this issue. 438 U.S. at 151, 98 S.Ct. at 2673 (Rehnquist, J., dissenting, joined by Burger, C.J., & Stevens, J.).

47. *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 115-16, 139, 98 S.Ct. 2646, 2654-55, 2666-67, 57 L.Ed.2d 631 (1978).

justified by emergency conditions, or (2) unless compensation is paid.

A permanent physical occupation of private property by the government or a government regulation which allows someone other than the property owner to have permanent physical occupation of a definable part of a piece of property should constitute a taking.<sup>48</sup> The government must pay compensation for such a taking of traditional property rights. However, in some cases, such as those which follow in this section, it may be difficult to determine when a transfer of property rights has taken place.<sup>49</sup>

48. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), on remand 58 N.Y.2d 143, 459 N.Y.S.2d 743, 446 N.E.2d 428 (1983) (city ordinance requiring landlord building owner to allow installation of cable television receiver on apartment building and denying landlord the ability to demand payment in excess of \$1 constitutes a compensable taking because the ordinance allowed for "permanent physical occupation" of a small part of the building).

49. *Rent Control Statutes.* Although rent control statutes clearly impair the value of the property, such statutes have often been upheld in the lower courts without a requirement that the government pay compensation to the landlord. These courts have viewed these statutes as allowing for a fair rate of return to the landlord from the property, so as not to create a totally unreasonable impairment of value the limitation to a fair return is justified by an overriding social interest in adequate housing for the populace. See e.g., *Eisen v. Eastman*, 421 F.2d 560, 567 (2d Cir. 1969), certiorari denied 400 U.S. 841, 91 S.Ct. 82, 27 L.Ed.2d 75 (1970).

However, under some circumstances it is arguable that rent control or rent continuation statutes so diminish property values or so restrict the use of properties that compensation should be due the landlord because of an unreasonable impairment of value and a restriction on the use of the property which is the functional equivalent of a physical taking. See *Helmsley v. Fort Lee*, 78 N.J. 200, 394 A.2d 65 (1978), appeal dismissed 400 U.S. 978, 99 S.Ct. 1782, 60 L.Ed.2d 237 (1979), clarified 82 N.J. 128, 411 A.2d 203 (1980).

The Supreme Court has upheld rent control and rent continuation statutes in light of congressional concerns over war time and post-war economic conditions. See *Block v. Hirsh*, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865 (1921). See also *Bowles v. Willingham*, 321 U.S. 503, 64 S.Ct. 641, 88 L.Ed. 892 (1944).

Although the Supreme Court has not set any standard for such cases, it would appear that a restriction on the amount that can be charged for rentals of personal or real property should not be deemed to be a taking, unless the maximum rental rate is judicially determined to be confiscatory. For example, in *Federal Communications Commission v. Florida Power Corporation*, 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987) the justices unanimously ruled that the Federal Communications Commis-

**Limitations on the Owner's Right to Exclude Others.** In *Kaiser Aetna v. United States*,<sup>50</sup> the Court held that the application of the federal navigational servitude to a lagoon on the island of Oahu constituted a taking for which compensation was required. Historically, the pond in question was considered to be private property. It was leased, along with the surrounding land, to a resort and private housing developer. The developer converted the pond into a marina, and dug channels connecting it with a bay which allowed ships to travel from the lagoon into the bay and the ocean. The federal government claimed that

sion had not taken the property of a utility company when it required the utility company to lower the annual rent charge for the use of its utility poles to cable television operators (for the attachment of cables to such poles). Justice Marshall, writing for a unanimous Court, found that the owners of the utility poles had agreed to the occupation of their property cables in the lease agreement and that the only issue was whether the limitation on the rental rate charged deprived the pole owners of the utility of the value of their property. The Supreme Court found that the rental rate established by the Federal Communications Commission was within the range of reasonable rates that it was statutorily authorized to set for such utility company agreements with cable television operators and that the limitation in the rental rate was not confiscatory. Therefore, there was no taking of property for which compensation would be required.

