

CHAPTER SIX: THE REGULATION OF PROPERTY

KEY CONCEPTS FOR THE CHAPTER

- SEVERAL PROVISIONS OF THE U.S. CONSTITUTION PROTECT INTERESTS IN PROPERTY; THE CANADIAN CHARTER DELIBERATELY EXCLUDED ANY TEXTUAL PROTECTION OF PROPERTY INTERESTS; THE AUSTRALIAN CONSTITUTION INCLUDES A PROVISION REQUIRING THE FEDERAL LEGISLATURE TO OFFER "JUST TERMS" FOR PROPERTY COMPULSORILY ACQUIRED "FOR ANY PURPOSE IN RESPECT OF WHICH THE [FEDERAL] PARLIAMENT HAS POWER TO MAKE LAWS".
- NONETHELESS, THE ACTUAL DIFFERENCE IN PROTECTION OF PROPERTY INTERESTS AGAINST EXPROPRIATION IS NOT THAT GREAT BETWEEN THE COUNTRIES, BECAUSE ALL CANADIAN JURISDICTIONS AND AUSTRALIAN STATES HAVE ENACTED EXPROPRIATION STATUTES.
- THE GENERAL PRINCIPLE OF THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT – THAT THE GOVERNMENT SHOULD NOT FORCE SOME TO BEAR A PUBLIC BURDEN WHICH SHOULD BE BORNE BY ALL OF SOCIETY – IS SHARED BY ALL COUNTRIES; THE KEY QUESTION IS WHETHER COURTS OR LEGISLATURES SHOULD BE ENTRUSTED WITH ENFORCING THIS PRINCIPLE
- BOTH AMERICAN AND CANADIAN CONSTITUTIONAL JURISPRUDENCE SEEKS TO AVOID THE "GHOST" OF THE *LOCHNER*-ERA IN U.S. JURISPRUDENCE; AMERICAN JUSTICES BY DISTINGUISHING BETWEEN "ECONOMIC" AND "PROPERTY" RIGHTS, AND CANADIAN JUSTICES BY AVOIDING THIS DISTINCTION COMPLETELY. FOR AUSTRALIAN COURTS, PROPERTY RIGHTS ARE DEFINED QUITE BROADLY BUT A KEY DISTINCTION IS DRAWN BETWEEN THE ACQUISITION OF PROPERTY AND THE REGULATION OF PROPERTY.
- THE MAJOR SIGNIFICANT DIFFERENCE IN THE REGULATION OF PROPERTY CONCERNS JUDICIAL REVIEW OF ENVIRONMENTAL AND LAND-USE REGULATIONS THAT MAY SIGNIFICANTLY IMPAIR THE ECONOMIC VALUE OF REAL PROPERTY; THESE "REGULATORY TAKINGS" WILL OFTEN REQUIRE COMPENSATION IN THE U.S., WILL SOMETIMES BE CONSIDERED ACQUISITIONS OF PROPERTY IN AUSTRALIA, AND ARE NOT CONSTITUTIONALLY PROTECTED IN CANADA.

I. Overview of the right to property

One of the fundamental differences between the constitutions that are the focus of these materials concerns protection of interests in property. Article I, §10 of the U.S. Constitution bars states from passing any law "impairing the Obligation of Contracts," and the Fifth and Fourteenth Amendments to the U.S. Constitution provide that no person shall be deprived of property without due process of law. Section 51(xxxi) of the Australian Constitution requires that the federal government acquire property on "just terms" but does not otherwise protect property or economic interests, and this provision does not apply to Australian states. The Canadian Charter contains no express textual protection for property interests. Indeed, great

care was taken to avoid such protection in the drafting of s. 7 of the Charter, which provides that "everyone" has the right to "life, liberty, and security of the person" and cannot be deprived of these rights unless "in accord with the principles of fundamental justice."

An oft-cited effort to explain American takings jurisprudence is Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967) (succinctly explained and analyzed in Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 Harv. L. Rev. 997 (1999)). Michelman frames the issue broadly, at p. 1169:

When a social decision to redirect economic resources entails painfully obvious opportunity costs, how shall these costs ultimately be distributed among all the members of society? *** Shall the losses be left with the individuals on whom they happen first to fall, or shall they be "socialized?"

Michelman argues that losses should be socialized when it would be either inefficient or unjust to allow the government to take the property without compensation. The principal economic explanation for the compensation requirement is that otherwise the government would take an inefficiently large amount of property -- that is, the price system provides an efficient discipline on the state's "consumption" of private property. See William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation Law,"* 17 J. Legal Stud. 269 (1988). Both efficiency and fairness are also invoked to limit the ability of government to expropriate property of politically vulnerable groups and individuals. See Saul Levmore, *Just Compensation and Just Politics*, 22 Conn. L. Rev. 285 (1990).

The U.S. Supreme Court has restated these principles in an oft-quoted statement about the meaning of American constitutional protection for property: the Takings Clause **prevents the government "from forcing some people to alone bear public burdens which, in all fairness and justice, should be borne by the public as a whole."** *Armstrong v. United States*, 364 U.S. 40, 49 (1960). For our purposes, however, the question is a bit more specific -- when government policy causes tangible economic injury, under what circumstances, if any, is the government *required* to compensate, even if the legislature believes that the injury is not one that ought to be "socialized."

As Professor Simon Evans has observed, interpretation of the Australian constitutional provision regarding property is "unclear and contested and in some areas close to incoherent." "Constitutional Property Rights in Australia: Reconciling Individual Rights and the Common Good" in *Protecting Rights Without a Bill of Rights* (Tom Campbell, Jeffrey Goldsworthy & Adrinne Stone, ed. 2006). The provision was proposed by Edmund Barton (later first Prime Minister, and then Justice of the High Court of Australia) at the final session (Melbourne) of the 1897-98 Federal Convention. Barton doubted that the 'incidental' power attached to every head of power (both by implication and expressly, in s 51 (xxxix)) would be sufficient to create a federal right of eminent domain. Other delegates wanted further time to consider the proposal (Isaac Isaacs - later a Justice and then Chief Justice of the High Court - expressed concern about the potential impact on the States.) Discussion was held over, and when the proposal was re-introduced late in the session (this time by Richard O'Connor, also later to become a Justice of the High Court), it was passed with little debate.

In "Quick and Garran" - the 1901 *Annotated Constitution of the Commonwealth of Australia* - John Quick (Victorian delegate to the Federal Convention) and Robert Garran

(Secretary to the Convention's Drafting Committee) compared the Australian imperative for adopting such a provision with the United States power. The United States, they wrote, was a sovereign State, and "the right of eminent domain was an incident of sovereignty, which required no special constitutional provision to call it into existence." In comparison, the Australian Commonwealth was "a federated community possessing many political powers approaching, and elements resembling, sovereignty, but falling short of it", since it remained subject to the paramount power of the British Parliament (pp. 640-41). Therefore, an express provision was needed to remove any doubt about the right of the Commonwealth to acquire property for federal purposes. Quick and Garran's analysis is not directly supported by the Convention Debates (since very little was said about the provision), but it is compatible with views expressed in other contexts.

Quick and Garran also compared the "just terms" proviso with the American "just compensation" limitation. In the U.S., they stated, the Supreme Court had held that where property was compulsorily taken, compensation "must not only be just to the owner whose property is taken, but just to the public who have to pay." This principle, they noted, extended to regulatory takings (although they didn't use that term), and to cases where there is such a serious interruption to the common and necessary use of property as practically to destroy its value. The U.S. provision, they concluded, served as a limitation on the exercise of sovereign power rather than a (limited) grant of power, as in Australia. On the second limitation - acquisition for "any purpose in respect of which the Parliament has power to make laws" - Quick and Garran suggested that the Commonwealth has power only to acquire property pursuant to the exercise of other heads of power.

These analyses call for several comments. If lack of complete sovereignty was the reason for an express provision in 1900, this is no longer the case. The Commonwealth of Australia has been fully sovereign (in the sense of free from the legislative power of the British Parliament) since 1931. The analysis of cases where "just compensation" is required in the U.S. remains applicable in Australia, with the possible exception of "regulatory takings." The latter expression is not familiar in Australian constitutional law, but that in itself has not prevented challenges arising regarding the impact of regulation on property rights. However, the High Court has held that statutory regulation which has the effect of adversely altering property rights does not amount to an acquisition, since statutory schemes are inherently susceptible to adjustment (see *Health Insurance Commission v Peverill* (1994) 179 CLR 226; *Mutual Pools v Commonwealth* (1994) 179 CLR 155). In *Mutual Pools*, Justices Deane and Gaudron stated:

While there is no set test or formula for determining whether a particular law can or cannot properly be characterized for the purposes of s.51(xxxi) as a law with respect to the acquisition of property for a purpose in respect of which the Parliament has power to make laws, it is possible to identify in general terms some categories of laws which are unlikely to bear the character of a law with respect to the acquisition of property notwithstanding the fact that an acquisition of property may be an incident of their operation or application. One such category consists of laws which provide for the creation, modification, extinguishment or transfer of rights and liabilities as an incident of, or a means for enforcing, some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest. Another category consists of laws defining and altering rights and liabilities under a government scheme involving the expenditure of government funds to provide social security benefits or for other public purposes. A law falling within either of those categories may, as an incident of its operation or enforcement, adjust, modify or extinguish rights in a way which involves an "acquisition of property" within the wide meaning which that phrase bears for

the purposes of s.51(xxxi). Yet, if such a law is of general operation, it is unlikely that it will be susceptible of being properly characterized, for the purposes of s.51 of the Constitution, as a law with respect to the acquisition of property for a purpose in respect of which the Parliament has power to make laws. The reason why that is so is that, even though an "acquisition of property" may be an incident or a consequence of the operation of such a law, it is unlikely that it will constitute an element or aspect which is capable of imparting to it the character of a law with respect to the subject-matter of s.51(xxxi).

Note, however, *Telstra Corporation Ltd v Commonwealth* (2008) 243 CLR 210, which concerned provisions of the *Trade Practices Act* regulating the telecommunications industry, including, among other things, obliging Telstra to make its "PSTN loops" (cables) available to other service providers. Telstra argued that this amounted to an acquisition of property without just terms. The Court (in a unanimous judgment) stated that

"references to statutory rights as being 'inherently susceptible of change' must not be permitted to mask the fact that "[i]t is too broad a proposition ... that the contingency of subsequent legislative modification or extinguishment removes all statutory rights and interests from the scope of s 51(xxxi)" [*Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 664]. Instead, analysis of the constitutional issues must begin from an understanding of the practical and legal operation of the legislative provisions that are in issue."

The Court went on to consider the particular history of telecommunication regulation in Australia: the fact that Telstra was formerly publicly owned and previously enjoyed a monopoly, and the fact that privatization had been accompanied by a range of measures giving competitors access to Telstra assets. Telstra, it noted, had never owned assets outside a regulatory scheme, and at the time the particular assets (the PSTN loops) were vested in Telstra, it was still a public company, owned by the Commonwealth. Notwithstanding that Telstra had subsequently been obliged to buy the assets (and notwithstanding the *obiter dicta* above), the Court concluded that "[w]hat is important is that the rights in the assets vested in Telstra were rights to use the assets in connection with the provision of telecommunications services, but those rights were always subject to a statutory access regime which permitted other carriers to use the assets in question." Thus, there was no acquisition of property requiring compensation under s 51(xxxi).

Quick and Garran's third point - that "any purpose in respect of which the Parliament has power to make laws" limits the Commonwealth to acquisitions under other heads of power - is probably accurate, but there is some uncertainty surrounding whether the Commonwealth may acquire property with only indirect reference to other heads of power. In *Mutual Pools*, Deane and Gaudron JJ stated that

"[T]he indirect operation of [s 51 (xxxii)] does not extend beyond abstracting from other grants of legislative power authority to make laws which can properly be characterized as laws with respect to the acquisition of property for a purpose in respect of which the Parliament has power to make laws. That does not, of course, mean that a law will be outside the reach of [s 51 (xxxii)] unless that is its sole or dominant character. For the purposes of s 51, a law can have a number of characters and be, at the one time, a law with respect to the subject matter of a number of different grants of legislative power..."

As we see below, the principal questions in Australian constitutional jurisprudence concerning this section have been: *what is property?* and *what is an acquisition?* The question *what are just terms?* has also been raised, but much less frequently (we consider this below).

One reason for the existence of a Takings Clause in earlier constitutions but not the Canadian Charter may be temporal. There is strong historical evidence that the drafters of the U.S. Constitution and Bill of Rights viewed the inalienable right to property as the right most at risk in our nascent republic. In contemporary terms, property holders would have been considered the leading "discrete and insular minority." As Jennifer Nedelsky (an American-trained Political Scientist at the University of Toronto) sets forth in her book, *Private Property and the Limits of American Constitutionalism* (Univ. of Chicago, 1990), the Madisonian constitutional structure of divided powers between the federal and state governments and among the legislative, executive, and judicial branches of the federal government would generally protect against the "tyranny of the majority." However, "the focus on property bred a suspicion of the people -- a permanent, fluid, majority of propertyless voters." Thus, not only did property have to be protected, as Madison provided, but the protection needed to be judicially enforceable.

It must be noted, however, that the scope of property rights intended for counter-majoritarian protection is not clear. A detailed historical analysis of pre-revolutionary land use law suggests that the framers did not intend what we now call regulatory takings to come within the ambit of the Fifth Amendment's protection. See John Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 Harv. L. Rev. 1252 (1996). A review of the legislative history of the Fifth Amendment, the original understanding of the Takings Clause, and most early judicial interpretations of the Fifth Amendment and contemporaneous state constitutional equivalents indicates that "compensation was mandated only when the government physically took property." William Treanor, *The Origins and Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L. J. 694, 798 (1985).

The relevance of this American experience in Australia is disputed. The Australian framers' keen awareness of U.S. Constitutional law and their express rejection of other individual rights makes it unlikely that the wording of s 51(xxxi) was not influenced by American Constitutional law. Justice Dixon has stated that it is based on the Fifth Amendment. *Andrews v Howell* (1941) 65 CLR 255, 282. On the other hand, there is no evidence in the constitutional debates that there was any fears of a democratic government that would redistribute property rights at will, as Nedelsky argues animates the American constitutionalizing of property. See Simon Evans, *Property and the Drafting of the Australian Constitution*, 29 Fed. L. Rev. 121, 121 (2001). Rather, the principal concerns about property protection surrounded whether property cases could be appealed to the British Privy Council. *Id.* at 138-40.

When Canadians turned to draft their Charter in 1982, the types of redistributive governmental programs considered acceptable had changed entirely from the view of 18th century politicians, and the notion that owners of property were somehow a discrete and insular minority unable to protect themselves in the political process seemed laughable. Even if s. 7 of the Charter had contained a right to property, its scope would be far narrower than the equivalent provisions of the Fifth and Fourteenth Amendments. In *Irwin Toy*, excerpted below, the Supreme Court of Canada interpreted s. 7's coverage of "everyone" as limited to real people, not corporations. Shortly after the adoption of the Fourteenth Amendment, the U.S. Supreme Court held the opposite. See *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886); *Mo. Pac. R.R. v. Nebraska*, 164 U.S. 403, 417 (holding that the takings clause applies to corporations).

Indeed, the Supreme Court of Canada found in *Manitoba Prostitution Reference*, excerpted

below, that the purpose behind the deliberate exclusion of property rights from the Canadian Charter was to avoid the undesirable line of American cases prior to the New Deal that struck down progressive social welfare legislation as an unconstitutional deprivation of economic liberty. A leading American proponent of vigorous judicial protection of property rights, Professor Richard Epstein, agrees that "the line between regulation and takings is incoherent." (*See generally*, his forward and the entire Symposium on his book, *Takings: Private Property and the Power of Eminent Domain* in 41 U. Miami L. Rev. (1986)). Epstein carefully sets out his view that, in addition to conventional takings of real property, "[a]ll regulations, all taxes, and all modifications of liability rules are takings of private property prima facie compensable by the state." *Takings* at p. 95.

Consider the case of *KAISER AETNA v. UNITED STATES*, 444 U.S. 164, 176, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979). The plaintiff secured government permission to dig channels connecting a pond it owned into a Hawaiian bay, thus converting the pond into a lagoon and eventual marina. As a "navigable water" subject to federal regulation, the lagoon thus became subject to regulation by the Army Corps of Engineers, who required public access. The Court held that such a requirement was a taking, based primarily on the plaintiff's investment-backed expectation that its marina would be exclusive. Now consider an alternative scenario: another firm spent the same amount of money as Kaiser Aetna did, in this case on designing and manufacturing boats for marinas like the one at issue in this case, when suddenly the Army Corps of Engineers issued regulations precluding boats of this type from federal navigable waters. It seems reasonably clear that there would be no compensation in this case.

II. American Constitutional Protection of Property but not Economic Regulation

MUGLER v. KANSAS

SUPREME COURT OF THE UNITED STATES
123 U.S. 623; 8 S. Ct. 273; 31 L. Ed. 205 (1887)

[Before Waite, C.J., and Miller, Field, Bradley, Harlan, Woods, Gray, Mathews, Blatchford, JJ.]

MR. JUSTICE HARLAN delivered the opinion of the court.

[Over a period from 1868-85, the Kansas legislature passed a series of statutes outlawing the manufacture of alcoholic beverages and the possession of implements of alcohol manufacture. Mugler and others were convicted under these statutes.]

The buildings and machinery constituting these breweries are of little value if not used for the purpose of manufacturing beer; that is to say, if the statutes are enforced against the defendants the value of their property will be very materially diminished.

* * *

Keeping in view these principles, as governing the relations of the judicial and legislative departments of the government with each other, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils

which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil. If, therefore, a state deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the Constitution to another department. And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.

* * *

The principle, that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the constitutions of nearly all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. * * *

It is supposed by the defendants that the doctrine for which they contend is sustained by *Pumpelly v. Green Bay Co.*, 13 Wall. 166. But in that view we do not concur. That was an action for the recovery of damages for the overflowing of the plaintiff's land by water, resulting from the construction of a dam across a river. The defence was that the dam constituted a part of the system adopted by the State for improving the navigation of Fox and Wisconsin rivers; and it was contended that as the damages of which the plaintiff complained were only the result of the improvement, under legislative sanction, of a navigable stream, he was not entitled to compensation from the State or its agents. The case, therefore, involved the question whether the overflowing of the plaintiff's land, to such an extent that it became practically unfit to be used, was a taking of property, within the meaning of the constitution of Wisconsin, providing that "the property of no person shall be taken for public use without just compensation therefor." This court said it would be a very curious and unsatisfactory result, were it held that, "if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction, without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction

upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for the invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." pp. 177, 178.

These principles have no application to the case under consideration. The question in *Pumpelly v. Green Bay Company* arose under the State's power of eminent domain; while the question now before us arises under what are, strictly, the police powers of the State, exerted for the protection of the health, morals, and safety of the people. That case, was an extreme qualification of the doctrine, universally held, that "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though these consequences may impair its use," do not constitute a taking within the meaning of the constitutional provision, or entitle the owner of such property to compensation from the State or its agents, or give him any right of action. It was a case in which there was a "permanent flooding of private property," a "physical invasion of the real estate of the private owner, and a practical ouster of his possession." His property was, in effect, required to be devoted to the use of the public, and, consequently, he was entitled to compensation.

As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not -- and, consistently with the existence and safety of organized society, cannot be -- burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in *Stone v. Mississippi*, above cited, the supervision of the public health and the public morals is a governmental power, "continuing in its nature," and "to be dealt with as the special exigencies of the moment may require;" and that, "for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." So in *Beer Co. v. Massachusetts*, 97 U.S. 32: "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer."

* * *

MR. JUSTICE FIELD delivered the following separate opinion.

[Justice Field dissented on the grounds that Kansas did not have the authority to prohibit the manufacture of alcoholic beverages for export, and that a statutory provision destroying bottles, glasses, and other implements of manufacture was not required to protect the health and morals of Kansans.]



PENNSYLVANIA COAL COMPANY v. MAHON

SUPREME COURT OF THE UNITED STATES

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

[Before Taft, C.J., and McKenna, Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, and Sanford, JJ.]

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the defendants in error to prevent the Pennsylvania Coal Company from mining under their property in such way as to remove the supports and cause a subsidence of the surface and of their house. The bill sets out a deed executed by the Coal Company in 1878, under which the plaintiffs claim. The deed conveys the surface, but in express terms reserves the right to remove all the coal under the same, and the grantee takes the premises with the risk, and waives all claim for damages that may arise from mining out the coal. But the plaintiffs say that whatever may have been the Coal Company's rights, they were taken away by an Act of Pennsylvania, approved May 27, 1921, P.L. 1198, commonly known there as the Kohler Act. The Court of Common Pleas found that if not restrained the defendant would cause the damage to prevent which the bill was brought, but denied an injunction, holding that the statute if applied to this case would be unconstitutional. On appeal the Supreme Court of the State agreed that the defendant had contract and property rights protected by the Constitution of the United States, but held that the statute was a legitimate exercise of the police power and directed a decree for the plaintiffs. A writ of error was granted bringing the case to this Court.

The statute forbids the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person. As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far.

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it 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. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case. *Rideout v. Knox*, 148 Mass. 368. But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is

not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. *Wesson v. Washburn Iron Co.*, 13 Allen, 95, 103. The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety. That could be provided for by notice. Indeed the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house. On the other hand the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land -- a very valuable estate -- and what is declared by the Court below to be a contract hitherto binding the plaintiffs. If we were called upon to deal with the plaintiffs' position alone, we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights.

It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case, "For practical purposes, the right to coal consists in the right to mine it." *Commonwealth v. Clearview Coal Co.*, 256 Pa. St. 328, 331. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does.

It is true that in *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, it was held competent for the legislature to require a pillar of coal to be left along the line of adjoining property, that, with the pillar on the other side of the line, would be a barrier sufficient for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water. But that was a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws.

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go -- and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree -- and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court. The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law but fell far short of the present act.

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

Decree reversed.

MR. JUSTICE BRANDEIS, dissenting.

The Kohler Act prohibits, under certain conditions, the mining of anthracite coal within the limits of a city in such a manner or to such an extent "as to cause the . . . subsidence of any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed." Coal in place is land; and the right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance; and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare. Whenever they do, the legislature has power to prohibit such uses without paying compensation; and the power to prohibit extends alike to the manner, the character and the purpose of the use. Are we justified in declaring that the Legislature of Pennsylvania has, in restricting the right to mine anthracite, exercised this power so arbitrarily as to violate the Fourteenth Amendment?

Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it. The State merely prevents the owner from making a use which interferes with paramount rights of the public. Whenever the use prohibited ceases to be noxious, -- as it may because of further change in local or social conditions, -- the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore.

The restriction upon the use of this property can not, of course, be lawfully imposed, unless its purpose is to protect the public. But the purpose of a restriction does not cease to be public, because incidentally some private persons may thereby receive gratuitously valuable special benefits. Thus, owners of low buildings may obtain, through statutory restrictions upon the height of neighboring structures, benefits equivalent to an easement of light and air. Furthermore, a restriction, though imposed for a public purpose, will not be lawful, unless the restriction is an appropriate means to the public end. But to keep coal in place is surely an appropriate means of preventing subsidence of the surface; and ordinarily it is the only available means. Restriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put. The liquor and the oleomargarine cases settled that. *Mugler v. Kansas*, 123 U.S. 623, 668, 669; *Powell v. Pennsylvania*, 127 U.S. 678, 682. Nor is a restriction imposed through exercise of the police power inappropriate as a means, merely because the same end might be effected through exercise of the power of eminent domain, or otherwise at public expense. Every restriction upon the height of buildings might be secured through acquiring by eminent domain the right of each owner to build above the limiting height; but it is settled that the State need not resort to that power. If by mining anthracite coal the owner would necessarily unloose poisonous gasses, I suppose no one would doubt the power of the State to prevent the mining, without buying his coal fields. And why may not the State, likewise, without paying compensation, prohibit one from digging so deep or excavating so near the surface, as to expose the community to like dangers? In the latter case, as in the former, carrying on the business would be a public nuisance.

It is said that one fact for consideration in determining whether the limits of the police power have been exceeded is the extent of the resulting diminution in value; and that here the restriction destroys existing rights of property and contract. But values are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property. The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The

sum of the rights in the parts can not be greater than the rights in the whole. The estate of an owner in land is grandiloquently described as extending ab orco usque ad coelum. But I suppose no one would contend that by selling his interest above one hundred feet from the surface he could prevent the State from limiting, by the police power, the height of structures in a city. And why should a sale of underground rights bar the State's power? For aught that appears the value of the coal kept in place by the restriction may be negligible as compared with the value of the whole property, or even as compared with that part of it which is represented by the coal remaining in place and which may be extracted despite the statute. Ordinarily a police regulation, general in operation, will not be held void as to a particular property, although proof is offered that owing to conditions peculiar to it the restriction could not reasonably be applied. But even if the particular facts are to govern, the statute should, in my opinion, be upheld in this case. For the defendant has failed to adduce any evidence from which it appears that to restrict its mining operations was an unreasonable exercise of the police power. Where the surface and the coal belong to the same person, self-interest would ordinarily prevent mining to such an extent as to cause a subsidence. It was, doubtless, for this reason that the legislature, estimating the degrees of danger, deemed statutory restriction unnecessary for the public safety under such conditions.

A prohibition of mining which causes subsidence of such structures and facilities is obviously enacted for a public purpose; and it seems, likewise, clear that mere notice of intention to mine would not in this connection secure the public safety. Yet it is said that these provisions of the act cannot be sustained as an exercise of the police power where the right to mine such coal has been reserved. The conclusion seems to rest upon the assumption that in order to justify such exercise of the police power there must be "an average reciprocity of advantage" as between the owner of the property restricted and the rest of the community; and that here such reciprocity is absent. Reciprocity of advantage is an important consideration, and may even be an essential, where the State's power is exercised for the purpose of conferring benefits upon the property of a neighborhood, as in drainage projects, or upon adjoining owners, as by party wall provisions. But where the police power is exercised, not to confer benefits upon property owners, but to protect the public from detriment and danger, there is, in my opinion, no room for considering reciprocity of advantage. There was no reciprocal advantage to the owner prohibited from using his oil tanks in *248 U.S. 498*; his brickyard, in *239 U.S. 394*; his livery stable, in *237 U.S. 171*; his billiard hall, in *225 U.S. 623*; his oleomargarine factory, in *127 U.S. 678*; his brewery, in *123 U.S. 623*; unless it be the advantage of living and doing business in a civilized community. That reciprocal advantage is given by the act to the coal operators.

Pennsylvania Coal's holding that compensation "depends upon the particular facts" has been carried over to the question of mandatory payments for social goals. In *CONNOLLY V. PENSION BENEFIT GUARANTY CORP.*, 475 U.S. 211, 106 S.Ct. 1018 (1986), the Court rejected a claim that a 1980 amendment to the Employee Retirement Income Security Act of 1974 (ERISA), requiring companies withdrawing from multi-employer pension plans to pay a fixed debt to cover future benefits, was a unconstitutional taking.

The federal law provided for a comprehensive regulation of private pension plans, including government guarantees to provide some assurance for pensioners. The amendment was designed to fix a problem with the original legislation created when some firms started withdrawing from multi-employer plans, leaving the remaining firms with more debt and more incentive to withdraw.

The Court conceded that the statute permanently deprived the employer of those financial assets necessary to satisfy the statutory obligation, but emphasized that the assets went to the pension trust, not the government. This was insufficient to be considered a taking of property.

But appellants' submission -- that such a statutory liability to a private party always constitutes an uncompensated taking prohibited by the Fifth Amendment -- if accepted, would prove too much. In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. For example, Congress may set minimum wages, control prices, or create causes of action that did not previously exist. Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.

475 U.S. at 222-23. As the Court described its precedents, *id.* at 224-25:

we have eschewed the development of any set formula for identifying a "taking" forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case. To aid in this determination, however, we have identified three factors which have "particular significance": (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Penn Central Transportation Co. [v. New York City]*, 438 U.S. 104, 124 (1978)].

The challenged pension statute was not a taking because (1) the economic impact was limited by the extent of the employer's participation in the plan and capped at 30% of net worth; (2) it was known at least at time ERISA was enacted that employers faced some liability and there was sufficient notice that pension plans were subject to significant regulation and that withdrawal may trigger additional liability; and (3) the Government neither physically invaded the assets nor permanently appropriated them for public use. Turning the oft-cited *Armstrong* test against the challenger, the Court concluded: "We are far from persuaded that fairness and justice require the public, rather than the withdrawing employers and other parties to pension plan agreements, to shoulder the responsibility for rescuing plans that are in financial trouble."

LUCAS v. SOUTH CAROLINA COASTAL COUNCIL

SUPREME COURT OF THE UNITED STATES
505 U.S. 1003; 112 S. Ct. 2886; 120 L. Ed. 2d 798 (1992)

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, O'CONNOR, and THOMAS, JJ., joined. KENNEDY, J., filed an opinion concurring in the judgment. BLACKMUN, and STEVENS, JJ., filed dissenting opinions. SOUTER, J., filed a separate statement.

JUSTICE SCALIA delivered the opinion of the Court.

[In 1986, petitioner Lucas bought two residential lots on a South Carolina barrier island, intending to build single-family homes such as those on the immediately adjacent parcels. At that time, Lucas's lots were not subject to the State's coastal zone building permit requirements. In 1988, however, the state legislature enacted the Beachfront Management Act, which barred Lucas from erecting any permanent habitable structures on his parcels. He filed suit against respondent state agency, contending that, even though the Act may have been a lawful exercise of the State's police power, the ban on construction deprived him of all "economically viable use" of his property and therefore effected a "taking" under the Fifth and Fourteenth Amendments that required the payment of just compensation. The state trial court agreed, finding that the ban rendered Lucas's parcels "valueless," and entered an award exceeding \$1.2

million. In reversing, the State Supreme Court, noting that Lucas did not challenge the legislature's "uncontested . . . findings" that new construction in the coastal zone threatened a valuable public resource, ruled that, under *Mugler v. Kansas* and its progeny, when a regulation is designed to prevent "harmful or noxious uses" of property akin to public nuisances, no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value. *NOTE*: that many scholars have suggested that these findings were in error and that Lucas' retained significant economic value from his land.]

III

A

Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 67 L. Ed. 322, 43 S. Ct. 158 (1922), it was generally thought that the Takings Clause reached only a "direct appropriation" of property, *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551, 20 L. Ed. 287 (1871), or the functional equivalent of a "practical ouster of [the owner's] possession," *Transportation Co. v. Chicago*, 99 U.S. 635, 642, 25 L. Ed. 336 (1879). Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 U.S. at 414-415. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared." *Id.*, at 415. These considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Ibid.*

Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "set formula" for determining how far is too far, preferring to "engage in . . . essentially ad hoc, factual inquiries." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978) (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962)). See Epstein, Takings: Descent and Resurrection, 1987 S. Ct. Rev. 1, 4. We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. [First, compensation is required whenever government compels the property owner to suffer a physical "invasion" of his property, no matter how minute. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (compensation for law requiring landlords to allow 1 1/2 cubic feet for cable facilities). Second, compensation is required] where regulation denies all economically beneficial or productive use of land. ***⁷

⁷ Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme -- and, we think, unsupportable -- view of the relevant calculus, see *Penn Central Transportation Co. v. New York City*, 42 N.Y.2d 324, 333-334, 366 N.E.2d 1271, 1276-1277, 397 N.Y.S.2d 914 (1977), aff'd, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978), where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the takings claimant's other holdings in the vicinity.) Unsurprisingly, this uncertainty regarding the composition of the

We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. See *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. at 652 (dissenting opinion). "For what is the land but the profits thereof[?]" 1 E. Coke, Institutes, ch. 1, § 1 (1st Am. ed. 1812). Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," *Penn Central Transportation Co.*, [*1018] 438 U.S. at 124, in a manner that secures an "average reciprocity of advantage" to everyone concerned, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415. And the *functional* basis for permitting the government, by regulation, to affect property values without compensation -- that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *id.*, at 413 -- does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use -- typically, as here, by requiring land to be left substantially in its natural state -- carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

B

It is correct that many of our prior opinions have suggested that "harmful or noxious uses" of property may be proscribed by government regulation without the requirement of compensation. For a number of reasons, however, we think the South Carolina Supreme Court was too quick to conclude that that principle decides the present case. The "harmful or noxious uses" principle was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate -- a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power. [Over time, the Court's analysis evolved to allow land use regulations that "substantially advanced state interests."]

*** Whether Lucas's construction of single-family residences on his parcels should be described as bringing "harm" to South Carolina's adjacent ecological resources thus depends principally upon whether the describer believes that the State's use interest in nurturing those resources is so important that *any* competing adjacent use must yield.

denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. Compare *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414, 67 L. Ed. 322, 43 S. Ct. 158 (1922) (law restricting subsurface extraction of coal held to effect a taking), with *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497-502, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987) (nearly identical law held not to effect a taking); see also *id.*, at 515-520 (REHNQUIST, C. J., dissenting); Rose, *Mahon* Reconstructed: Why the Takings Issue is Still a Muddle, 57 S. Cal. L. Rev. 561, 566-569 (1984). The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property -- *i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.

[The majority therefore rejected the South Carolina Supreme Court's effort to preclude compensation by affirming the legislature's finding that Lucas' construction of homes was a noxious use.] If it were, departure would virtually always be allowed. The South Carolina Supreme Court's approach would essentially nullify *Mahon's* affirmation of limits to the noncompensable exercise of the police power. Our cases provide no support for this: None of them that employed the logic of "harmful use" prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land.

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "as long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). See *Andrus v. Allard*, 444 U.S. 51, 66-67, 62 L. Ed. 2d 210, 100 S. Ct. 318 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.¹⁵

Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 426 -- though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title. Compare *Scranton v. Wheeler*, 179 U.S. 141, 163, 45 L. Ed. 126, 21 S. Ct. 48 (1900) (interests of "riparian owner in the submerged lands . . . bordering on a public navigable water"

¹⁵ After accusing us of "launching a missile to kill a mouse," *post*, 505 U.S. at 1036, JUSTICE BLACKMUN expends a good deal of throw-weight of his own upon a noncombatant, arguing that our description of the "understanding" of land ownership that informs the Takings Clause is not supported by early American experience. That is largely true, but entirely irrelevant. The practices of the States *prior* to incorporation of the Takings and Just Compensation Clauses, see *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897) -- which, as JUSTICE BLACKMUN acknowledges, occasionally included *outright physical appropriation* of land without compensation, see *post*, 505 U.S. at 1056 -- were out of accord with *any* plausible interpretation of those provisions. JUSTICE BLACKMUN is correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all, see *post*, 505 U.S. at 1057-1058, and n.23, but even he does not suggest (explicitly, at least) that we renounce the Court's contrary conclusion in *Mahon*. Since the text of the Clause can be read to encompass regulatory as well as physical deprivations (in contrast to the text originally proposed by Madison, see Speech Proposing Bill of Rights (June 8, 1789), in 12 J. Madison, *The Papers of James Madison* 201 (C. Hobson, R. Rutland, W. Rachal, & J. Sisson ed. 1979) ("No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation"), we decline to do so as well.

held subject to Government's navigational servitude), with *Kaiser Aetna v. United States*, 444 U.S. at 178-180 (imposition of navigational servitude on marina created and rendered navigable at private expense held to constitute a taking). We believe similar treatment must be accorded confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts -- by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

On this analysis, the owner of a lakebed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit. See Michelman, Property, Utility, and Fairness, Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1239-1241 (1967). In light of our traditional resort to "existing rules or understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth and Fourteenth Amendments, this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional. When, however, a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.

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

It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the "essential use" of land, *Curtin v. Benson*, 222 U.S. 78, 86, 56 L. Ed. 102, 32 S. Ct. 31 (1911). The question, however, is one of state law to be dealt with on remand. We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*. As we have said, a "State, by *ipse dixit*, may not transform private property into public property without compensation" *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S.

155, 164, 66 L. Ed. 2d 358, 101 S. Ct. 446 (1980). Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can [*1032] the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.¹⁸

JUSTICE KENNEDY, concurring in the judgment. [Opinion omitted.]

JUSTICE BLACKMUN, dissenting.

If the state legislature is correct that the prohibition on building in front of the setback line prevents serious harm, then, under this Court's prior cases, the Act is constitutional. "Long ago it was recognized that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community, and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce [*1040] it." *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491-492, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987). The Court consistently has upheld regulations imposed to arrest a significant threat to the common welfare, whatever their economic effect on the owner.

*** The Court creates its new takings jurisprudence based on the trial court's finding that the property had lost all economic value. This finding is almost certainly erroneous. Petitioner still can enjoy other attributes of ownership, such as the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979). Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer. State courts frequently have recognized that land has economic value where the only residual economic uses are recreation or camping. Petitioner also retains the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house.

Ultimately even the Court cannot embrace the full implications of its *per se* rule: It eventually agrees that there cannot be a categorical rule for a taking based on economic value that wholly disregards the public need asserted. Instead, the Court decides that it will permit a State to regulate all economic value only if the State prohibits uses that would not be permitted under "background principles of nuisance and property law."¹⁵

¹⁸ JUSTICE BLACKMUN decries our reliance on background nuisance principles at least in part because he believes those principles to be as manipulable as we find the "harm prevention"/"benefit conferral" dichotomy. There is no doubt some leeway in a court's interpretation of what existing state law permits -- but not remotely as much, we think, as in a legislative crafting of the reasons for its confiscatory regulation. We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.