In *Pennell v. City of San Jose*, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988) the Supreme Court upheld a rent control ordinance that allowed landlords to raise rents up to 8% but that gave tenants a right to object to rent increases beyond 8%. The statute established a hearing procedure to determine whether such rent increases were reasonable. The reasonableness of a rent increase was to be determined by seven statutory standards, six of which involved factors that related to the objective reasonableness of the rent increase and one standard that involved a determination of whether the rent increase would impose "hardship" on a tenant or tenants. The Supreme Court found that the contention that the tenant hardship provision might constitute a taking of property by denying the property owner a reasonable return on his investment in the property was premature because there was no indication that any landlord had ever had a rent increase reduced below the figure that it would have been set at on the basis of the objective factors due to tenant hardship. The Court also rejected due process and equal protection attacks on this rent control statute. The majority opinion found that a state rent control regulation should be upheld under the due process clause so long as it was not "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt." The ordinance would survive equal protection so long as it was "rationally related to a legitimate state interest."

50. 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979).

the connection of the waterway to the bay made it a "navigable water" of the United States and therefore subject to regulation by the Corps of Engineers and open to public use.

The Supreme Court found that the lagoon was a navigable waterway and subject to regulation by the United States government and the Corps of Engineers acting under the commerce power. However, the government could not require the owners and lessees of the marina to allow the public free access without invoking the eminent domain power and paying them compensation. The Court held that although the government could have refused to allow connection of the lagoon to the bay or regulated use of the lagoon in any arguably reasonable manner, it could not simply convert private property into public property without paying just compensation.<sup>51</sup>

The state's removal of a property owner's right to exclude others under certain circumstances does not necessarily constitute a "taking" in the constitutional sense. In order to determine whether or not such a limitation of property rights constitutes a taking, a court must consider the character of the government's action in terms of the degree to which it (1) promotes legitimate social goals, (2) diminishes the value of the private property owner's economic interest, and (3) interferes with reasonable expectations regarding the use of the property.

For example, in *PruneYard Shopping Center v. Robins*,<sup>52</sup> the United States Supreme

51. 444 U.S. at 177-81, 100 S.Ct. at 391-94.

In *Vaughn v. Vermillion Corp.*, 444 U.S. 206, 100 S.Ct. 399, 62 L.Ed.2d 365 (1979), the Court held that privately-owned canals connected with public waterways were not automatically open to general public use under the federal navigational servitude. Unless the government could show that the private canals had destroyed or diverted a pre-existing natural waterway, it would have to pay compensation to the canal owners whose private property was converted to a public waterway.

Not all actions taken by the federal government to enforce the federal navigational servitude and public access to waterways will be declared takings of property for which compensation is due. Government actions must be examined on a case-by-case basis to determine whether the government action at issue has taken or impaired a property interest in a manner that requires the granting of compensation. In *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 107 S.Ct. 1487, 94 L.Ed.2d 704 (1987), the Supreme Court found that no

Court upheld a decision of the California Supreme Court, which ruled that the California constitution prohibited the owners of private shopping centers from excluding persons who wish to engage in nondisruptive speech and petitioning activities. Although the state had thus eliminated part of the shopping center owner's right to exclude other persons, the owners did not suffer a taking in the constitutional sense because they could not demonstrate that an unchecked right to exclude others was a basic part of the economic value of the shopping center. The state court ruling was seen as a reasonable government regulation of the use of property normally open to members of the public and not a taking of property.<sup>53</sup>

Another example of the difficulty of determining when a legal restriction on a property owner's right to exclude others from using his property constitutes a taking is provided by the Supreme Court's decision in *Nollan v. California Coastal Commission*.<sup>54</sup> In this five to four decision, the Supreme Court found that a condition of a building reconstruction permit that required a public easement across beach property constituted a taking of property for which compensation was due. At issue in the case was a restriction placed on beach-front property in California. The owners wished to demolish a small building on the property and replace it with a larger structure. The Coastal Commission granted the

compensation was due to the Indian tribe that owned property rights in a river or riverbed when the federal government exercised its rights under the federal navigational servitude and made navigational improvements to the river.

52. 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980).