¹⁵ Although it refers to state nuisance and property law, the Court apparently does not mean just any state nuisance and property law. Public nuisance was first a common-law creation, see Newark, *The Boundaries of Nuisance*, 65 L. Q. Rev. 480, 482 (1949) (attributing development of nuisance to 1535), but by the 1800's in both the United States and England, legislatures had the power to define what is a public nuisance, and particular uses often have been selectively targeted. See Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 999-1000 (1966); J. Stephen, *A General View of the Criminal Law of England* 105-107 (2d ed. 1890). The Court's references to "common-law" background principles, however, indicate that legislative determinations do not constitute "state nuisance and property law" for the Court.

Until today, the Court explicitly had rejected the contention that the government's power to act without paying compensation turns on whether the prohibited activity is a common-law nuisance.¹⁶ The brewery closed in *Mugler* itself was not a common-law nuisance, and the Court specifically stated that it was the role of the legislature to determine [*1053] what measures would be appropriate for the protection of public health and safety. See 123 U.S. at 661. ***

Even more perplexing, however, is the Court's reliance on common-law principles of nuisance in its quest for a valuefree takings jurisprudence. In determining what is a nuisance at common law, state courts make exactly the decision that the Court finds so troubling when made by the South Carolina General Assembly today: They determine whether the use is harmful. Common-law public and private nuisance law is simply a determination whether a particular use causes harm. See Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997 (1966) ("*Nuisance* is a French word which means nothing more than harm"). There is nothing magical in the reasoning of judges long dead. They determined a harm in the same way as state judges and legislatures do today. If judges in the 18th and 19th centuries can distinguish a harm from a benefit, why not judges in the 20th century, and if judges can, why not legislators? There simply is no reason to believe that new interpretations of the hoary common-law nuisance doctrine will be particularly "objective" or "value free." ***

Finally, the Court justifies its new rule that the legislature may not deprive a property owner of the only economically valuable use of his land, even if the legislature finds it to be a harmful use, because such action is not part of the "long recognized" "understandings of our citizens." *Ante*, 505 U.S. at 1027. These "understandings" permit such regulation only if the use is a nuisance under the common law. Any other course is "inconsistent with the historical compact recorded in the Takings Clause." *Ante*, 505 U.S. at 1028. It is not clear from the Court's opinion where our "historical compact" or "citizens' understanding" comes from, but it does not appear to be history. [Here, the dissent argued that the pre-constitutional concept of property permitted extensive regulation, that pre-constitutional states frequently regulated acts deemed by the legislature to be harmful, and cited a scholar's conclusion that "Until the end of the nineteenth century . . . jurists held that [*1058] the constitution protected possession only, and not value." Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. Cal. L. Rev. 1, 76 (1986).]

JUSTICE STEVENS, dissenting.

Moreover, because of the elastic nature of property rights, the Court's new rule will also prove unsound in practice. In response to the rule, courts may define "property" broadly and only rarely find regulations to effect total takings. This is the approach the Court itself adopts in its revisionist reading of venerable precedents. We are told that -- notwithstanding the Court's findings to the contrary in each case -- the brewery in *Mugler*, the brickyard in *Hadacheck*, and the gravel pit in *Goldblatt* all could be put to

¹⁶ Also, until today the fact that the regulation prohibited uses that were lawful at the time the owner purchased did not determine the constitutional question. The brewery, the brickyard, the cedar trees, and the gravel pit were all perfectly legitimate uses prior to the passage of the regulation. See *Mugler v. Kansas*, 123 U.S. at 654; *Hadacheck v. Sebastian*, 239 U.S. 394, 60 L. Ed. 348, 36 S. Ct. 143 (1915); *Miller*, 276 U.S. at 272; *Goldblatt v. Hempstead*, 369 U.S. 590, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962). This Court explicitly acknowledged in *Hadacheck* that "[a] vested interest cannot be asserted against [the police power] because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions." 239 U.S. at 410 (citation omitted).

"other uses" and that, therefore, those cases did not involve total regulatory takings.³

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

The Court's holding today effectively freezes the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property. Until today, I had thought that we had long abandoned this approach to constitutional law. More than a century ago we recognized that "the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Munn v. Illinois*, 94 U.S. 113, 134, 24 L. Ed. 77 (1877). As Justice Marshall observed about a position similar to that adopted by the Court today:

"If accepted, that claim would represent a return to the era of *Lochner v. New York*, 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539 (1905), when common-law rights were also found immune from revision by State or Federal Government. Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstance. The Due Process Clause does not require such a result." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93, 64 L. Ed. 2d 741, 100 S. Ct. 2035 (1980) (concurring opinion).

Arresting the development of the common law is not only a departure from our prior decisions; it is also profoundly unwise. The human condition is one of constant learning and evolution -- both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners. Thus, when the Nation came to understand that slavery was morally wrong and mandated the emancipation of all slaves, it, in effect, redefined "property." On a lesser scale, our ongoing self-education produces similar changes in the rights of property owners: New appreciation of the significance of endangered species, see, e. g., *Andrus v. Allard*, 444 U.S. 51, 62 L. Ed. 2d 210, 100 S. Ct. 318 (1979); the importance of wetlands, see, e. g., 16 U. S. C. § 3801 *et seq.*; and the vulnerability of coastal lands, see, e. g., 16 U. S. C. § 1451 *et seq.*, shapes our evolving understandings of property rights.

³ Of course, the same could easily be said in this case: Lucas may put his land to "other uses" -- fishing or camping, for example -- or may sell his land to his neighbors as a buffer. In either event, his land is far from "valueless."

This highlights a fundamental weakness in the Court's analysis: its failure to explain why only the impairment of "economically beneficial or productive use," *ante*, 505 U.S. at 1015 (emphasis added), of property is relevant in takings analysis. I should think that a regulation arbitrarily prohibiting an owner from continuing to use her property for bird watching or sunbathing might constitute a taking under some circumstances; and, conversely, that such uses are of value to the owner. Yet the Court offers no basis for its assumption that the only uses of property cognizable under the Constitution are *developmental* uses.

The Just Compensation Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49. Accordingly, one of the central concerns of our takings jurisprudence is "preventing the public from loading upon one individual more than his just share of the burdens of government." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893). We have, therefore, in our takings law frequently looked to the *generality* of a regulation of property.⁷

[Thus, Stevens, J. agreed that so-called "developmental exactions" require close scrutiny because of "the risk that particular landowners might 'be singled out to bear the burden' of a broader problem not of his own making." Likewise, a diminution in value caused by a zoning regulation is far less likely to constitute a taking if it is part of a general and comprehensive land-use plan, while "spot zoning" is far more likely to constitute a taking.]

The presumption that a permanent physical occupation, no matter how slight, effects a taking is wholly consistent with this principle. A physical taking entails a certain amount of "singling out." Consistent with this principle, physical occupations by third parties are more likely to effect takings than other physical occupations. Thus, a regulation requiring the installation of a junction box owned by a third party is more troubling than a regulation requiring the installation of sprinklers or smoke detectors; just as an order granting third parties access to a marina, *Kaiser Aetna v. United States*, 444 U.S. 164, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979), is more troubling than an order requiring the placement of safety buoys in the marina.

In considering Lucas' claim, the generality of the Beachfront Management Act is significant. The Act does not target particular landowners, but rather regulates the use of the coastline of the entire State. ***

Statement of JUSTICE SOUTER.

I would dismiss the writ of certiorari in this case as having been granted improvidently. ***



A case illustrating the active judicial scrutiny of American land use regulation is *DOLAN v. CITY OF TIGARD*, 512 U.S. 374 (1994). The case involved municipal approval of Dolan's building permit only on condition that a portion of her property be dedicated for flood control and traffic improvements, specifically part of a bikeway along the flood plain on which she was otherwise prohibited from building. Her business expansion proposal would have created more paved concrete, thus increasing water run-off (this is Oregon, where it rains a LOT) into the nearby creek, as well as increasing downtown traffic congestion.

The Court began its analysis by stating that an outright requirement that Dolan dedicate

⁷ This principle of generality is well rooted in our broader understandings of the Constitution as designed in part to control the "mischiefs of faction." See *The Federalist* No. 10, p. 43 (G. Wills ed. 1982) (J. Madison).

An analogous concern arises in First Amendment law. There we have recognized that an individual's rights are not violated when his religious practices are prohibited under a neutral law of general applicability. ***

If such a neutral law of general applicability may severely burden constitutionally protected interests in liberty, a comparable burden on property owners should not be considered unreasonably onerous.

an easement would require compensation, because the easement "would deprive petitioner of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979)." Second, the Court distinguished this case from ordinary zoning, because it took place in an adjudicative context of her own parcel and because it required public access.

The key question was how closely federal courts would scrutinize the "nexus" between the regulation of land and the social problem caused by the landowner. In *Nollan v. California Coastal Comm'n*, 483 U.S. 825(1987), the California Coastal Commission demanded a lateral public easement across the Nollans' beachfront lot, designed to connect two public beaches separated by the Nollans' property, in exchange for a permit to demolish an existing bungalow and replace it with a three-bedroom house. Although the Court found that the Commission had a legitimate interest in protecting visual access to the ocean, which might have justified requiring the Nollans to provide a viewing spot on their property, the Commission's condition lacked any nexus to this legitimate governmental purpose. This "left the Coastal Commission in the position of simply trying to obtain an easement through gimmickry, which converted a valid regulation of land use into "an out-and-out plan of extortion."

Although the Court conceded that the permit conditions imposed by the town were not gimmicks but rather there was a nexus between the petitioner's development and the preventing of flooding along the creek and reduction of traffic congestion, the majority then considered the degree of appropriate judicial scrutiny. The majority rejected the very deferential standard some states had adopted in determining the relationship between required dedications and the proposed development: "We think this standard is too lax to adequately protect petitioner's right to just compensation if her property is taken for a public purpose." On the other hand, the majority concluded that the Federal Constitution did not require "exacting scrutiny" adopted by states such as Illinois, which require that conditions be "specific and uniquely attributable" to the property development.

We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

The court rejected the dissent's claim that the city was simply engaging in "a species of business regulation" warranting deferential judicial scrutiny: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." On the facts, the majority held that requiring Dolan to keep the floodplain undeveloped was reasonable, but requiring access for bikes was not. And, while "no precise mathematical calculation is required," the majority faulted the city

for failing to provide any quantifiable evidence to support its conclusion that the pathways related to the increased traffic generated by the building expansion.

Justice Stevens, joined by Justices Blackmun and Ginsburg, dissented. The dissent argues that there was the requisite "essential nexus" required by *Nollan* between the city's conditions and the increased risk to flood and traffic congestion caused by the plaintiff's development. Thus, the dissent observed, the city would have been justified in completely denying any permit. Next, the dissent's analysis of the state court decisions concluded that there is nothing akin to the rough proportionality requirement created by the majority. Finally, the majority is faulted for failing to consider the economic benefits to the plaintiff.

In their view, the majority's "narrow focus on one strand in the property owner's bundle of rights is particularly misguided in a case involving the development of commercial property." The dissent reasoned that commercial owners are interested in profits, not "defending hearth and home against the king's intrusion" (citing Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for A Rationale*, 52 Cornell L. Q. 871, 923 (1967)). There was no evidence that the town's conditions would have "any impact at all on the value or profitability of [Dolan's] development." The dissent accused the majority of a "resurrection of a species of substantive due process analysis that it firmly rejected decades ago."

In our changing world one thing is certain: uncertainty will characterize predictions about the impact of new urban developments on the risks of floods, earthquakes, traffic congestion, or environmental harms. When there is doubt concerning the magnitude of those impacts, the public interest in averting them must outweigh the private interest of the commercial entrepreneur. If the government can demonstrate that the conditions it has imposed in a land use permit are rational, impartial and conducive to fulfilling the aims of a valid land use plan, a strong presumption of validity should attach to those conditions. The burden of demonstrating that those conditions have unreasonably impaired the economic value of the proposed improvement belongs squarely on the shoulders of the party challenging the state action's constitutionality. That allocation of burdens has served us well in the past. The Court has stumbled badly today by reversing it.

A shifting Supreme Court majority held in *TAHOE-SIERRA PRESERVATION COUNCIL, INC. V. TAHOE REGIONAL PLANNING AGENCY*, 122 S.Ct. 1465 (2002), that a 32-month deprivation of all economic use of land during a planning moratorium was not a taking requiring compensation. Faced with a growth of algae caused by increased development that threatened the status of Lake Tahoe as an environmental treasure, a bi-state agency imposed a slow-growth plan that effectively prevented development in the most environmentally sensitive areas. Developers sought compensation for the moratorium period.

The Court first reviewed its precedents. When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary and no matter how small the occupation. But a government regulation that merely prohibits landlords from evicting tenants unwilling to pay a higher rent, that bans certain

private uses of a portion of an owner's property, or that forbids the private use of certain airspace, does not constitute a categorical taking. "The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions."

Noting that the Court had never provided a standard for determining when, in Justice Holmes' words, a regulation went "too far" and required compensation, the Court observed that *Pennsylvania Coal* did reject the view expressed in Justice Brandeis' dissent that no taking occurred as long as the property remained in the possession of the owner. The Court adhered to the *Penn Central* multi-prong test, rather than adopt a categorical rule that a temporary deprivation of all economic use constituted a taking.

In an otherwise complicated opinion producing a sharply divided court, the justices unanimously agreed in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 119 S. Ct. 1624 (1999), that the *Dolan* test of rough-proportionality applied only to exactions and not to deprivation of value based on zoning decisions.

II. Just Terms and the Australian Constitution

As noted, the principal questions asked by the High Court over the years concerning the scope of s 51 (xxxii) have been: *what is property?* and *what is an acquisition?* The answer to the first was settled in very broad terms. In *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, Starke J stated that property "extends to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and *choses in action*." The definition of property has been extended further, to include even common law causes of action (*Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297).

Regarding the second question, the Court has held that an acquisition must include some benefit gained by the Commonwealth. But what is acquired does not have to be the same as that which is lost. *NEWCREST MINING (WA) LTD V COMMONWEALTH* (1997) 190 CLR 513 concerned Commonwealth laws that extended the boundaries of Kakadu National Park (in the Northern Territory), combined with the *Conservation Amendment Act* 1987 (Cth) which prohibited mining in the Park. The result was that certain mining tenements operated by Newcrest were now situated on protected land, and the company could not continue mining. Newcrest challenged the laws, arguing that they amounted to an acquisition of property without just terms. Despite the fact that the Commonwealth did not "acquire" the corresponding right to mine, the High Court held that there had been an acquisition. The law, furthermore, was not based on a statutory scheme, but constituted a modification of the Commonwealth's pre-existing common law (Crown) title to the land. As Justice Gummow explained it:

"There is no reason why the identifiable benefit or advantage relating to the ownership or use of property, which is acquired, should correspond precisely to that which was taken. This is not a case in the category considered in *Health Insurance Commission v Peverill* where what was in issue were rights derived purely from statute and of their very nature inherently susceptible to the variations or extinguishment which had come to pass...It is not correct, for the purposes of

the application of s 51 (xxxi) to identify the property held by Newcrest as no more than a statutory privilege under a licensing system ... It is true, as [the Commonwealth] submit[s], that the mining tenements were not, in terms, extinguished. It is true also that Kakadu extended only 1,000 m beneath the surface. But, on the surface and to that depth... [the Act] forbade the carrying out of operations for the recovery of minerals. The vesting in the Commonwealth of the minerals to that depth and the vesting of the surface and balance of the relevant segments of the subterranean land in the [Commonwealth] had the effect, as a legal and practical matter, of denying to Newcrest the exercise of its rights under the mining tenements."

Much s 51 (xxxi) jurisprudence has concerned the type of acquisition that - notwithstanding meeting the definition of property and satisfying the test of "acquisition" - does not attract just terms. As we saw above, property rights that are conferred purely by statute fall into this category (albeit with some unspecified possible exceptions, as noted in *Telstra*). Similarly, fines or other penalties, including forfeiture of property, as punishment for Commonwealth offences are free of s 51 (xxxi). Some acquisitions of property are made under heads of power that, of their nature, inherently fall outside the provision. For example, the taxation power (s 51 (ii)) allows the Commonwealth compulsorily to acquire (economic) property, but it would be absurd to argue that compensation must be paid to tax-payers. *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 concerned a Commonwealth law made under the "Copyrights, Patents... and Trade Marks" power (s 51 (xviii)), regulating electronic circuits, such as those used in video games. The High Court rejected Nintendo's claim for compensation:

"It is of the essence of that grant legislative power that it authorizes the making of laws which create, confer, and provide for the enforcement of intellectual property rights ... It is of the nature of such laws that they ...they conversely limit and detract from the proprietary rights which would otherwise be enjoyed by the owners of affected property. Inevitably, such laws may, at their commencement, impact upon existing proprietary rights. To the extent that such laws involve an acquisition of property from those adversely affected by the intellectual property rights which they create and confer, the grant of legislative power contained in s 51 (xviii) manifests a contrary intention which precludes the operation of s 51 (xxxi)."

The third question - what are "just terms"? - has received relatively little attention. The "justness" of compensation offered by the Commonwealth has only occasionally been at issue. *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269 concerned the amount of compensation offered for a department store that had been occupied during World War II for Defence Force purposes, and then permanently acquired at the end of the war. The question was, among others, whether a compensation scheme based on a calculation of the market rate prior to the date of acquisition was "just." Justice Dixon expressed "justness" in terms of fairness, asking "whether the law amounts to a true attempt to provide fair and just standards of compensating or rehabilitating the individual considered as an owner of property, fair and just as between him and the government of the country." (He, and the majority, concluded that the law did not breach s 51 (xxxi).)

Conflict between the goals of environmental protection and the protection of property rights (or compensation for property acquired in the course of protecting the environment) has not featured significantly in Australian constitutional jurisprudence. For the most part, environmental protection laws are a matter for state legislatures. (Recall that, while the Fourteenth Amendment applies the Takings Clause to American States, the provisions of s 51(xxvi) do *not* apply to Australian states.) However, there are cases where the

Commonwealth has drawn on heads of power other than s 51 (xxxi) in the pursuit of environmental protection. The *Tasmanian Dam case - Commonwealth v Tasmania* (1983) 158 CLR 1 - concerned the *World Heritage Properties Conservation Act 1983* (Cth) which had the effect of prohibiting the construction of a dam for a state hydro-electricity scheme on the Franklin River in a wilderness region of Tasmania. In passing this law, the Commonwealth relied principally upon the External Affairs power (s 51 xxix), giving effect to the UN World Heritage Convention, to which Australia was a signatory, and which applied to the relevant area of land in Tasmania. (It also drew on the Corporations power, s 51 (xx).) The Act did not offer direct compensation, but involved a scheme for making claims for compensation, which included a waiting period and a Commission of Inquiry for claims above a certain amount. The majority on the High Court did not rule on the "justness" of this scheme, holding that the law did not involve an acquisition of property, but merely prohibited the use of land for a specified purpose, without the transfer of any proprietary rights (or "acquisition").¹ In so ruling, Justice Mason specifically found that American Takings jurisprudence had "no direct relevance" to the interpretation of s 51 (xxxi) (at 144). He went on to contrast the purposes of the constitutional provisions, distinguishing the *Armstrong* focus on appropriate allocation of costs of regulation with s 51 (xxxi)'s focus on "acquisition of property for purposes of the Commonwealth."

In *Murphores Inc v Commonwealth* (1976) 136 CLR 1, the Commonwealth drew on the trade and commerce power (s 51 (i)) to prohibit the export of mineral sand extracted by the Murphores company from the wilderness sand island off the Queensland coast, Fraser Island. The Commonwealth's undisguised purpose was to protect the island's environment. The High Court held that the purpose - which was not, of itself, trade and commerce - was irrelevant, so long as the law could fairly be characterised as a law respecting trade and commerce. No attempt was made to argue a s 51 (xxxi) case, however, probably because the law would not have met the criteria for an acquisition.

As all of the above suggests, the High Court has tended to proceed on a case-by-case basis in its interpretation of s 51 (xxxi). No single normative principle has emerged from its jurisprudence. The provision, however, has had a life of its own in other quarters - as the "star" of a movie, *The Castle*, a 1997 comedy about a family whose house is about to be compulsorily acquired by the Commonwealth for the extension of an airport runway. The family protest - successfully in the end - that *no* money, indeed *nothing*, could serve as "just terms" to compensate for the lost of their modest home. While the conclusion is jurisprudentially doubtful, accurate reference is made to real case law in the depiction of High Court argument. The film - perhaps the first to take a constitutional section as its core - has given rise to a number of popular humorous expressions, including, notably "*The Vibe*" (used by a character in the film, a hopelessly inadequate lawyer, who cannot read Roman

¹ Justice Deane alone considered the scheme in the light of s 51 (xxxi), and concluded that, while there is nothing "intrinsically unfair in the Parliament providing a procedure for determining the quantum of compensation outside the ordinary judicial process, [t]here is... something intrinsically unfair in a procedure which, in effect, ensures that, unless a claimant agrees to accept the terms which the Commonwealth is prepared to offer, he will be forced to wait years before he is allowed even access to a court, tribunal or other body which can authoritatively determine the amount of the compensation which the Commonwealth must pay ... [This] is quite unacceptable and unfair according to the ordinary standards of ...fair dealing..." (at 600).

numerals and therefore cannot refer in argument to s 51 (xxxi). "The Vibe" refers to the principles of fairness and decency, supposedly inherent in the Constitution (see [http://en.wikipedia.org/wiki/The_Castle_\(film\)](http://en.wikipedia.org/wiki/The_Castle_(film))). The Castle is not only celebrated in Australian popular culture, it has its own entry in *The Oxford Companion to the High Court of Australia* (OUP 2001).²

III. Rejection of Canadian Constitutional Protection for Property

The Charter's framers "clearly wanted to avoid a re-enactment of the extremes that had accompanied early American substantive review of the content of legislation." Jean McBean, "The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights" (1988), 26 Alta. L. Rev. 548. Opposition from several provincial premiers and the leadership of the New Democratic Party led Pierre Trudeau's Liberal government to oppose efforts by the Conservative Party to include in the Charter a right to property. The principal provincial opposition came from those who feared judicial attacks on zoning legislation and limitations on land ownership by non-residents (apparently a significant problem on tiny Prince Edward Island). The NDP opposition was based on its concern with the possible inhibition on public ownership of resource-based industries.

Post-patriation academic work echoes the original intent to prevent the Charter from introducing *Lochner*-like close scrutiny of economic regulation in Canada. As Dean Peter Hogg explained, the principal normative objection to constitutionalizing a right to property is its effect on society's ability to regulate business:

Most forms of regulation impose costs on those who are regulated, and it would be intolerably costly to compensate them. Moreover, much regulation has a redistributive purpose: it is designed to reduce the rights of one group (manufacturers, employers, for example) and increase the rights of another (consumers, employees, for example). A compensation regime would work at cross-purposes to the purpose of the regulation. 1 *Constitutional Law of Canada* (Toronto: Carswell, Looseleaf edition) §28.5, at p.28-10.

Professor Joel Bakan observes that many of today's statutes reflect efforts "to provide at least some limited safeguards against the most egregious abuses by individuals and corporations of the power they derive from their property rights." "Against Constitutional Property Rights," in *Constitutional Politics* (D. Cameron & M. Smith, eds., Toronto: Lorimer, 1992). Bakan suggests that Canadians should be particularly risk-averse to adding an American-style right to property, because of the different social and political framework of the two countries:

... the Canadian state has traditionally been more "interventionist" in the market than has its American counterpart. Parliament and the provincial legislatures have developed over the years a wide range of social programmes and regulation (often at the expense of private property rights) that have no parallel in the United States. Would such programmes have

² By happy coincidence, the actor Eric Bana, who plays a member of the family, is the real-life son-in-law of the (now former) Chief Justice of the High Court, Murray Gleeson.

passed constitutional muster in the United States? We will never know because there have been no attempts to introduce them in the United States. *Id.* at 125.

IRWIN TOY LTD. v. QUEBEC (ATTORNEY GENERAL)

**SUPREME COURT OF CANADA
[1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577**

[Before Dickson C.J. and Beetz, McIntyre, Lamer, and Wilson JJ.]

THE CHIEF JUSTICE AND LAMER AND WILSON JJ.--

[This decision, also excerpted above in Chapter 3, concerned the constitutionality of a Quebec statute strictly regulating television advertising directed at younger children. In the prior excerpt, the Court explained why the statute constituted a reasonable limit on the right of free expression.]

VIII--Whether ss. 248 and 249 Violate s. 7 of the Canadian *Charter of Rights and Freedoms*

[The plaintiffs further alleged that the statute violated s. 7 of the Charter because the imposition of penal sanctions require an even greater degree of certainty than required by the right of free expression and the statute was too vague to meet this standard.]

In order to put forward a s. 7 argument in a case of this kind where the officers of the corporation are not named as parties to the proceedings, the corporation would have to urge that its own life, liberty or security of the person was being deprived in a manner not in accordance with the principles of fundamental justice. In our opinion, a corporation cannot avail itself of the protection offered by s. 7 of the Charter. First, we would have to conceive of a manner in which a corporation could be deprived of its "life, liberty or security of the person". We have already noted that it is nonsensical to speak of a corporation being put in jail. To say that bankruptcy and winding up proceedings engage s. 7 would stretch the meaning of the right to life beyond recognition. The only remaining argument is that corporations are protected against deprivations of some sort of "economic liberty".

There are several reasons why we are of the view that this argument can not succeed. It is useful to reproduce s. 7, which reads as follows:

"7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

What is immediately striking about this section is the inclusion of "security of the person" as opposed to "property". This stands in contrast to the classic liberal formulation, adopted, for example, in the Fifth and Fourteenth Amendments in the American Bill of Rights, which provide that no person shall be deprived "of life, liberty or property, without due process of law". The intentional exclusion of property from s. 7, and the substitution therefor of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within "security of the person". Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and

shelter, to traditional property--contract rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights. In so stating, we find the second effect of the inclusion of "security of the person" to be that a corporation's economic rights find no constitutional protection in that section.

That is, read as a whole, it appears to us that this section was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved; only human beings can enjoy these rights. "Everyone" then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings. In this regard, the case of *[R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 344]* is of no application. There are no penal proceedings pending in the case at hand, so the principle articulated in *Big M Drug Mart* is not involved.

[The reasons of Beetz and McIntyre JJ., which notes agreement with majority on all points -- including the analysis of s. 7 -- except for the conclusion that the legislation is a reasonable limit on free expression -- is omitted.]



REFERENCE RE SS. 193 AND 195.1(1)(C) OF THE CRIMINAL CODE (MAN.)
"The Prostitution Reference"

SUPREME COURT OF CANADA
[1990] 1 S.C.R. 1123, 56 C.C.C. (3d) 65

[Before Dickson C.J. and Lamer, Wilson, La Forest, L'Heureux-Dube and Sopinka JJ. **Ed. note:** For purposes of clarity, the separate opinion of Lamer, J., is reproduced first, followed by the plurality opinion by the Chief Justice. The case is a reference by the Manitoba government concerning the constitutionality of Criminal Code provisions relating to prostitution. The relevant statutes prohibit "common bawdy-houses" or impedes traffic to solicit prostitution. Simple prostitution itself is not a violation of the *Criminal Code*.]

LAMER J.--

V. "Void for Vagueness" and s. 7 of the Charter

[Justice Lamer adopted an approach similar to the "void for vagueness" doctrine in the United States in holding that vague criminal legislation is inconsistent with s. 7. He then explained why in his opinion this statute was not unconstitutionally vague.]

VI. Economic Liberty and s. 7 of the Charter

This case raises an important issue that has been recurring in our jurisprudence under the Charter. Simply stated, the issue centers on the scope of s. 7 of the Charter, more specifically the guarantees of life, liberty and security of the person. The appellants argue that the impugned provisions infringe prostitutes' right to liberty in not allowing them to exercise their chosen profession, and their right to security of the person, in not permitting them to exercise their profession in order to provide the basic necessities of life. I should like to point out at the outset something that may seem obvious to some, or which may come as a surprise to others, but which in any event needs to be kept in mind throughout:

prostitution is not illegal in Canada. We find ourselves in an anomalous, some would say bizarre, situation where almost everything related to prostitution has been regulated by the criminal law except the transaction itself. The appellants' argument then, more precisely stated, is that in criminalizing so many activities surrounding the act itself, Parliament has made prostitution *de facto* illegal if not *de jure* illegal.

I now turn to the issue of interpreting the meaning of the rights guaranteed by s. 7 of the Charter, more specifically the right to liberty and security of the person. The appellants in the case at bar rely on an expansive interpretation of the rights guaranteed by s. 7 to argue that carrying on a lawful occupation is protected by the right to liberty. As a basis for this view the following summary of the position taken by the English philosopher John Stuart Mill is relied upon:

"The only end for which society is warranted in infringing the liberty of action of any individual, he said, is self-protection. Power should be exercised to prevent the individual from doing harm to others, but that is the only part of his conduct for which he should be answerable to society. In every other way he should have freedom."

One of the earliest U.S. decisions interpreting what has become known as the "due process clause" of the Fourteenth Amendment is *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). The Supreme Court held that a Louisiana statute that purported to regulate a contract formed between parties in Louisiana and New York was unconstitutional. Peckham J., speaking for the court, held that the Fourteenth Amendment protected liberty of contract, and more specifically stated the following at p. 589:

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

* * *

It should not be overlooked, however, that the American experience with "economic liberty" jurisprudence in particular, has been controversial throughout its history. As I noted above, the case of *Allgeyer v. Louisiana*, *supra*, was the first to define liberty as including the right to make contracts. But it is the decision in *Lochner v. New York*, 198 U.S. 45 (1905), that firmly established economic liberty as a constitutionally protected interest. In that case a majority of the United States Supreme Court invalidated a New York law that set maximum hours of work for bakers because, at p. 57,

"... there is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker."

Between *Lochner*, *supra*, and the start of the Depression, the U.S. Supreme Court invalidated many regulatory measures on the grounds that they intruded upon liberty of contract and property rights: see for example *Adair v. United States*, 208 U.S. 161 (1908), *Coppage v. Kansas*, 236 U.S. 1 (1915), invalidating legislation prohibiting employers from imposing "yellow-dog" contracts (a contract requiring employees to disavow union membership or affiliation as a condition of employment), and *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), invalidating a minimum wage law in the District of Columbia.

The onset of the Depression and President Roosevelt's New Deal initiatives caused a confrontation between the notion of "economic liberty" and the needs of a modern regulatory state. Beginning in 1935

the U.S. Supreme Court rendered a number of decisions invalidating New Deal legislation, one of the most significant being *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), a decision striking down state minimum wage legislation. What ensued was the so-called "Court Crisis" in which President Roosevelt proposed a court reorganization plan. The plan was never put into effect. Significantly, however, the court overruled its decisions in *Morehead* and *Adkins*, *supra*, in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and adopted a more deferential approach to cases of state regulation of "economic liberty". Indeed, in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), the court espoused a deferential standard of review on questions of "economic liberty" with more active scrutiny where the state interferes with "civil" liberties: see *United States v. Carolene Products Co.*, *supra*, at pp. 152-53, especially the now famous "Footnote 4". This attitude of deference in respect of "economic liberty" has been reiterated more recently. All of this is to emphasize the difficulties that the United States Supreme Court has faced in dealing with the concept of "economic liberty" as a constitutionally protected freedom, and how much the American experience is linked to its particular historical and social context.

Along these lines, I pause to note that in applying principles developed under a provision of the U.S. Constitution to cases arising under our Charter, the Court must take into account differences in wording and historical foundations of the two documents. As Strayer J.⁺ observed in *Smith, Kline & French Laboratories Ltd. v. Attorney General of Canada*, [1986] 1 F.C. 274, at p. 314:

"... it must be kept in mind that the historical background and social and economic context of the Fourteenth Amendment are distinctly American. Further it must be noted that in the Fourteenth Amendment "liberty" is combined with "property" which gives a different colouration to the former through the introduction of economic values as well as personal values. This is not the case in section 7 of the *Canadian Charter of Rights and Freedoms*."

With this in mind I now propose to examine the Canadian jurisprudence in the area of "economic liberty" and s. 7 of the Charter.

I begin by noting the words of the Chief Justice in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at pp. 785-86:

"In my opinion "liberty" in s. 7 of the Charter is not synonymous with unconstrained freedom Whatever the precise contours of "liberty" in s. 7, I cannot accept that it extends to an unconstrained right to transact business whenever one wishes."

Much in the same vein other courts in this country have decided that "liberty" does not generally extend to commercial or economic interests. * * *

In short then I find myself in agreement with the following statement of McIntyre J. in the *Reference Re Public Service Employee Relations Act (Alta.)*, [[1987] 1 S.C.R. 313], at p. 412:

"It is also to be observed that the Charter, with the possible exception of s. 6(2)(b) (right

⁺ [Ed. note: Judge Barry Strayer, now retired from the Federal Court of Appeal, was a professor of constitutional law at the University of Saskatchewan in the 1960s and served from 1974-83, during the period when the *Charter* was drafted, as the Assistant Deputy Minister of Justice. He is generally regarded as the *Charter's* principal drafter.]

to earn a livelihood in any province) and s. 6(4), does not concern itself with economic rights."

I therefore reject the application of the American line of cases that suggest that liberty under the Fourteenth Amendment includes liberty of contract. As I stated earlier these cases have a specific historical context, a context that incorporated into the American jurisprudence certain laissez-faire principles that may not have a corresponding application to the interpretation of the Charter in the present day. There is also a significant difference in the wording of s. 7 and the Fourteenth Amendment. The American provision speaks specifically of a protection of property interests while our framers did not choose to similarly protect property rights. This then, is sufficient to dispose of this ground of appeal.

*** The interests protected by s. 7 are those that are properly and have been traditionally within the domain of the judiciary. Section 7 and more specifically ss. 8-14 protect individuals against the state when it invokes the judiciary to restrict a person's physical liberty through the use of punishment or detention, when it restricts security of the person, or when it restricts other liberties by employing the method of sanction and punishment traditionally within the judicial realm. This is not to say that s. 7 protects only an individual's physical liberty. It is significant that the section protects one's security of the person as well.***

* * *

I do recognize, however, that the increasing role of administrative law in our modern society has provided the state with an avenue to regulate and control a myriad of activities and areas that affect individuals: for example, to name but a few, communications, consumer protection, energy, environmental management, financial markets and institutions, food production and distribution, health and safety, human rights, labour/management relations, liquor, occupational licensing, social welfare and transportation. As a result, this area of law has developed its own regime of common and statutory law dealing with procedural and substantive fairness. The extent to which s. 7 of the Charter can be invoked in the realm of administrative law, its implications for administrative procedures, and its relationship to the common law rules of natural justice and the duty of fairness are not before this Court, and it is preferable to develop that jurisprudence on an ongoing, case-by-case basis. What is clear, however, is that the state in certain circumstances has created bodies, such as parole boards and mental health review tribunals, that assume control over decisions affecting an individual's liberty and security of the person. Those are areas, because they involve the restriction to an individual's physical liberty and security of the person, where the judiciary has always had a role to play as guardian of the administration of the justice system. There are also situations in which the state restricts other privileges or, broadly termed, "liberties" in the guise of regulation, but uses punitive measures in cases of non-compliance. In such situations the state is in effect punishing individuals, in the classic sense of the word, for non-compliance with a law or regulation. In all these cases, in my view, the liberty and security of the person interests protected by s. 7 would be restricted, and one would then have to determine if the restriction was in accordance with the principles of fundamental justice. By contrast, as I have stated, there is the realm of general public policy dealing with broader social, political and moral issues which are much better resolved in the political or legislative forum and not in the courts.

* * *

[Justice Lamer's reasons for concluding that the statute was a reasonable limit on free expression are omitted.]

The judgment of Dickson C.J. and La Forest and Sopinka JJ. was delivered by

THE CHIEF JUSTICE--I have had the advantage of reading the reasons of my colleagues, Justice Lamer and Justice Wilson. [The plurality concluded that while soliciting for prostitution was protected

expression, s. 195.1(c)'s prohibition was a reasonable limit. They also concluded that s. 193's proscription of "bawdy-houses" was not protected expression.]

I now turn to the question of whether ss. 193 and 195.1(1)(c) separately or in combination infringe s. 7 of the Charter. There are two components of s. 7 that must be satisfied before finding a violation. First, there must be a breach of one of the s. 7 interests of the individual -- life, liberty or security of the person. Second, the law that is responsible for that breach must be found to violate the principles of fundamental justice. With respect to the first component, there is a clear infringement of liberty in this case given the possibility of imprisonment contemplated by the impugned provisions. Beyond this obvious violation, the appellants raise various arguments relating to an economic aspect of liberty that has been infringed. It is submitted that the impugned provisions infringe the liberty interest of street prostitutes in not allowing them to exercise their chosen profession, and their right to security of the person, in not permitting them to exercise their profession in order to provide the basic necessities of life. In the context of these "economic" arguments, the challengers make repeated reference to the fact that prostitution per se is legal. They submit that restriction of a legal activity to the point where it becomes impossible to engage in that activity is contrary to the principles of fundamental justice.