53. The Court in *PruneYard Shopping Center* distinguished *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979), noted above at footnote 41, on the basis that the taking of the right of exclusivity from property held for private use in *Kaiser* went too far in interfering with "reasonable investment backed expectations," whereas the shopping center regulation was in the nature of a reasonable regulation of commercial functions. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83-85, 100 S.Ct. 2035, 2041-43, 64 L.Ed.2d 741 (1980).

54. 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

construction permit on the condition that the owners allow the public to pass across the beach area of their property. This easement would allow members of the public to cross the private property when traveling between two public beach areas which were separated, in part, by the beachfront lot.

Although this point may be subject to some debate, it appears that the Court determined it was irrelevant whether the easement granted to the public ran from the street to the beach across the part of the property that abutted the house or merely across the beach portion of the property providing "lateral access" to the public beaches. The majority opinion by Justice Scalia found that there was no purpose supporting the required grant of a public easement, other than facilitating public travel across private property. This was not an illegitimate interest; the state could pursue it by condemning a portion of the land for the easement and paying just compensation to the property owner.<sup>55</sup>

Justice Scalia's opinion for the Court in *Nollan* stated, in dicta, that a zoning commission might condition a waiver of a zoning regulation regarding the size of buildings near a beach that would allow the construction of a new building blocking the public's view of the beach if the owner agreed to provide a limited public access area on the property for passers-by to view the beach. In other words, since a limitation on the size of buildings for aesthetic purposes would be permissible (so long as it did not unreasonably diminish the economic value of the property), the limited granting of access to the property for the purpose of providing the public the ability to see the beach should not be imper-

missible (unless the amount of required access constituted a substantial diminishment in the value of the property). However, the easement at issue in the *Nollan* case was not, in the view of the majority, related to preserving the aesthetic quality of the beachfront area or the public's ability to view the beach. The permit system in *Nollan* in effect created a continuous strip of publicly accessible beach by granting to the public the use of privately owned property.<sup>56</sup>

**Utility Rate Regulation.** Virtually all governmental entities that have conferred the right to be a legal monopoly on a utility company owned by private parties have regulated the utility's charges to its customers. The regulation of the amounts that utilities may bill for their services is a regulation of the property of the utility owners; if the government sets the utility's charges, and the rate of return on the owners' investment, at a level that is judicially determined to be unjust and confiscatory, the rate regulation would constitute a taking of the property of the utility. In *Duquesne Light Co. v. Barasch*,<sup>57</sup> Chief Justice Rehnquist wrote for eight Justices in upholding a state system of utility regulation; the majority opinion reviewed 90 years of Supreme Court cases concerning utility rate regulation.<sup>58</sup> In *Duquesne Light Co.* a Pennsylvania utility company asserted that the method used to determine the amount of its rates and rate increases constituted a taking of property because state law prohibited including in the rate base (the value of the utility that would be used for determining the rates and rate of return) the amount of money that the utility invested in initial stages of construction for four power plants that were

55. 483 U.S. at 831-34, 107 S.Ct. at 3145-46.

56. In dissent, Justice Brennan, joined by Justice Marshall attempted to demonstrate the ways in which the easement might be used to offset restricted visual and physical use of the public beaches by members of the public, occasioned by the increased development on the beachfront property. *Nollan v. California Coastal Commission*, 483 U.S. 825, 840, 107 S.Ct. 3141, 3150, 97 L.Ed.2d 677 (1987) (Brennan, J., joined by Marshall, J., dissenting). Justices Blackmun and Stevens also dissented in *Nollan*, 483 U.S. at 863, 107 S.Ct. at 3162 (Blackmun, J., dissenting); 483 U.S. at 866, 107 S.Ct. at 3163 (Stevens, J., joined by Blackmun, J., dissenting).

57. 488 U.S. 299, 109 S.Ct. 609, 102 L.Ed.2d 646 (1989).