With respect to the first component of s. 7, the strongest argument that can be made regarding an infringement of liberty derives from the fact that the legislation contemplates the possibility of imprisonment. Because this is the case, I find it unnecessary to address the question of whether s. 7 liberty is violated in another, "economic", way. I wish to add here that this case does not provide the appropriate forum for deciding whether "liberty" or "security of the person" could ever apply to any interest with an economic, commercial or property component.

The reasons of Wilson and L'Heureux-Dube JJ. were delivered by WILSON J. (dissenting)--

[Justice Wilson, emphasizing that Parliament had decriminalized simple prostitution, concluded that the challenged statutes were not reasonable limits on free expression. Turning to the s. 7 issue, she rejected Lamer J.'s characterization of the issue as raising a question of "economic liberty," finding that s. 7 was triggered by the threatened loss of personal liberty from imprisonment. On the merits, Wilson J. would have found that Parliament could not constitutionally criminalize the operation of "bawdy houses" when it had explicitly declined to make the act of prostitution a crime.]

V. Canadian and Australian Non-constitutional Protection for Property

Recall that the fundamental constitutional issue is not whether the government should require "some people to alone bear public burdens which, in all fairness and justice, should be borne by the public as a whole," but rather whether the decision about whether a particular judgment that certain burden should be fairly borne by certain owners of property should be made by the courts or the legislatures. In the United States, Takings Clause jurisprudence makes it clear that this decision is made by the courts; in Canada (and in Australia at the state level), the foregoing decisions make it clear that the decision is up to the legislatures.

Thus, in *R. v. Appleby (No. 2)*, (1976) 76 D.L.R. (3d) 110 (N.B.A.D.), no compensation was owed to a publisher complying with statutory requirement that two copies of each book be

provided "at his own expense" to the National Library. And sections 53(3) and 121(2) of the British Columbia *Forest Act* provide that government taking of a portion of property constituting less than 5% of the total land value need not be compensated. American law is to the contrary. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (physical invasion of property of residential landlords to permit 1 cubic foot of cable facilities on building held a compensable taking).

Nonetheless, the notion that Canadian or Australian state legislatures engage in wholesale expropriations of property could not be farther from accurate, as the following statutes and judicial non-constitutional doctrines make clear.

In Australia, s 51(xxxi) makes federal acquisitions of property subject to just terms, with courts determining what constitutes an "acquisition," while state property takings are not constitutionally protected (a proposed constitutional amendment that would have extended the provision to the states was defeated in a referendum in 1988). The states, however, have statutory schemes for the protection of property; for example the *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW). The NSW Act is a "super-statute": it includes a provision (section 8), stating that the Act "prevails, to the extent of any inconsistency, over the provisions of any other Act relating to the acquisition of land by an authority of the State." Notably, this Act protects real property, and does not extend to the very wide types of property defined by the High Court as falling under s. 51 (xxxii).

Expropriations acts likewise have a "quasi-constitutional" status in Canada, a status unknown in the United States. In case of a conflict between ordinary statutes, courts generally seek an interpretation that accommodates both pieces of legislation; in case of conflict, specific rules of decision (specific trumps the general, more recent trumps older) are invoked. Quasi-constitutional statutes, however, completely trump any prior statute, and any subsequent statute is presumed to have been written subject to the quasi-constitutional statute, unless it explicitly provides to the contrary.

Compensation claims for property allegedly taken by Canadian governments are usually based on an *Expropriations Act* enacted by each province and Parliament. *MANITOBA FISHERIES LTD. V. THE QUEEN*, [1979] 1 S.C.R. 101, 88 D.L.R. (3d) 462, illustrates the fairly broad protection extended to property owners by statute. The appellant was a private corporation engaged in exporting fish from Manitoba lakes to other provinces and the United States, until May 1, 1969. On that date, the *Freshwater Fish Marketing Act* came into effect, creating a crown corporation with the exclusive right to export fish from Manitoba. This put Manitoba Fisheries out of business. The statute empowered the federal government to compensate the plaintiff for plant and equipment. The government argued since none of the plaintiff's plant or equipment had been taken, no compensation was owed. The plaintiff argued that it had developed substantial goodwill in building its business over many years and this was an asset for which compensation was due. The Supreme Court agreed and reversed.

Justice Ritchie held that "goodwill, although intangible in character is a part of the property of a business just as much as the premises, machinery and equipment employed in the production of the product whose quality engenders that goodwill." He acknowledged that the federal *Expropriation Act* did not expressly provide for compensation for goodwill. However, he invoked a "long-established rule" of broad construction of expropriation

statutes.

The recognized rule for the construction of [these] statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation. (quoting Lord Atkinson in *Attorney-General v. De Keyser's Royal Hotel Ltd.* [[1920] A.C. 508], at p. 542)

... the general principle, accepted by the legislature and scrupulously defended by the courts, [is] that the title to property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless full compensation was afforded in its place. Acquisition of title or possession was "taking." Aspects of this principle are found in the rules of statutory interpretation devised by the courts, which required the presence of the most explicit words before an acquisition could be held to be sanctioned by an Act of Parliament without full compensation being provided, or imported an intention to give compensation and machinery for assessing it into any Act of Parliament that did not positively exclude it. (quoting *Belfast Corp. v. O.D. Cars Ltd.*, [1960] A.C. 490 (H.L. (N.I.))

Indeed, on occasion the statutory rights of Canadian property owners may exceed the constitutional rights of American property owners under the Fifth Amendment. This was true in *TORONTO AREA TRANSIT OPERATING AUTHORITY V. DELL HOLDINGS LTD.*, [1997] 1 S.C.R. 32, 142 D.L.R. (4th) 206. Dell owned about 40 acres of land in Mississauga, and was not permitted to develop it for residences pending a study concerning the location of a rapid transit station in the Toronto suburb. After several years, the site was located and 9 acres of Dell's land was expropriated and paid for. Dell sought further compensation for the lost profits caused because of the delay. The court once again ruled in favor of the property owner, stressing the need to broadly interpret the provincial *Expropriations Act*. The Court reasoned:

20. The expropriation of property is one of the ultimate exercises of governmental authority. To take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that the power of an expropriating authority should be strictly construed in favour of those whose rights have been affected. This principle has been stressed by eminent writers and emphasized in decisions of this Court.

The Court therefore held that Dell was entitled to the lost profits from delay, which were a "natural and reasonable consequence of the expropriation." However, the Court declined to award compensation for lost profits to Dell's remaining acres. Because there was no expropriation, the statute did not apply.

A similarly expansive interpretation resulted in compensation in *KETTERING PTY LTD V NOOSA SHIRE COUNCIL*, 207 ALR 1 (HCA 2004). The plaintiff sought \$9.3 million, claiming that the defendant's Development Control Plan had injuriously affected his land, reducing the potential development from 73 house lots and 132 building units to 24 house lots and 75 units. Compensation was sought pursuant to s 3.5(1) of the *Local Government (Planning and Environment) Act 1990 (Qld)*, which provides for compensation where "a person has an interest in premises within a planning scheme area and the interest is injuriously affected by the coming into force of any provision contained in a planning scheme." The Court noted that s 3.5(5) puts the onus on the local government authority to prove that exceptions to

compensation apply. *See also Marshall v Director-General, Department of Transport* (2001) 205 CLR 603 at 623 [38] (Gaudron, J) (“The right to compensation for injurious affection following upon the resumption of land is an important right of that kind and statutory permit. Certainly, such provisions should not be construed on the basis that the right to compensation is subject to limitations or qualifications which are not found in the terms of the statute.”)

This does not mean, however, that compensation is always granted. The principal hurdle for compensation for regulatory takings is that Expropriations Acts usually require some interest to be acquired by for the benefit of the government or the public. As the court observed in *Steer Holdings Ltd. v. Manitoba*, [1992] 79 Man. R.2d 169, 174-75 (Q.B.):

For there to be a statutory taking which gives rise to a claim for compensation, not only must the owner be deprived of the benefit in its property, there must also be a resulting enhancement or improvement conferred on whatever entity the Legislature intended to benefit. Something must not only be taken away, it must be taken over.

MARINER REAL ESTATE LTD. ET AL. V. NOVA SCOTIA (ATTORNEY GENERAL)

NOVA SCOTIA COURT OF APPEAL
178 N.S.R. (2d) 294; 549 A.P.R. 294 (1999)

Introduction

[1] Cromwell, J.A.: This case involves a collision of important interests. On one side, there are the interests of the respondents in the enjoyment of their privately owned land at Kingsburg Beach. On the other is the public interest in the protection and preservation of environmentally fragile and ecologically significant beach, dune and beach ridge resources. In the background of this case is the policy issue of how minutely government may control land without buying it. But in the foreground is the narrower issue of whether the stringent land use regulations applied by the Province to the respondents' lands is an expropriation of them within the meaning of the *Expropriation Act*, R.S.N.S. 1989, c. 56.

[2] The respondents' lands were designated as a beach under the *Beaches Act*, R.S.N.S. 1989, c. 32. This designation brings with it a host of restrictions on the uses of and activities on the land. Pursuant to power conferred by the Act and Regulations made under it, the Minister refused to grant the respondents permission to build single family dwellings on their land. The respondents sued, claiming their lands had, in effect, been expropriated and that they were entitled to compensation. Tidman, J., at trial, found that there had been an expropriation.

[The trial judge held that the plaintiffs had been deprived of land within the meaning of the *Expropriation Act* because the designation as a “protected beach” was either itself a taking of land, or a taking when combined with the application of regulations flowing from the designation. Second, the trial judge held that the land was taken within the meaning of the *Expropriation Act* because the regulation of the respondents' lands enhanced the value of the provincially owned property from the high watermark seaward. The Court of Appeal reversed on both points.]

II. Facts And Relevant Legislation:

[10] The right to compensation asserted by the respondents is set out in s. 24 of the *Expropriation Act*:

"24. Where land is expropriated, the statutory authority shall pay the owner compensation as is determined in accordance with this Act."

Section 3(1) of the *Expropriation Act* defines expropriation as "... the taking of land without consent of the owner by an expropriating authority in the exercise of its statutory powers ...". There is no issue here that the owners did not consent or that the designation was lawful. The question is whether "land" was "taken" "by" an expropriating authority.

[11] The respondents' claim is that there has been a de facto expropriation, so called because it is claimed that there has been an expropriation, in fact, even though the formal procedures of expropriation were not followed and no legal title has been lost or acquired. The claim is that the restrictions on the use of the land arising from the application of the *Beaches Act* and Regulations have taken away virtually all the economic value and benefits of ownership of the land and that there has been a resulting enhancement of the value of publicly owned land. It is common ground on this appeal that for there to be an expropriation, land must be taken from the respondents and acquired by the Province.

[12] As noted, there is no challenge in these proceedings to the legality of the designation. ***

[The court found that the regulatory scheme was designed to protect the dune areas. The Minister's letter rejecting respondent's requests to build homes on the beach noted that a commissioned study found that "maintaining the integrity of the present sand dunes is critical to reducing or preventing widespread flooding of the backshore lowland by the sea and to preventing erosion and narrowing of the beach face. Given the sensitive nature of the dune system, no additional development was recommended."]

III. Analysis:

(a) De Facto Expropriation:

[37] The respondents' claim that what was, in form, a designation of their land under the *Beaches Act* is, in fact, a taking of their land by a statutory authority within the meaning of the *Expropriation Act*. This claim of de facto expropriation, or as it is known in United States constitutional law, regulatory taking, does not have a long history or clearly articulated basis in Canadian law. We were referred to only three Canadian cases in which such a claim was made successfully, only two of which dealt with the expropriation of land.

[38] The scope of claims of de facto expropriation is very limited in Canadian law. They are constrained by two governing principles. The first is that valid legislation (primary or subordinate) or action taken lawfully with legislative authority may very significantly restrict an owner's enjoyment of private land. The second is that the courts may order compensation for such restriction only where authorized to do so by legislation. In other words, the only questions the court is entitled to consider are whether the regulatory action was lawful and whether the *Expropriation Act* entitles the owner to compensation for the resulting restrictions.

[39] De facto expropriation is conceptually difficult given the narrow parameters of the court's

authority which I have just outlined. While de facto expropriation is concerned with whether the "rights" of ownership have been taken away, those rights are defined only by reference to lawful uses of land which may, by law, be severely restricted. In short, the bundle of rights associated with ownership carries with it the possibility of stringent land use regulation.

[40] I dwell on this point because there is a rich line of constitutional jurisprudence on regulatory takings in both the United States and Australia which is sometimes referred to in the English and Canadian cases dealing with de facto expropriation. The Fifth Amendment to the United States Constitution (which also applies to the States through the Fourteenth Amendment) provides that private property shall not be taken for public use without just compensation. In the Australian Constitution, s. 51(xxxi) prohibits the acquisition of property except upon just terms. While these abundant sources of case law may be of assistance in developing the Canadian law of de facto expropriation, it is vital to recognize that the question posed in the constitutional cases is fundamentally different.

[41] These U.S. and Australian constitutional cases concern constitutional limits on legislative power in relation to private property. As O'Connor, J., said in the United States Supreme Court case of *Eastern Enterprises v. Apfel* (1998), 118 S. Ct. 2131, the purpose of the U.S. constitutional provision (referred to as the "takings clause") is to prevent the government from "... forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole". Canadian courts have no similar broad mandate to review and vary legislative judgments about the appropriate distribution of burdens and benefits flowing from environmental or other land use controls. In Canada, the courts' task is to determine whether the regulation in question entitles the respondents to compensation under the *Expropriation Act*, not to pass judgment on the way the Legislature apportions the burdens flowing from land use regulation.

[42] In this country, extensive and restrictive land use regulation is the norm. Such regulation has, almost without exception, been found not to constitute compensable expropriation. It is settled law, for example, that the regulation of land use which has the effect of decreasing the value of the land is not an expropriation. *** I would refer, as well, to the following from E.C.E. Todd, *The Law of Expropriation in Canada* (2nd 1992), at pp. 22-23:

"Traditionally the property concept is thought of as a bundle of rights of which one of the most important is that of user. At common law this right was virtually unlimited and subject only to the restraints imposed by the law of public and private nuisance. At a later stage in the evolution of property law the use of land might be limited by the terms of restrictive covenants.

"Today the principal restrictions on land use arise from the planning and zoning provisions of public authorities. By the imposition, removal or alteration of land use controls a public authority may dramatically increase, or decrease, the value of land by changing the permitted uses which may be made of it. In such a case, in the absence of express statutory provision to the contrary an owner is not entitled to compensation or any other remedy notwithstanding that subdivision approval or rezoning is refused or development is blocked or frozen pursuant to statutory planning powers in order, for example, to facilitate the future acquisition of the land for public purposes. ***

[47] In light of this long tradition of vigorous land use regulation, the test that has developed for applying the *Expropriation Act* to land use restrictions is exacting and, of course, the respondents on appeal as the plaintiffs at trial, had the burden of proving that they met it. In each of the three Canadian cases which have found compensation payable for de facto expropriations, the result of the governmental action went beyond drastically limiting use or reducing the value of the owner's property. In *Tener and*

Tener v. British Columbia, [1985] 1 S.C.R. 533; 59 N.R. 82, the denial of the permit meant that access to the respondents' mineral rights was completely negated, or as Wilson, J., put it at p. 552, amounted to total denial of that interest. In *Casamiro Resource Corp. v. British Columbia* (1991), 80 D.L.R.(4th) 1 (B.C.C.A.), which closely parallels *Tener*, the private rights had become "meaningless". In *Manitoba Fisheries v. Canada*, [1979] 1 S.C.R. 101; 23 N.R. 159, the legislation absolutely prohibited the claimant from carrying on its business.

[48] In reviewing the de facto expropriation cases, R.J. Bauman concluded, and I agree, that to constitute a de facto expropriation, there must be a confiscation of "... all reasonable private uses of the lands in question": R.J. Bauman, "Exotic Expropriations: Government Action and Compensation" (1994), 54 *The Advocate* 561, at p. 574. While there is no magic formula for determining (or describing) the point at which regulation ends and taking begins, I think that Marceau, J.'s, formulation in [*Alberta v. Nilsson*, [1999] A.R. TBed. JN.053; [1999] A.J. No. 645 (Q.B.)] is helpful. The question is whether the regulation is of "sufficient severity to remove virtually all of the rights associated with the property holder's interest". (at para. 48).

[49] Considerations of a claim of de facto expropriation must recognize that the effect of the particular regulation must be compared with reasonable use of the lands in modern Canada, not with their use as if they were in some imaginary state of nature unconstrained by regulation. In modern Canada, extensive land use regulation is the norm and it should not be assumed that ownership carries with it any exemption from such regulation. As stated in *Belfast [Corp. v. O.D. Cars Ltd., [1960] A.C. 490 (H.L. (N.I.))]*, there is a distinction between the numerous "rights" (or the "bundle of rights") associated with ownership and ownership itself. The "rights" of ownership and the concept of reasonable use of the land include regulation in the public interest falling short of what the Australian cases have called deprivation of the reality of proprietorship: see e.g. *Newcrest Mining (W.A.) Ltd. v. Australia (Commonwealth)*, [1996-1997] 190 C.L.R. 513, at p. 633. In other words, what is, in form, regulation will be held to be expropriation only when virtually all of the aggregated incidents of ownership have been taken away. The extent of this bundle of rights of ownership must be assessed, not only in relation to the land's potential highest and best use, but having regard to the nature of the land and the range of reasonable uses to which it has actually been put. It seems to me there is a significant difference in this regard between, for example, environmentally fragile dune land which, by its nature, is not particularly well-suited for residential development and which has long been used for primarily recreational purposes and a lot in a residential subdivision for which the most reasonable use is for residential construction.

[50] Claims of de facto expropriation may be contrasted with administrative law challenges to the legality or appropriateness of planning decisions. For example, zoning bylaws may be attacked as *ultra vires* if they are enacted for a confiscatory or other improper purpose if such purpose is not one authorized by the relevant grant of zoning power. ***

(b) The Effects Of Regulation:

[Here, the court adopted the American practice of looking at the "actual application of the regulatory scheme as opposed simply to its potential for interference with the owner's activities." Thus, the mere act of designating the property as a protected beach was insufficient as a matter of law to find an expropriation.]

(c) Is Loss Of Economic Value Loss Of Land Under The *Expropriation Act*?

[55] The trial judge found that the respondents had been deprived of land. His main conclusion appears to have been that the loss of "virtually all economic value" constituted the loss of an interest in land. He also found, however, that the "... fee simple in the [respondents'] lands has been stripped of its

whole bundle of rights". Both aspects of his holding are before us in this appeal and, in my respectful view, both are in error.

[59] The *Expropriation Act* does not define land exhaustively, but states that land includes "... any estate, term, easement, right or interest in, to, over or affecting land": s. 3(1)(i). This provision, especially the emphasized text, suggests that a broad, non-technical approach to the definition of land was intended. This is consistent with the compensatory objectives of the *Expropriation Act* and with the long-established interpretative approach to such legislation. As Cory, J., said in *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32:;

"..., since the *Expropriations Act* is a remedial statute, it must be given a broad and liberal interpretation consistent with its purpose. Substance, not form, is the governing factor. ... In *Laidlaw v. Municipality of Metropolitan Toronto*, [1978] 2 S.C.R. 736, at p. 748, it was observed that '[a] remedial statute should not be interpreted, in the event of an ambiguity, to deprive one of common law rights unless that is the plain provision of the statute'.

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"It follows that the *Expropriations Act* should be read in a broad and purposive manner in order to comply with the aim of the Act to fully compensate a land owner whose property has been taken."

[62] While the term "land" must be given a broad and liberal interpretation, the interpretation must also respect the legislative context and purpose. As I will develop below, the *Expropriation Act* draws a line, on policy grounds, between the sorts of interference with the ownership of land that are compensable under the Act and those which are not. That line, in general, is drawn where land is taken. In interpreting where this line falls, the court must give the term a meaning which is both consistent with the Act's remedial nature but also with appropriate regard to the legal context in which the term was adopted. It is not the court's function, as it would be if applying a constitutional guarantee of rights of private property, to evaluate the legality or fairness of where the legislature has drawn that line, but to interpret and apply it.

[63] Kroft, J., in [*Steer Holdings Ltd. v. Manitoba* (1993), 79 Man.R.(2d) 169 (Q.B.)] at para. 34 sounded a note of caution in this regard in his discussion of *Tener* and *Manitoba Fisheries*. He emphasized that while both of those decisions gave a liberal interpretation to the kinds of property rights which may become the object of a claim for compensation, both reinforced the point that prohibition of uses or dissipation in value is not necessarily a taking.

[71] We have been referred to no Canadian case in which the decline of economic value of land, on its own, has been held to be the loss of an interest in land. Several cases, on the contrary, recognize the distinction between the value of ownership and ownership itself. This suggests that the loss of economic value of land is not the loss of an interest in land within the meaning of the *Expropriation Act*. This conclusion is, in my view, strongly supported by the overall scheme of compensation established by the Act and by judicial interpretation of it.

[72] The loss of interests in land and the loss of the value of land have been treated distinctly by both the common law and the *Expropriation Act*. In my view, this distinct treatment supports the conclusion that decline in value of land, even when drastic, is not the loss of an interest in land. To understand this point, it is necessary to consider briefly compensation for "injurious affection", that is, injury to lands retained by the owner which results from the taking.

[74] Pursuant to s. 30(1), compensation is payable to the owner of land for loss or damage caused by

injurious affection; [s. 3(1)(ii) defines “injurious affection” to mean “where the statutory authority does not acquire part of the land of an owner, (A) such reduction in the market value of the land of the owner, and (B) such personal and business damages, resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute ...”]

[75] Pursuant to ss. 26(c) and 30(1) and 3(1)(h), the Act provides for compensation to the owner of land where there has been no taking of that owner's land. The important points are first, that compensation for injurious affection as defined in the Act is the only instance in which compensation is provided for the loss of value of land absent the taking of an interest in land. Second, the legislative scheme for compensation draws a sharp dividing line between loss resulting from a taking of land and the loss of value of land caused by other governmental activities. In short, a sharp, and in a sense, arbitrary division is made for the purposes of compensation between takings and losses caused in other ways.

[76] This distinction was noted and described by Cory, J., for the majority of the Supreme Court of Canada, in *Dell Holdings* at pp. 51-52 [S.C.R.]:

"The whole purpose of the *Expropriations Act* is to provide full and fair compensation to the person whose land is expropriated. It is the taking of the land which triggers and gives rise to the right to compensation. An owner whose land is caught up in a zoning or planning process but not expropriated must simply accept in the public interest any loss that accrues from delay. There is neither a statutory requirement nor a policy reason for employing a similar approach to compensation for losses accruing from delay when land is expropriated and for losses accruing from delay in the planning approval process when land is not taken. Both statutory and judicial approaches to compensation are, as might be expected, very different in these two situations."

[77] As noted by Cory, J., the common law recognized this distinction. ***

[78] The important point is this. While the distinction between the value of land and interests in land is, in one sense highly technical, it is, nonetheless, deeply imbedded in the scheme of compensation provided for under the *Expropriation Act*. It is fundamental to the entitlement to compensation under the Act claimed by the respondents. This is so because the distinction defines the line between cases in which governmental interference with the enjoyment of land is compensable under the Act and cases in which it is not. An impressive argument may be made supporting a broader approach to compensation for governmental interference with the enjoyment of land. ***

[79] I conclude, therefore, that the learned trial judge erred in holding that the loss of virtually all economic value of the respondents' land, was the loss of an interest in land within the meaning of the Expropriation Act.

(d) Loss Of The "Bundle Of Rights"

[80] That brings me to the trial judge's holding that the effect of the designation and the way it was applied here was to strip the fee simple of its whole bundle of rights. The cases have long recognized that at a certain point, regulation is, in effect, confiscation. The law insists that the substance of the situation, not simply its form, be examined. As noted in *Nilsson*, restrictions on the use of land may be so stringent and all-encompassing that they have the effect of depriving the owner of his or her interest in the land, although leaving paper title undisturbed.

[81] While the decline in economic value of land is not the loss of an interest in land, it may be evidence of the loss of an interest in land. ***

[86] With respect, the trial judge erred in finding that the *Beaches Act* designation and ensuing regulation resulted in the expropriation of these two of the Mosher's properties. Residences could not be built on them prior to the designation, and there is no evidence that permission for other uses has been refused.

(e) Acquisition Of Land

[91] As noted, there must not only be a taking away of land from the owner but also the acquisition of land by the expropriating authority for there to be an expropriation within the meaning of the Act.

[92] There is no suggestion here that the Province acquired legal title or any aspect of it. The land remains private property although subject to the regulatory regime established by the *Beaches Act*. The argument is that the effect of the regulatory scheme is, for practical purposes, the acquisition of an interest in land.

[The court distinguished language in prior cases noting how the challenged activity benefitted government land or crown corporation assets.]

[99] I conclude that for there to be a taking, there must be, in effect, as Estey, J., said in *Tener*, an acquisition of an interest in land and that enhanced value is not such an interest.

[100] The respondents further submit that their lands have been effectively pressed into public service and that this is sufficient to constitute an acquisition of land. The judgment of the United States Supreme Court in *Lucas v. South Carolina Coastal Council* (1992), 112 S. Ct. 2886 (U.S. Sup. Ct.), is relied on. I do not think that case assists us here.

[101] The U.S. constitutional law has, on this issue, taken a fundamentally different path than has Canadian law concerning the interpretation of expropriation legislation. In U.S. constitutional law, regulation which has the effect of denying the owner all economically beneficial or productive use of land constitutes a taking of property for which compensation must be paid. Under Canadian expropriation law, deprivation of economic value is not a taking of land, for the reasons I have set out at length earlier. It follows that U.S. constitutional law cases cannot be relied on as accurately stating Canadian law on this point. Moreover, in U.S. constitutional law, as I understand it, deprivation of property through regulation for public purposes is sufficient to bring a case within the constitutional protection against taking for "public use", unlike the situation under the *Expropriation Act* which requires the taking of land. It is not, as I understand it, necessary in U.S. constitutional law to show that the state acquires any title or interest in the land regulated. For these reasons, I conclude that the U.S. takings clause cases are not of assistance in determining whether there has been an acquisition of land within the meaning of the Nova Scotia *Expropriation Act*.

[Although the court found there to be no expropriation, in *dicta* it rejected the government's claim that provision in the *Beaches Act* precluded any compensation. The court found that the express and broad provisions of the *Expropriation Act* trump any inconsistent provisions of the *Beaches Act*, so that compensation would have been owed if an expropriation had occurred.]

At the end of the day, though, state legislatures retain the power to take property without compensation that a court deems just.

DURHAM HOLDINGS PTY LTD v NEW SOUTH WALES

HIGH COURT OF AUSTRALIA
(2001) 205 CLR 399, 177 A.L.R. 436

[By the operation of s 5 of the *Coal Acquisition Act 1981 (NSW)* (the Act) on 1 January 1982, coal in certain lands in New South Wales was vested in the Crown in right of that state. Pursuant to s 6 of the Act, an instrument was made by the governor providing for payments of compensation described as interim payments (the arrangements). Under this scheme, the applicant would have been entitled to more than \$93 million in compensation. However, s 6 was amended by the *Coal Acquisition (Amendment) Act 1990 (NSW)* (the 1990 Act) which added s 6(3). This stated:

"Arrangements under this section may differentiate between the persons to whom compensation is payable as a result of the enactment of this Act by providing that specified persons, or persons of a specified class, are not entitled to be paid more than a specified sum or specified sums of money in respect of coal vested in the Crown by the operation of section 5, irrespective of the amount of coal that they owned immediately before the commencement of this Act."

The result of that provision and cl 22AA(3) in administrative arrangements made by the Governor was to cap the total amount of compensation payable to the applicant at \$ 23.25m. The applicant contended that cl 22AA(3) of the arrangements was invalid because it was beyond the power conferred by s 6 as amended by the 1990 Act, that s 6 must be read in accordance with the presumption that the legislature did not intend to acquire property without compensation and that the legislation was invalid because the Parliament of New South Wales lacked power to enact laws for the acquisition of property without compensation.

GAUDRON, MCHUGH, GUMMOW AND HAYNE JJ.

By instrument dated 27 June 1990, the arrangements were amended with the object of limiting to \$ 60m the total amounts which might be paid as compensation to certain coal mining companies, of which the applicant was one. The rate of compensation was increased from 50c per tonne to 90c per tonne but the effect of the new cl 22AA(3) of the arrangements was to "cap" the total amount of compensation payable to the applicant at \$ 23.25m.

The applicant submits, as it did to the Court of Appeal, that s 6 must be read in accordance with the presumption that the legislature does not intend to acquire property without compensation. The terms of s 6(3) of the Act rebut any operation of the presumption.

The applicant also contends in this court that the legislation in question is invalid because the Parliament of New South Wales lacks power to enact laws for the acquisition of property without compensation. There are numerous statements in this court which deny that proposition.³ Moreover, the existence of the presumption referred to above suggests that the power, against the exercise of which the presumption operates, indeed exists.

³ New South Wales v Commonwealth (the *Wheat Case*) (1915) 20 CLR 54 at 66, 77, 98, 105; P J Magennis Pty Ltd v Commonwealth (1949) 80 CLR 382 at 403, 405, 416, 419; Pye v Renshaw (1951) 84 CLR 58 at 78-80; ; Minister for Lands (NSW) v Pye (1953) 87 CLR 469 at 486; ; Mabo v Queensland (1988) 166 CLR 186 at 202 83 ALR 14 at 21; ; Commonwealth v WMC Resources Ltd (1998) 194 CLR 1 at 58 [149] 152 ALR 1 at 43.

However, as the facts narrated above indicate, the acquisition occurred in 1982 by force of s 5 of the Act, with the then attendant compensation scheme. The substance of the applicant's complaint concerns not acquisition without compensation, but the quantum or measure of the additional compensation provided pursuant to the "cap" imposed by the 1990 Act. The applicant pleaded invalidity of cl 22AA(3) and of s 6(3), in so far as it authorised the introduction of that subclause, on the ground that the legislation purported to deprive it of its property "without just, or any properly adequate, compensation". In this court, the applicant also asserted that it had been subjected to a legislative judgment which confiscated its property as a punishment and was in the nature of a Bill of Pains and Penalties. However, there is nothing to show any punishment of the applicant, and this submission therefore need not further be considered.

In *Union Steamship Co of Australia Pty Ltd v King*, [(1988) 166 CLR 1 at 10; 82 ALR 43 at 48] the court stated that, within the limits of the grant, a power such as that conferred on the New South Wales Parliament by s 5 of the Constitution Act 1902 (NSW) to make laws "for the peace, welfare, and good government of New South Wales" is "as ample and plenary as the power possessed by the Imperial Parliament itself". Moreover, at the time of the 1990 Act, *the Australia Act 1986* (Cth) (the Australia Act) was in force. Section 2(2) thereof declared and enacted that the legislative powers of each state parliament included all legislative powers that Westminster might have exercised before the commencement of that Act for the peace, order and good government of the state.

In *Union Steamship*, the court added [(1988) 166 CLR 1 at 10; 82 ALR 43 at 48]:

Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score. Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law,¹² a view which Lord Reid firmly rejected in *British Railways Board v Pickin*, [[1974] AC 765 at 782; [1974] 1 All ER 609 at 614] is another question which we need not explore.

The question that the applicant posed for the Court of Appeal thus was whether or not the right to receive "just" or "properly adequate" compensation is such a "deeply rooted right" as to operate as a restraint upon the legislative power of the New South Wales Parliament. What the Court of Appeal said is true of the application to this court, namely:¹⁴

The [applicant] was unable to point to any judicial pronouncements, let alone a decided case, which indicated, at any time, that any such principle existed in the common law of England, or of the colonies of Australasia, or of Australia. It advocated the development of the common law, by the recognition of such a principle for the first time in this case.

¹² See *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 at 390; ; *Fraser v State Services Commission* [1984] 1 NZLR 116 at 121; ; *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398.

¹⁴ (1999) 47 NSWLR 340 at 365; 166 ALR 500 at 520-1

The applicant sought to rely upon statements respecting the common law in decisions respecting the powers of several of the states of the United States before the inclusion in those written state constitutions of guarantees respecting the taking of property.¹⁵ However, what would be involved if the applicant's submission were accepted would not be the development of the common law of Australia. Rather, it would involve modification of the arrangements which comprise the constitutions of the states within the meaning of s 106 of the Constitution, and by which the state legislatures are erected and maintained, and exercise their powers.

The applicant must seek to introduce into the constitutional text, in particular s 2(2) of the Australia Act, a limitation not found there. Undoubtedly, having regard to the federal system and the text and structure of "[t]he Constitution of each State of the Commonwealth" (the phrase used in s 106 of the Constitution), there are limits to the exercise of the legislative powers conferred upon the parliament which are not spelled out in the constitutional text.¹⁷ However, the limitation for which the applicant contends is not, as a matter of logical or practical necessity, implicit in the federal structure within which state parliaments legislate. Further, whatever may be the scope of the inhibitions on legislative power involved in the question identified but not explored in *Union Steamship*, the requirement of compensation which answers the description "just" or "properly adequate" falls outside that field of discourse. The Court of Appeal correctly refused to disturb what, since the *Wheat Case*, [(1915) 20 CLR 54] has been taken to be the settled position respecting state legislative power.

KIRBY J.

Normally, in Australia, where property is compulsorily acquired in accordance with law, the property owner is compensated justly for the property so acquired.²⁴ Australian society ordinarily attaches importance to protecting ownership rights in property. The present application was brought to test the constitutional right of a parliament and executive government of a state of the Commonwealth to depart from the foregoing norms. The applicant asked this court to consider whether, under the Act and the arrangements, properly construed, the state had acquired its property and, if so, whether such laws were beyond the state's lawmaking powers.

The presumption of compensation

It is usually appropriate (and often necessary) to consider any arguments of construction of legislation before embarking on challenges to constitutional validity. This rule is frequently observed in relation to attacks on the constitutionality of federal laws.³⁴ It is convenient to take this course in the present

¹⁵ The significant cases begin with the decision of Chancellor Kent in *Gardner v Newburgh* 2 Johns Ch 162 (1816) 7 Am Dec 526 and they are usefully discussed in Stoebuck, "A General Theory of Eminent Domain" (1972) 47 *Washington Law Review* 553 at 572-88.

¹⁷ See, for example, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 138 ALR 577; ; *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 at 567-8 145 ALR 96 at 112-13.

²⁴ In respect of federal acquisitions, in accordance with the Constitution s 51(xxxi) and the Lands Acquisition Act 1989 (Cth). In the State of New South Wales, see the Land Acquisition (Just Terms Compensation) Act 1991 (NSW). See also Jacobs, *The Law of Resumption and Compensation in Australia*, 1998, pp 194-201.

³⁴ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 186; ; *R v Hughes* (2000) 171 ALR 155 at 173-4 [66] 74 ALJR 802 at 816; ; *Residual Assco Group Ltd v Spalvins* (2000) 172 ALR 366 at

application because, if the applicant were to succeed on its construction argument, the challenge to the validity of the Act might fall away, or at least be postponed.

The foundation for the applicant's first argument is a principle which I did not take the respondent, the state, to contest. It is that, within the Australian legal system, courts will presume that legislation (federal, state or territory), or subordinate laws made under such legislation, do not amend the common law to derogate from important rights enjoyed under that law, except by provisions expressed in clear language. This principle is sometimes described as a "presumption" or as a "[rule] of construction" or as an "intention" which is attributed to the lawmaker. It rests on the imputed aspiration of the law to attain, and not to deny, basic precepts of justice. The presumption, rule of construction or imputed intention certainly applies to the taking of property without compensation. This has been acknowledged by this court in respect both of legislation³⁷ and delegated lawmaking.³⁸ Indeed, it has been suggested that "the general rule has added force in its application to common law principles respecting property rights".³⁹n39

In addition to these principles of the common law, the applicant invoked a connected, but different, "presumption". This was that Australian legislation would be construed so as to accord with the basic principles of customary international law.⁴⁰ It submitted that this was particularly so where such law expressed established norms of fundamental human rights.⁴¹ The applicant argued that the right of an individual, corporation or state in Australia to own property (and thus, by inference, not to be deprived of property by arbitrary process or without just terms) was implicit in contemporary customary international law.⁴² According to the applicant "compensation", in this context, meant "the full money equivalent of the thing of which [the owner] has been deprived".⁴³

There is little point in searching for additional expositions of, or foundations for, the principle that courts will presume that legislation does not overrule the common law in the absence of clear and express terms, given that it is so clear and that it was not really contested by the state. In English legal history the

389 [81] 74 ALJR 1013 at 1030.

³⁷ *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18 93 ALR 207 at 214-15.

³⁸ *C J Burland Pty Ltd v Metropolitan Meat Industry Board* (1968) 120 CLR 400 at 406-7, 415.

³⁹ *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 at 683.

⁴⁰ *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363.

⁴¹ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38 110 ALR 97 at 122; ; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 128 ALR 353 at 361-2; ; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384 152 ALR 540 at 571; cf ; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42 107 ALR 1 at 29; see Simpson and Williams, "International Law and Constitutional Interpretation" (2000) 11 *Public Law Review* 205.