58. Justice Blackmun dissented on a jurisdictional issue, he did not make any comments upon the Chief Justice's examination of the taking of property issue. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 317, 109 S.Ct. 609, 621, 102 L.Ed.2d 646 (1989) (Blackmun, J., dissenting). Justice Scalia, joined by Justices White and O'Connor, joined the Chief Justice's opinion and also wrote a concurring opinion. 488 U.S. at 317, 109 S.Ct. at 620 (Scalia, J., joined by White and O'Connor, JJ., concurring).

cancelled prior to being put into use. Because the investments in these power plants were admitted to be "prudent" when the initial investments were made, the utility claimed that the method for calculating the rate of return was a violation of the principles of the takings clause because the state disregarded the historical cost of the utility. However, the utility did not claim that the rates that had been established by the State of Pennsylvania resulted in a total return on the utility's investment that was unjust or unreasonable. The Court found that the utility rate regulation would not constitute a taking of property so long as the rate of return was not so unreasonable and unjust as to be considered "confiscatory."

Justice Rehnquist's majority opinion noted that the Supreme Court had examined utility regulations since late in the 19th century and had continuously followed the principle that state legislators, as well as state administrative entities, could limit utility charges and that limitations on those rates and charges would not be considered a taking of property unless the rates were so low as to be confiscatory.<sup>59</sup> Shortly after the Supreme Court began to examine utility rate regulations, in *Smyth v. Ames*,<sup>60</sup> the Court indicated that rates and charges should be set according to the present value of the assets employed by the utility, so as to determine whether the rate was reasonable by examining it as a return on the "fair value" of the utility. Justice Brandeis, in the 1920s, had noted the difficulty of attempting to establish the "fair

value rule" as a constitutional requirement.<sup>61</sup> Justice Brandeis believed that the Constitution allowed utility rate regulations to be set with a system that would compare the utility's rate of return to the value of the capital that had been prudently invested in the utility throughout its history. The position advocated by Justice Brandeis, which is sometimes called the "prudent investment" or the "historical cost" principle, was eventually used by the Supreme Court in the 1940s. In *Federal Power Commission v. Hope Natural Gas Company*,<sup>62</sup> the Supreme Court found that the fair value rule, which had been previously adopted in *Smyth*, was not the only method for constitutionally setting utility rates and allowed state lawmakers to use the historical cost or prudent investment rule.

In *Duquesne Light Co.*, Chief Justice Rehnquist wrote for eight members of the Court in finding that no single formula for fixing utility rates was mandated by the Constitution.<sup>63</sup> So long as the utility's rate of return was not so unjust as to be confiscatory, it would not be invalidated due to the method by which the state law had set the rate structure. The Chief Justice noted that, if a utility company challenged a rate as being "confiscatory", an examination of the value of the company and the return upon prudent investments would be considerations in determining whether the rate was confiscatory.<sup>64</sup>

### (c) Emergency Actions

A number of Supreme Court decisions have dealt with the conflicting rights and duties of

59. Early Supreme Court opinions concerning utility rate regulation were written in terms of "due process of law", but those opinions are now understood as establishing principles identical to those inherent in the takings clause of the fifth amendment, which is now applicable to the states through the fourteenth amendment due process clause.

"The guiding principle has been that the constitution protects utilities from being limited to a charge for their property, serving the public which is so 'unjust' as to be confiscatory. *Covington and Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597, 17 S.Ct. 198, 205-206, 41 L.Ed. 560 (1896) (a rate is too low if it is 'so unjust as to destroy the value of [the] property for all the purposes for which it was acquired,) and in so doing "practically deprive[s] the owner of property without due process of law" . . . ." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-308, 109 S.Ct. 609, 615, 102 L.Ed.2d 646 (1989).

60. 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819 (1898).

61. *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276, 291-94, 43 S.Ct. 544, 547-548, 67 L.Ed. 981 (1923) (Brandeis, J., dissenting).

62. 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944).

63. "[A]n otherwise reasonable rate is not subject to constitutional attack by questioning the theoretical consistency of the method that produced it." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 314, 109 S.Ct. 609, 619, 102 L.Ed.2d 646 (1989).

64. This point was emphasized by three concurring Justices. 488 U.S. at 310-311, 109 S.Ct. at 617. *Id.* at 317-318, 109 S.Ct. at 620-621 (Scalia, J., joined by White and O'Connor, JJ., concurring).

the government and private landowners during times of emergency. Authorities have long stated that in time of extreme emergency, the government, if the need arises, may take or even destroy private property.<sup>65</sup> As a general rule, the Supreme Court has been reluctant, during the time of emergency, to find that the government need compensate the injured property owner.

Military actions taken in time of war are often found to be noncompensable emergency measures. In *United States v. Caltex, Inc.*<sup>66</sup> the Supreme Court found that the Army had not "taken" property which had been destroyed to prevent its capture by enemy forces. The Army, in late 1941, destroyed the claimant's oil facilities in Manila as Japanese troops were entering the city. After the war, the owner of the facilities demanded compensation for all the property destroyed by the Army. The government agreed to pay for all the petroleum products used or destroyed but refused to pay for the destroyed terminal facilities. The Court, upholding the army's refusal, held that the destruction of private property during battle is a cost that must be borne by individual owners.<sup>67</sup>

Similarly, regulation to help the public purpose of solving an emergency will be upheld as noncompensable measures. Thus, in *United States v. Central Eureka Mining Co.*,<sup>68</sup> another case arising from government action during World War II, the Supreme Court refused to find that a War Production Board order requiring nonessential gold mines to cease operation amounted to a taking of the mines. The Court observed that the government had in no way taken physical possession of the affected mines,<sup>69</sup> and that the order was a reasonable means of conserving equipment needed to promote the war effort. "War, particularly in modern times," stated the Court,

"demands the strict regulation of nearly all resources. It makes demands which otherwise would be insufferable."<sup>70</sup>

The Court reaffirmed these principles in *National Board of Young Men's Christian Associations v. United States*.<sup>71</sup> Here the Court denied compensation to a private landowner where looters in the Panama Canal Zone destroyed its building because American troops had taken shelter there. The Court, concluding that the presence of the troops in the area had been for the landowner's benefit, found that "fairness and justice" did not require that the loss be compensated by the government and shifted to the public.<sup>72</sup> The Marines had not planned to take over the building but only sought its temporary use in an emergency; therefore there was no compensable taking.

The type of emergency situation that may enable the state to destroy property, without payment of compensation, is not limited to wartime conflict. *Miller v. Schoene*<sup>73</sup> involved the destruction by the State of Virginia of a large number of ornamental red cedar trees. The trees were infected with cedar rust, a disease that is highly dangerous to apple trees. The only effective means of controlling the disease is to destroy all infected red cedars growing within two miles of any apple orchards.

In *Schoene*, the Supreme Court held that the trees could be destroyed by the state without incurring any constitutional duty to compensate the injured landowner. The Court observed that apple production was an important agricultural activity in Virginia while the ornamental cedar trees had only minimal importance. The Supreme Court concluded that "[w]hen forced to such a choice, the state does not exceed its constitutional powers by deciding upon the destruction of one class of

65. See, e.g., Comment, Land Use Regulation and the Concept of Takings in Nineteenth Century America, 40 U.Chi.L.Rev. 854, 860-61 (1973).

66. 344 U.S. 149, 73 S.Ct. 200, 97 L.Ed. 157 (1952).

67. 344 U.S. at 154-56, 73 S.Ct. at 202-04.

68. 357 U.S. 155, 78 S.Ct. 1097, 2 L.Ed.2d 1228 (1958), rehearing denied 358 U.S. 858, 79 S.Ct. 9, 3 L.Ed.2d 91 (1958).

69. 357 U.S. at 165-66, 78 S.Ct. at 1102-03.

70. 357 U.S. at 168, 78 S.Ct. at 1104.

71. 395 U.S. 85, 89 S.Ct. 1511, 23 L.Ed.2d 117 (1969).

72. 395 U.S. at 89-92, 89 S.Ct. at 1514-16.

73. 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928).

property in order to save another, which, in the judgment of the legislature, is of greater value to the public." <sup>74</sup> Like the zoning-property use decisions, this case comports with modern substantive due process analysis by allowing the government to determine how to deal with societal problems without strict judicial review.