⁴² *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 657-60 147 ALR 42 at 147-50 in relation to constitutional interpretation; United Nations Commission on Human Rights, *The Right of Everyone to Own Property Alone as well as in Association with Others*, UN Doc/E/CN.4/1994/19, 1993, pp 90-2. See also Allen, *The Right to Property in Commonwealth Constitutions*, 2000.

⁴³ *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495 at 571.

principle can be traced back for at least 300 years and probably further.⁴⁴ It has been applied countless times in Australia, including in the construction of legislation governing privately owned minerals and the public acquisition thereof.

However, any presumption, rule of construction, or imputed intention is subject to valid legislative provisions to the contrary. Judges may decline to read such legislation as having such an effect. The more preemptory, arbitrary and unjust the provisions, the less willing a judge may be to impute such a purpose to an Australian lawmaker. But a point will be reached where the law in question is "clear and unambiguous". Various other verbal formulae are used in the reasoning of this court to describe that point. They are collected by the Court of Appeal in its reasons. Once that point is reached, subject to any constitutional invalidity, the judge has no authority to ignore or frustrate the commands of the lawmaker. To do so would be to abuse judicial power, not to exercise it.

A glance at the legislative history of the Act, contained in the parliamentary debates, indicates that a deliberate policy decision was made by the government, and explained to the parliament of the state prior to the enactment of s 6(3) of the Act. This was to impose the limit of \$ 60m on compensation for the three largest claimants, including the applicant.⁴⁵ This was said to be because of "the need for budgetary constraint". In the debates, the minister was even more blunt: "The Government promised . . . fair and equitable compensation; and that is what people are getting -- except the big fellows." The terms of s 6(3) of the Act, therefore, contemplate precisely the arrangements which ensued. The limits that were imposed, the discrimination that was effected and the "compensation" paid on terms less than just, were all deliberate acts of the government and parliament of the state.

The Court of Appeal was therefore correct to dismiss the construction argument. No occasion arises for this court to disturb that court's judgment on that basis.

Powers of state parliament: the applicant's arguments

This conclusion obliges this court to examine the applicant's second argument. This was that the Act, specifically s 6, construed as above, is outside the legislative powers of the state and, by inference, that the arrangements are likewise unconstitutional.

It is not unusual to have challenges in this court to the constitutional validity of state legislation. Such challenges have arisen ever since the court was established. Provisions in state statutes, including some of great importance to the state, are, from time to time, found constitutionally invalid. But this result ordinarily follows a conclusion that the state law in question is invalid because it is inconsistent with federal law, or with an express prohibition in the Constitution or with an implication drawn from the

⁴⁴ In relation to property rights, see *Barrington's case* (1610) 8 Co Rep 136b at 138a 77 ER 681 at 684. A similar idea is reflected in *Magna Carta* (1215) cl 52. For recent English authority on the principle generally, see ; *R v Lord Chancellor*; *Ex parte Witham* [1998] QB 575 at 586 [1997] 2 All ER 779 at 788; ; *R v Secretary of State for the Home Department*; *Ex parte Pierson* [1998] AC 539 at 575, 588; [1997] 3 All ER 577 at 592, 604; *R v Secretary of State for the Home Department*; *Ex parte Simms* [2000] 2 AC 115 at 131 [1999] 3 All ER 400 at 412; ; *R v Secretary of State for the Foreign and Commonwealth Office*; *Ex parte Bancoult* [2000] EWCA 78 at [28]-[38].

⁴⁵ New South Wales, Legislative Assembly, Parliamentary Debates (*Hansard*), 16 May 1990, p 3542.

language and structure of the Constitution. What was unusual about the present application was that, for the most part, the applicant's argument did not rest on an invocation of the federal Constitution. It depended upon contentions about fundamental limitations said to exist in the legislative powers of a parliament of a state to enact a law such as the Act.

In essence, the applicant submitted that the lawmaking powers of the parliament of the state were "largely determined by the common law" and were therefore subject to such restrictions as the common law imposed. The applicant argued that the assumption that a legislature, such as the parliament of the state, was "uncontrolled" and subject to no applicable constitutional limits (within the subjects of lawmaking otherwise open to it) was fundamentally misconceived. It was an assumption that could be traced to the Oxford lectures of the legal scholar A V Dicey.⁶⁴ According to the applicant, Dicey's assertion that there was no constitutional limit to the legislative power of the United Kingdom Parliament (and by derivation the legislature of New South Wales) was historically inaccurate, wrong in principle, "tragic" in its legacy and doubted by persuasive dicta in Australian courts. It was made no more convincing by judicial repetition that rested on unexamined assumptions.

The applicant's submission was that, when examined against the background of preceding English constitutional law and history, it would be concluded that Dicey's assumption that parliament (whether in the United Kingdom or of a state of Australia) was "sovereign" and "omnipotent" was revealed to be a slogan, unsupported by proper analysis. As the applicant would have it, a distinguished academic had misled generations of British, Australian and colonial judges. My own reasoning, both in the New South Wales Court of Appeal and in this court, was taken to task. The basic mistake made by so many judges was (it was submitted) in simply assuming that Dicey's parliamentary sovereignty or omnipotence theory was correct in law. In fact, according to the applicant, it was no more than an assertion, comparatively recent, which was denied by historical materials and logical scrutiny.

There is no doubt that there exist in England very old cases which suggest that a view was once held that the English Parliament was less than omnipotent, being subject to the laws of God. Yet "[a]lthough many lawyers maintained that Parliament was bound by natural or divine law", there is, according to Professor Goldsworthy, "no evidence of substantial support in any period for the notion that the judiciary rather than Parliament possessed ultimate authority to interpret and enforce that"⁷¹.

Celebrated instances have arisen, from time to time, when English judges have held that an Act of the English Parliament could be treated as invalid where it conflicted with a basic principle of the common law, for example, that a person should not be a judge in his or her own cause.⁷² The uncontrolled omnipotence of parliament was rejected on a number of occasions by Lord Chief Justice Coke. It was questioned by Lord Chief Justice Hale⁷⁴ and also, apparently, by Lord Chief Justice Holt, Lord Chief

⁶⁴ Dicey, *Law of the Constitution*, 10th ed, 1959, pp 39-40. In *Sue v Hill* (1999) 199 CLR 462 at 492 [64] 163 ALR 648 at 666, Gleeson CJ, Gummow and Hayne JJ noted Professor Wade's observation that "Dicey never explained how he reconciled his assertions that Westminster could destroy or transfer sovereignty and the proposition that it could not bind future Parliaments" (footnote omitted). See Wade, "The Basis of Legal Sovereignty" (1955) *Cambridge Law Journal* 172 at 196.

⁷¹ Goldsworthy, *The Sovereignty of Parliament*, 1999, p 233.

⁷² *Dr Bonham's case* (1610) 8 Co Rep 113b at 118a 77 ER 646 at 652.

⁷⁴ cf Holdsworth, "Sir Matthew Hale on Hobbes: An Unpublished MS" (1921) 37 *Law Quarterly Review* 274.

Justice Kenyon, Lord Mansfield and Lord Chief Justice Camden. Doubts about it appear in other writings.⁷⁹ In turn, this view came to influence the early development of the common law in the United States of America.⁸⁰ The assertion of the right of the courts in that country to strike down laws which were found to be invalid (a right not expressed in the Constitution itself⁸¹) may have been influenced as much by the foregoing assertions of common law judicial authority in England, as by the pre-existing exercise by the Privy Council of its power to strike down laws of the American colonies found to be incompatible with laws made by the British Parliament.

From the foregoing historical material, the applicant sought to build its argument, in effect, that in the 19th century the law had taken a wrong turning under the influence of Dicey's ideas. This had infected British thinking and spread to Britain's colonies, including in Australia. But there had always been academic sceptics. In more recent years, their numbers had increased.⁸⁴ At last, English judges were beginning to join in the criticism of Dicey's "crude absolute of statutory omnipotence". In numerous decisions of the courts the role of judicial review had been enlarged to apply to situations that once would have been unthinkable -- including even consideration of challenges to the validity of an Act of the United Kingdom Parliament by virtue of its suggested conflict with the European Communities Act 1972 (UK).⁸⁷

The applicant urged this court to adopt an approach in harmony with this enlarged understanding of the function of the courts, in relation to the Parliament of the United Kingdom, by reference both to judicial opinions in early history and in more recent times. Putting it shortly, it submitted that the time had come for this court to release Australian law from the intellectual prison into which Dicey had cast so many judges and lawyers for more than a century. His theory of the sovereignty and omnipotence of "uncontrolled" British legislatures was a leftover from the thinking of absolute monarchy whose mantle had been temporarily seized by absolute parliaments. It was an approach unsuitable to the law and society of today which recognised, and enforced, checks on power, not obedience to notions of absolute power.⁸⁸

⁷⁹ cf Sherry, "Natural Law in the States" (1992) 61 *University of Cincinnati Law Review* 171 at 175.

⁸⁰ Early decisions in the United States held that state legislatures had no power to take property without compensation: *Gardner v Newburgh* 2 Johns Ch 161 (NY) (1816) 7 Am Dec 526; ; *Sinnickson v Johnson* 2 Harrison 129 (NJ) (1839) 34 Am Dec 184; ; *Young v McKenzie* 3 Ga 31 at 42 (1847); ; *Parham v Justices* 9 Ga 341 at 349-50 (1851); ; *Pumpelly v Green Bay Co* 80 US 166 (1871); ; *Chicago, Burlington and Quincy Railroad Co v Chicago* 166 US 226 at 236-8 (1897).

⁸¹ *Marbury v Madison* 5 US 87 (1803).

⁸⁴ Mann, "Britain's Bill of Rights" (1978) 94 *Law Quarterly Review* 512 at 513; Allott, "The Courts and Parliament: Who Whom?" (1979) *Cambridge Law Journal* 79 at 114; Craig, "Sovereignty of the United Kingdom Parliament after *Factortame*" (1991) 11 *Yearbook of European Law* 221 at 234, 238; Finn, "Statutes and the Common Law" (1992) 22 *University of Western Australia Law Review* 7 at 20; Allan, "Parliamentary Sovereignty: Law, Politics, and Revolution" (1997) 113 *Law Quarterly Review* 443 at 449.

⁸⁷ *R v Secretary of State for Transport; Ex parte Factortame Ltd* [1990] 2 AC 85 at 152-3; ; *R v Secretary of State for Transport; Ex parte Factortame Ltd (No 2)* [1991] 1 AC 603; see Wade, "Sovereignty -- Revolution or Evolution?" (1996) 112 *Law Quarterly Review* 568 at 569-70, 573.

⁸⁸ An analogy might be drawn with previous assertions of the uncontrolled omnipotence of

In further support of its submission, the applicant invoked three additional considerations. The first comprised a series of decisions of the New Zealand Court of Appeal. Justice Cooke, as he then was, expressed the opinion that "[s]ome common law rights presumably lie so deep that even Parliament could not override them".⁹⁰ Such judicial statements were made with reference to the suggested limitations that would exist, even in the case of the Parliament of New Zealand, on the power to enact "literal compulsion, by torture for instance". Once such a principle was established as a matter of law, its operation would be elucidated by the traditional means of case-by-case determination.

Secondly, the applicant invoked Sir Owen Dixon's reminder that the principle of parliamentary supremacy is itself a doctrine of the common law.⁹² What the judges had recognised for a time to be an omnipotent and unqualified supremacy, they could now recognise to be subject to specified limitations. Such limitations would include controls at least on such gross and discriminatory departures from basic civil rights as were reflected in the Act and the arrangements.

Powers of state parliament: authority

In *Union Steamship Co of Australia Pty Ltd v King*, [(1988) 166 CLR 1 at 10] this court left open the question whether, with respect to a parliament of a state, there were any common law rights which were so fundamental as to be beyond legislative power. In its amended statement of claim the applicant contended that the legislative powers of the parliament of the state excluded the power to "deprive named persons of their property without just, or any properly adequate, compensation". However, the applicant could not point to any case in England, the colonies of Australasia or modern Australia, to support its argument that this was the kind of "fundamental" common law right that "lay so deep" contemplated by the New Zealand cases. It could point to no judicial opinion to support its attempt to revive the question reserved in *Union Steamship* and to require its answer in this case.

Before modern times, English legal history contained many examples of statutes, enforced by the courts, by which the parliament at Westminster authorised the acquisition of property without compensation. The statutes by which the Crown appropriated the lands of the monasteries in England provide an early illustration⁹⁹. Of direct relevance to Australia are the Imperial Acts which necessarily deprived the indigenous peoples of Australia of any rights that they might have enjoyed in land acquired for the purposes of British settlement. If the validity of such legislation has not hitherto been questioned, some point of distinction, connected with a different status belonging to the New South Wales Parliament, would have to be found to justify a legal approach different from the acceptance accorded to analogous laws of the Westminster Parliament.

absolute monarchy: see eg speech of King Louis XV in France in 1766 in West et al, *The French Legal System*, 2nd ed, 1998, p 31. Just as such extreme notions of unbridled monarchical power have been discarded so, it was suggested, should notions of uncontrolled legislative power.

⁹⁰ Taylor v New Zealand Poultry Board [1984] 1 NZLR 394 at 398; see also ; Fraser v State Services Commission [1984] 1 NZLR 116 at 121.

⁹² Dixon, "The Common Law as an Ultimate Constitutional Foundation" in *Jesting Pilate*, 1965, p 203 at pp 206-11.

⁹⁹ 27 Hen VIII c 28 (1536); 31 Hen VIII c 13 (1539).

It was suggested that a distinction was evident from colonial times. This was that, by statute¹⁰¹ or by the common law, no law could be made by a colonial legislature "repugnant to the Law of England", that is, the common law of England. However, for many reasons, this argument is unavailable to the applicant. Most importantly, the status of the Parliament of New South Wales is no longer that of a colonial legislature, governed by imperial legislation. It is that of a state of the Australian Commonwealth as provided for in the Australian Constitution. Yet even before that Constitution was enacted, *** the *Colonial Laws Validity Act 1865 (Imp)* had been enacted. It was there provided [s 3] that "[n]o Colonial Law shall be or be deemed to have been void or inoperative on the Ground of Repugnancy to the Law of England, unless the same shall be repugnant to the Provisions of some such Act of Parliament, Order, or Regulation as aforesaid". Clearly enough, this enactment was designed to restrict the operation of previous doctrines of repugnancy which had been thought by some to limit the legislative powers of a parliament such as that of New South Wales to conform with fundamental principles of the common law of England. By the time that legislature had become the parliament of a state, such limitations had been swept away. There is therefore no applicable repugnancy on which the applicant could rely.

[Next, Kirby J rejects the notion that the grant of legislative power "to make laws for the peace, welfare, and good government" of the colony (later the state) operate as words of limitation.]

Thirdly, so far as the powers of a parliament of a state of Australia to permit the acquisition of property without the payment of compensation are concerned, a long line of opinions in this court upholds the existence of that power. Clearly these opinions stand in the way of the second proposition advanced by the applicant. These decisions equate the power of a parliament of a state to the uncontrolled legislative authority enjoyed by the Parliament of the United Kingdom in its own sphere.¹¹¹ Whereas in the federal Constitution, specific provision had been made requiring the provision of "just terms" as a precondition to the acquisition of property from any state or person by federal law, no equivalent provision was there included in respect of state acquisition laws.

[Kirby J then notes that the HCA had, in *Mabo v Queensland*, (1988) 166 CLR 186; 83 ALR 14, rejected the argument that the Queensland Parliament lacked legislative power to deprive indigenous peoples of property rights without providing compensation.]

Powers of state parliament: the theory and reality

Apart from the expositions of judicial authority in the above decisions, considerations of legal policy and political theory reinforce, and to some extent explain, the judicial authority collected in the cases. Members of a legislature, such as the Parliament of New South Wales, are regularly answerable to the electors, whereas judges in Australia are not. Judges recognise that, whatever the deficiencies of electoral democracy, the necessity of answering to the electorate at regular intervals has a tendency to curb legislative excesses. Many judges reject "the role of a Platonic guardian" and are "pleased to live in a society that does not thrust [that role] upon [them]". Most judges in Australia would probably share this relatively modest conception of their role. In this conception, the duty of obedience to a law made by a parliament of a state derives from the observance of parliamentary procedures and the conformity of the resulting law with the state and federal constitutions. It does not rest upon judicial pronouncements to

¹⁰¹ Australian Constitutions Act 1850 (Imp) (13 and 14 Vict c 59) s 14.

¹¹¹ *Commencing with New South Wales v Commonwealth* (1915) 20 CLR 54 at 77 per Barton J.

accord, or withhold, recognition of the law in question by reference to the judge's own notions of fundamental rights, apart from those constitutionally established.

Ultimately, this conception of the judicial function rests on political facts. These include the existence and powers of the parliaments of the states and the inappropriateness of judicial questioning of such basic political realities. These are reasons why, in Australia, the notion that there are some basic common law rights that "lie so deep" that even a parliament, otherwise acting within its powers, cannot contradict them, has so far gathered few adherents. To the contrary, the commonly expressed view about the common law in Australia envisages a "more modest" role, at least where a legislature has made law within the ambit of its constitutional powers. This is because, in Australia, the common law operates within an orbit of written constitutional laws and political realities.

One further consideration, to which the Court of Appeal referred, should also be mentioned in answering the applicant's submission that this court should now turn its back on past authority, if necessary overrule its previous holdings, and uphold as a doctrine of the common law an entitlement of judges to invalidate state legislation found to breach fundamental or "deep lying" rights. It is a consideration of particular relevance to the present case. In 1988 a referendum of electors in Australia rejected a proposal to add to the federal Constitution a new provision requiring that, to be valid, a "law of a State" providing for the "acquisition of property from any person" had to afford "just terms".¹³²

The referendum proposal of 1988, although it was lost, reinforces to some extent the orthodox theory of Australia's legal and political arrangements. Under the Australian Constitution, it is not necessary to depend on judges to prevent, or cure, all injustices, including those of the kind of which the applicant complains. At least in theory, it is open to the electors to do so. They may do so by dismissing the government and the parliament responsible for creating such laws. Alternatively, it is open to the electors to influence the insertion in the federal and state constitutions of entrenched provisions that forbid repetition of such laws. The practicalities are not always so straightforward. However, the legal principle postulated by the applicant was one reserved for an extreme case. For such a case it may ordinarily (although not inevitably) be assumed that, ultimately, the political process will produce just laws on significant topics.

Judicial responses to extreme laws

Before parting with this application, I would mention briefly a number of points which were not argued. Some of them are relevant to meeting the suggestion that constitutional law in Australia, as expounded by this court, particularly in respect of state laws, is devoid of any means of preventing, and providing redress against, extreme departures from fundamental rights in the form of state legislation. Such a conclusion would be mistaken.