In *Dames & Moore v. Regan*<sup>75</sup> the Supreme Court upheld the validity of executive agreements suspending claims of United States citizens against the government of Iran in exchange for a return of our citizens who were being held hostage by that country.<sup>76</sup> In so doing the majority opinion by Justice Rehnquist found that the Presidential order nullifying attachments on Iranian assets and allowing a transfer of those assets out of the country did not constitute a compensable taking of property because the President had statutory authority to prevent or condition the allowance of such attachments so that those bringing claims against Iran did not have a property interest in the attachment.<sup>77</sup>

74. 276 U.S. at 279, 48 S.Ct. at 247.

75. 453 U.S. 654, 100 S.Ct. 2972, 69 L.Ed.2d 918 (1981).

76. The separation of powers aspects of this case are examined in Chapter 6, supra.

77. 453 U.S. at 674 n. 6, 101 S.Ct. at 2983-84 n. 6. Justice Powell was the only justice who would have found that nullification of the attachments constituted a taking of property. He believed that the attachment entitling a creditor to resort to specific property for the satisfaction for a claim was a compensable property interest which could not be made less so through the executive order making the attachments conditional. 453 U.S. at 690, 101 S.Ct. at 2992 (Powell, J., concurring and dissenting in part).

78. *Dames & Moore v. Regan*, 453 U.S. 654, 689, 101 S.Ct. 2972, 2991-92, 69 L.Ed.2d 918 (1981). Justice Stevens indicated, without taking a clear position, that he believed that requiring persons to bring their claims before an international tribunal would not constitute a taking of property. 453 U.S. at 690, 101 S.Ct. at 2992. (Stevens, J., concurring).

Justice Powell took the position that parties whose claims were not fully adjudicated or fully paid by actions before the claims tribunal were entitled to compensation from the federal government because their property had been taken in order to advance the nation's foreign policy goals. 453 U.S. at 690-01, 101 S.Ct. at 2992-93 (Powell, J., concurring and dissenting in part).

79. 453 U.S. at 689-90, 101 S.Ct. at 2991-92. The Court was careful to note that, in finding that the President had power to settle claims against Iran it was not indicating that individual claimants did not have a "pos-

As a part of the agreement with Iran, the President suspended claims of United States citizens pending in United States courts and required their submission to a "claims tribunal." The Supreme Court refused to consider whether this suspension of claims constituted a compensable taking of property because all parties admitted that the issue was not ripe for review.<sup>78</sup> However, the Court found that persons whose claims were suspended by the Presidential order could bring an action in the Court of Claims to determine whether the suspension of their claim had resulted in an unconstitutional taking of property by executive action.<sup>79</sup>

#### (d) Impairment of Use

The taking issue can arise even when the government has neither destroyed nor regulated the use of private property. Where, as a result of some governmental activity, a landowner's use and enjoyment of his property is impaired, there may be a "taking" for which compensation is due.

sible taking claim against the United States." 453 U.S. at 688, n. 14, 101 S.Ct. at 2991 n. 14.

In *United States v. Sperry Corp.*, 493 U.S. 52, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989), the Supreme Court found that a Department of Treasury Regulation requiring a deduction from each award given by the Iran-United States Claims Tribunal was not a taking of property but, rather, a constitutional user fee designed to reimburse the government for the establishment and operation of the Tribunal. The fact that the federal government had not set the user fee in a way that matched its costs did not result in a finding that the user fee violated the takings clause. The deduction was a reasonable approximation of costs for the benefits supplied by the federal government to claimants; the deductions were not "so clearly excessive as to belie their purported character as user fees." \_\_\_ U.S. at \_\_\_, \_\_\_ n. 8, 110 S.Ct. 394, 395 n. 8. The deduction was required by a federal statute that was enacted after the Tribunal had made the award to Sperry. The Supreme Court found that the legislation did not violate due process, even though it had a retroactive effect. The retroactive application of the legislation was justified by the legislative goal of requiring claimants to bear some of the costs for the Tribunal. The statute assessed the user fee only on successful claimants (those who actually received an award from the Tribunal). The imposition of the fee on successful plaintiffs, but not on unsuccessful plaintiffs, did not establish a classification that violated the equal protection component of the due process clause. There was no fundamental constitutional right or suspect classification involved; the classification was upheld because it was rationally related to a legitimate government interest.