Just as the available protections against extreme cases of discrimination and injustice do not arise in Australia from a comprehensive constitutional charter of civil rights [citing Canada] or from a binding treaty on fundamental rights given local legislative effect [citing the *Human Rights Act 1998 (UK)*], nor

¹³² The proposed amendment was to insert a new s 115A in the Constitution. It was voted upon on 3 September 1988, together with several other proposals. It was defeated, having failed to pass in all states and nationally. The national vote in favour was 30.33% of the electors with 68.19% against and 1.48% informal. The affirmative vote in New South Wales was only 29.27%. See Blackshield and Williams, *Australian Constitutional Law and Theory*, 2nd ed, 1998, p 1188.

do they arise from a belated attempt to assert for the common law (and the judges who expound and apply it) a role superior to legislation which judicial authority, legal history and political realities deny.

In Australia, the foundation for judicial protection against "extreme" derogation from fundamental rights lies, in part, in the presumptive principle of construction which judges, federal and state, regularly invoke. But it also lies in the provisions of, and implications derived from, the federal Constitution itself. Whereas the role of the common law, in the face of legislation, is "modest", the role of the Constitution is substantial.

An illustration of the way in which implications derived from the language and structure of the Constitution can sometimes afford protections from state legislation deemed incompatible with the Constitution is *Kable v Director of Public Prosecutions (NSW)* [(1996) 189 CLR 51]. Further implications may be drawn from the language, structure and presuppositions of Ch III. Any attempt to impose on state courts functions incompatible with the exercise of judicial power and due process of law might, in a given case, contravene the presuppositions of Ch III of the Constitution. If this is so, an extreme case may well be constrained by other implications, derived from the Constitution, which limit and control the lawmaking of other branches of the government of a state, including a parliament of a state.

The significance of the contemporary realisation that the foundation of Australia's Constitution lies in the will of the Australian people has not yet been fully explored. It is not impossible that this conception would, in an extreme case, also reinforce the foregoing and affect judicial recognition of a purported "State law" that was not, in truth, a "law" at all. In Australia, considerations such as these, derived directly or indirectly from the Constitution, afford the likely future judicial response to any extreme affront masquerading as a state law. The answer lies in the implications derived from the Constitution, not in assertions by judges that the common law authorises them to ignore an otherwise valid law of a state. Such an over-mighty assertion in relation to constitutional powers of lawmaking is as alien to our law as to our political realities. On the other hand, judicial derivation of implications from the federal Constitution is not alien but familiar. [In a telling fn. 153, Kirby J teasingly states that it is beyond the scope of his reasons "to explore the extent to which, in the exercise of historical powers, the Crown's representatives in a polity governed by a written constitution are authorised to delay or refuse the royal assent to a law, procedurally valid, which clearly offends basic constitutional norms provided by that constitution. See Evatt, *The King and his Dominion Governors*, 2nd ed, 1967, pp 148-52; Goldsworthy, *The Sovereignty of Parliament*, 1999, pp 130-2."

CALLINAN J.

I would reserve my position on two matters which it is unnecessary to decide in this case: the existence or otherwise, or the nature of, any unexpressed limits upon the legislative powers of the states; and, as to the drawing of inferences to support substantive implications in the Constitution. Otherwise I agree generally with the reasons for judgment of Gaudron, McHugh, Gummow and Hayne JJ.

V. Contrasting Approaches

A. Review Hypothetical

HYPOTHETICAL: ENVIRONMENTAL REGULATION

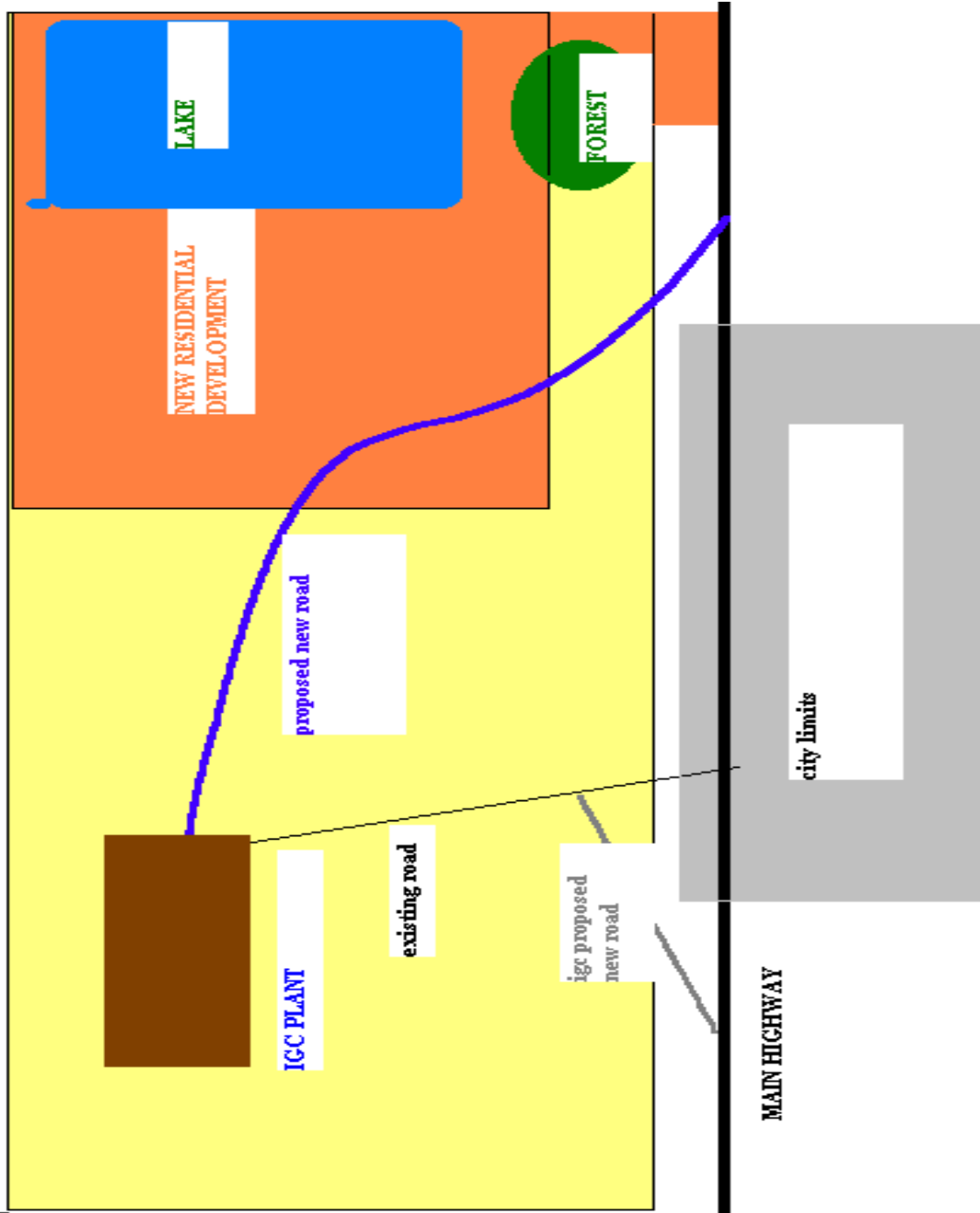
The International Grain Company operates a large food processing plant in Ontario/ Michigan/New South Wales. Its industrial processes require a lot of water, most of which is returned to the land. Several years ago, it decided to expand the plant significantly to manufacture retail food products, which will involve a significant increase in truck traffic between the plant and the nearest road. Meanwhile, IGC has sold adjacent land for a significant new “planned village” high-tech residential development. The village will use groundwater from the same aquifer that attracts the discharge from the plant.

The government took the following actions in response to these developments:

-- the Environment Department/Ministry informs IGC that it will have to begin treatment of its water discharges based on an existing law governing discharges to aquifers being used as a source for personal drinking water

-- the Transportation Department/Ministry initially informed IGC that its permit would not be granted for twelve months to undertake a study of the area’s transportation needs; after this study, the department/ministry informs IGC that, as a condition of obtaining the necessary permit for the construction of new facilities as part of its planned expansion, the company must dedicate an easement over its vast land holdings in the area to permit the construction of a new road from the plant to the nearest highway. The decision is based on general statutory authority to ensure adequate roads for the needs of a community.

International Grain Company objects to these terms, as well as to the delay in obtaining the permits. Water treatment will be very expensive; indeed, one of its plants on the site will not be profitable and will have to be shut down if water treatment is required. The demanded easement will cover significant profitable farmland currently owned by IGC. In particular, a significant portion of the road expansion seems necessary because of the residential development, not IGC’s plans. IGC offers, instead, to grant an easement over a much smaller area of its land so that its current road can connect to the main highway. As to the development, IGC argues that under the common law doctrine of easement by necessity it need not assist the development because the parcel is not literally landlocked. The government claims that its proposed road better meets transportation planning needs, and argues that the common law should evolve to recognize the need to grant an easement under circumstances where such an easement provides clearly superior access to the affected parcel.



B. Review Problems

(1) Under the reasoning of *Mugler v Kansas*, can the State of Michigan effectively require IGC, without compensation, to shut down some of its operations to ensure that residents of a new residential development will have clean drinking water?

(2) How would American courts decide the same question under the reasoning of *Pennsylvania Coal v Mahon*?

(3) How would American courts decide the same question under the reasoning of *Lucas v So. Carolina Coastal Council*?

(4) Must Michigan compensate IGC for the easement for road construction?

(a) Under the common law, an "easement by necessity" is traditionally imposed when the grantor transfers land-locked property to the grantee and there is not other access to the main road; in a American states, the state supreme court has adopted the rule of "reasonable necessity" to make it easier to grant the easement; *If Michigan courts were persuaded to adopt the modern/ minority rule of "reasonable necessity," and ordered an easement here under the common law of Michigan, would there be a compensable taking under the Fifth and Fourteenth Amendments?*

(5) Must Michigan compensate IGC for lost profits or back interest because of the 12-month delay in approval of its permit?

(6) Does IGC have a constitutional claim that Ontario must compensate for the easement for road construction?

(7) Is there any legal claim that IGC can make with regard to the required road access?

(a) What about the 12-month delay?

(8) Does IGC have any Canadian statutory claims with regard to the requirement to cease water polluting operations?

(9) Would IGC have any claims against the Australian Commonwealth government if its regulations barred pollution of the aquifer?

(10) Would IGC have any claims against the Australian Commonwealth government for the required easement?

(11) Would IGC have any claims if the regulations were imposed by the New South Wales government?

(12) Is the Canadian and Australian state experience instructive with regard to Justice Holmes' view, in *Mahon*, that constitutional protection is necessary to counteract the natural tendency of human nature to extend regulation until private property would disappear?

(13) What value differences explain (at least in part) the absence of constitutional protection for property in Canada?

(14) Is there any principled justification for the American differentiation between regulations that impinge on general economic liberty (which are NOT subject to close judicial scrutiny) and regulations that impinge on the profit taken by an owner of real property? Why do even liberal dissenters to recent decisions, such as Justice Stevens in Lucas, conclude that an order granting third parties access to a marina is more troubling than an order requiring the placement of safety buoys in the marina (even if the latter were more expensive for the owner)?

C. Contrasting “public use” with “just compensation”

The Fifth Amendment provides: “nor shall private property be taken for public use, without just compensation.” Although courts have closely scrutinized government action to determine if property is “taken,” and whether compensation is appropriate, the Supreme Court has been much more deferential to legislative judgments about whether a compensation is “for public use.” In *Berman v. Parker*, 348 U.S. 26 (1954), the court upheld an urban renewal scheme where land was expropriated, compensation provided, and the land resold to a developer whose plans removed urban blight. The Court held that any goal that was within Congress’ recognized authority over the District of Columbia (or, more broadly, within the state’s police power) would justify the use of eminent domain proceedings. In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the Court likewise upheld a plan to condemn vast landholdings by the few Hawaiians who owned private land, for redistribution to the vast number of homeowners who rented their land. Most recently, in *Kelo v. City of New London*, 545 U.S. 469 (2005), the Court upheld the forced sale of homes directed by the city so that a shopping mall likely to generate higher tax revenues could be constructed.

This particular use of eminent domain is highly controversial in the United States, and the decision provoked a strong reaction. Although no federal response has been passed by Congress, homeowners in 42 states have used the political process to enact legislation that bars or significantly limits the authority of local governments to use the eminent domain power in broad and unfettered ways.

D. Additional considerations: What Is “Property” for Takings Purposes?

As noted earlier, one of the principal reasons for the Canadian unwillingness to constitutionalize a right to property is the perceived difficulty in distinguishing property rights from other economic rights that Canadians do not want to protect from government regulation. This difficulty could be significantly ameliorated if the right to property were fixed an unchanging. If this were so, the boundaries of the constitutional right would be clear, and government regulation of economic interests that were not within these boundaries could proceed unfettered. But it isn’t. As Dean John Cribbet noted in *Concepts in Transition: The Search for a New Definition of Property*, 1989 U. of Ill. L. Rev. 1, “the meaning of the chameleon-like word property constantly changes in time and space.”

Cribbet concludes that even with a takings clause it is “still incorrect to say that the judiciary protects property. Rather, the judiciary calls property that which they protect, and

that which they protect is forever in transition." *Id.* at 41. The process of defining the right to property is particularly difficult in the United States. The constitutional right is a federal one, determined ultimately by the U.S. Supreme Court. But property rights are generally defined by states (originally under the common law, often today by statute). As the common law right to property evolves, whether the state is "taking" property rights gets very murky.

For example, although the U.S. Supreme Court has held that the right to exclude others is a critical aspect of the constitutionally protected property right, the court in *State v. Shack*, 277 A.2d 369 (N.J. 1971) interpreted New Jersey law to hold that farmers could not exclude governmental or charitable aid officials from entering land to assist migrant farmworkers. Formally, the court's decision could be seen as a modest, evolutionary expansion of the doctrine of necessity to enter the lands of another. Realistically, the Court forthrightly engaged in a "fair adjustment of the competing needs of the parties, in light of the realities of the relationship" between the migrant workers and the owner of their housing.

Treatment of riparian water rights (the right of a landowner to use water flowing adjacent to or through his property) illustrate the different approaches taken in Canada and the U.S. and the effect of the presence or absence of a constitutional right to property. The *Nova Scotia Water Act*, enacted in 1919, declared that every watercourse and the sole and exclusive right to use, divert and appropriate any and all water in any watercourse was vested forever in the Crown in the right of the Province. The law provided that "notwithstanding any provision for previous users, the Governor-in-Council may authorize any water use." Such a direct "taking" of property "rights" would of course be inconsistent with the 5th Amendment. However, as Professor Eric Freyfogle notes in *Water Justice*, 1986 U.Ill. L. Rev. 481, American courts, using common law jurisprudence, shifted the law away from granting riparian landowners certain fixed rights to adjacent water to a legal regime authorizing all to make "reasonable" use of water and prohibiting "unreasonable" uses. Courts currently perform this function, although Freyfogle suggests that a regulatory regime to identify reasonable uses would be preferable, and it would be hard under these circumstances to see how such regulation would be a taking.

The U.S. Supreme Court's focus on "background principles of the State's law of property and nuisance" that may burden property, first articulated in *Lucas v. South Carolina Coastal Council*, *supra*, further complicates the analysis. This passage makes it quite unclear whether the continuing evolution of the common law of property constitutes a taking or not. Unfortunately, the Supreme Court's sensitivity to this question is not well demonstrated. For example, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Court held that a federal statute granting public access to a privately-created marina constituted a taking, ignoring the government's argument, Brief of the United States at 27-30, No. 78-738, that under Hawaiian law the property would have been burdened with a public easement.

In important respects, then, *Lucas* can be read to effectively constitutionalize the common law of property, and to possibly limit the common law's ability to regulate land use to traditional concepts of nuisance. This aspect has provoked a sharp critique:

In *Lucas* the Supreme Court held firm to the distinction between common law ownership and the statutory rules of the ecological age, as if one were static, neutral, and

sound, the other shifting, political, and suspect. With the golden age of the common law long passed, this reasoning rings hollow. Back when courts kept ownership norms up to date, the common law embodied the community's values and aims. In an age when governing power has drifted from courts to regulatory agencies, from states to the federal level, the common law no longer reflects current thinking on right and wrong land use. The latest thinking - indeed, the accumulated wisdom of much of the last century - now resides elsewhere. It is simply not possible to discern the "understanding" of citizens, as *Lucas* would have us do, without paying heed to these positive lawmaking efforts. Only by ignoring statutory law, federal law, and the entire "public" legal realm can one embrace the severely flawed notion that land ownership today means the right to engage in any land use that is not a common law nuisance.

Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 U.C.L.A. L. Rev. 77, 123-24 (1995).

To illustrate, consider how the common law of property deals with the problem illustrated in Hypothetical E of how residents to the New Residential Development can get access to their property from the Main Highway, other than by an easement over IGC property. Older precedents recognized a non-compensable "easement by necessity," but required proof of "strict necessity." In the Hypothetical, it would be physically possible to build a road from the main highway, near the forest, and between the forest and the lake, but this would be much less desirable and perhaps even unreasonable. Some state courts have, over the past 100 years, changed the common law doctrine to require "reasonable necessity." Assuming that the Michigan Supreme Court had not yet joined this trend, does the Fifth Amendment limit its ability to do so now?

In this regard, consider one venerable and two recent cases. In *Palmer v. Mulligan*, 3 Cai. R. 307 (N.Y. Sup. Ct. 1805), the court refused to apply traditional concepts of riparian water rights, which barred any use of water that caused any harm to upstream or downstream owners. In permitting the defendant to construct a mill in competition with the plaintiff's mill, the court reasoned, in part, that sound public policy in favor of competition counseled against a rule of law that limited another mill on the river. The traditional rule may have well-fitted life in 17th century England, when low levels of economic activity made land use conflicts rare. With intensive uses accompanying industrialization, the common law evolved. See generally ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* 66-70 (2003).

More recently, a number of state legislatures have enacted "right to farm" laws that immunize farming activity from claims by neighboring property owners that the activity constitutes a nuisance. *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998), held the statute to constitute an unconstitutional taking. The court reasoned that under the Restatement of Property the ability to engage in harmful activity constitutes an easement on the property of the affected owner. Normally, the Fifth Amendment requires compensation when an easement is imposed. This approach was rejected in *Moon v. N. Idaho Farmers Ass'n*, 140 Idaho 536, 96 P.3d 637 (2004), where the court rejected the Restatement approach and held that nuisance could be defined by state law, and that the state could remove causes of action without violating the Fifth Amendment. For an excellent critique of the *Bormann* approach, see Jennifer L. Beidel, Comment, *Pennsylvania's Right-To-Farm Law: A Relief For Farmers Or An Unconstitutional Taking?*, 110 Penn St. L. Rev. 163 (2005).