The Constitution does not require the literal appropriation of property before there is a "taking". In *Pumpelly v. Green Bay Co.*,<sup>80</sup> the Supreme Court of the United States was required to interpret the "taking" clause of a state constitution and it found that a serious interruption in the use of property might be the equivalent of a taking, so that the flooding of land by a government dam would be a "taking".<sup>81</sup> In *Bedford v. United States*,<sup>82</sup> however, the Court appeared to step back from the broad statements of *Pumpelly*. In this case the Court found noncompensable the backup of flood waters which was a consequential effect of government action. The opinion found that a distinction between damaging and taking must be observed for purposes of determining whether a constitutional requirement of compensation exists. The Court distinguished *Pumpelly* on the ground that the landowner in that case was directly injured by the dam project. In this case the government had only fortified the banks of a river to prevent flooding at a point distant from the plaintiff's land; the plaintiff was not directly injured by this act.

In this area the Court's rulings have an *ad hoc* quality because individual decisions are based on the degree of loss to the individual and the reasonableness of the government's actions in relation to the private property. For example, in *Peabody v. United States*,<sup>83</sup> the Court faced the issue of whether the placement of a gun battery in the vicinity of the claimant's resort hotel amounted to a fifth amendment taking. The resort owners argued that the proximate location of the battery to the hotel property greatly impaired the land's recreational value for all practical purposes. The Supreme Court found no taking, but, in *dicta*, stated that if the government had installed the battery with the in-

tent to practice at will over the hotel property, "with the intent of depriving the owner of its profitable use," such action would constitute an appropriation of property and would require compensation.<sup>84</sup>

Six years later, in *Portsmouth Harbor Land & Hotel Co. v. United States*,<sup>85</sup> the hotel owners again sought recovery as a result of additional firings of the battery. The Court rejected this second claim, refusing to infer an intent on the part of the government to create a servitude across the hotel's property. Three years later the same parties again sought recovery urging that the cumulative effect of subsequent firings had resulted in a taking.<sup>86</sup> The Court, per Justice Holmes, reversed the trial court's dismissal of the action, and, adopting the theory of *Peabody*, ordered that evidence be heard to determine whether the continued firings were sufficient to prove an intent to create a servitude over the hotel property.

In *United States v. Causby*,<sup>87</sup> the Supreme Court applied the rationale of the *Portsmouth Hotel* cases in determining whether frequent and regular flights of government planes over the plaintiffs' land had created an easement for the benefit of the government. The plaintiffs in this case owned a small chicken farm near an airport used by army and navy planes. The glide path of one of the airport runways passed directly over the property at a height of only 83 feet. The use of the runway greatly disturbed the occupants of the farm and also eventually forced the plaintiffs to give up their chicken business. The Supreme Court found that the frequent low altitude flights of government planes over the farm created an easement in the plaintiffs' land.<sup>88</sup> The Court held that the landowner was entitled to as much of the air space over

80. 80 U.S. (13 Wall.) 166, 20 L.Ed. 557 (1871).

81. 80 U.S. at 179-80.

82. 192 U.S. 217, 24 S.Ct. 238, 48 L.Ed. 414 (1904).

83. 231 U.S. 530, 34 S.Ct. 159, 58 L.Ed. 351 (1913).

84. 231 U.S. at 538, 34 S.Ct. at 160.

85. 250 U.S. 1, 39 S.Ct. 399, 63 L.Ed. 809 (1919).

86. *Portsmouth Harbor Land and Hotel Co. v. United States*, 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287 (1922).

87. 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946).

88. 328 U.S. at 265, 66 S.Ct. at 1067-68. The Court later held that the establishment of a county owned airport next to residential property could constitute a taking if the flight and operation of the airport made the property unusable for residential purposes. *Griggs v. Allegheny County*, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962), rehearing denied 369 U.S. 857, 82 S.Ct. 931, 6 L.Ed.2d 16 (1962).