# Takings II

## F. Regulatory Takings

Pennsylvania Coal Co. v. Mahon

260 U.S. 393 (1922)

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. 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. 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.

But the case has been treated as one in which the general validity of the act should be discussed. The Attorney General of the State, the City of Scranton and the representatives of other extensive interests were allowed to take part in the argument below and have submitted their contentions here. It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain.

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. 328, 331, 100 Atl. 820. 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 the 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 rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. Hairston v. Danville & Western Ry. Co., 208 U. S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

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.…

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 cannot, 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. Welch v. Swasey, 214 U. S. 91. 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 oleomargine cases settled that. Mugler v. Kansas, 123 U. S. 623, 668, 669; Powell v. Pennsylvania, 127 U. S. 678, 682. See also Hadacheck v. Los Angeles, 239 U. S. 394; Pierce Oil Corporation v. City of Hope, 248 U. S. 498. 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 gases, 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 100 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.

It is said that this is a case of a single dwelling house, that the restriction upon mining abolishes a valuable estate hitherto secured by a contract with the plaintiffs, and that the restriction upon mining cannot be justified as a protection of personal safety, since that could be provided for by notice. The propriety of deferring a good deal to tribunals on the spot has been repeatedly recognized. May we say that notice would afford adequate protection of the public safety where the Legislature and the highest court of the state, with greater knowledge of local conditions, have declared, in effect, that it would not? If the public safety is imperiled, surely neither grant, nor contract, can prevail against the exercise of the police power.… Nor can existing contracts between private individuals preclude exercise of the police power.… The fact that this suit is brought by a private person is, of course, immaterial. To protect the community through invoking the aid, as litigant, of interested private citizens is not a novelty in our law. That it may be done in Pennsylvania was decided by its Supreme Court in this case. And it is for a state to say how its public policy shall be enforced.

This case involves only mining which causes subsidence of a dwelling house. But the Kohler Act contains provisions in addition to that quoted above; and as to these, also, an opinion is expressed. These provisions deal with mining under cities to such an extent as to cause subsidence of—

(a) Any public building or any structure customarily used by the public as a place of resort, assemblage, or amusement, including, but not limited to, churches, schools, hospitals, theaters, hotels, and railroad stations.

(b) Any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public.

(c) Any track, roadbed, right of way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by the Public Service Law, section 1.

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. 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.

Notes

1. **Nuisances.** Justice Brandeis’s dissent objects that the Kohler Act simply prohibits a “noxious use.” A number of prior precedents, Brandeis argues, established that the state may enjoin such uses even if doing so “deprives the owner of the only use to which the property can then be profitably put.” In *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), for example, the Court found no taking where an ordinance prohibiting brickyards largely destroyed the value of an existing facility. The land was alleged to be worth $800,000 as a brickyard and $60,000 otherwise. Nonetheless, the Court deemed it within the state’s police power to declare previously lawful activities to be nuisances and enjoin them. *Id.* at 410 (“[T]here must be progress, and if in its march private interests are in the way, they must yield to the good of the community.”). The principle, that regulating nuisances is never a taking, has been referred to as a second categorical rule in takings law. As we will see below (in our discussion of the *Lucas* case), the actual doctrine is not so simple.
2. **Diminution of value.** How far is too far depends on how one defines the property interest at stake. For Holmes, the Kohler Act “purports to abolish … an estate in land,” by preventing the exercise of the mining company’s bargained-for rights. On this logic, the diminution of value is total. Brandeis, by contrast, objected that “[t]he 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.” Analyzing the takings question by looking at the property as a composition of discrete “estates,” rather than as an integrated whole has been called “**conceptual severance**.” Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1676 (1988) (“[T]his strategy hypothetically or conceptually “severs” from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.”).

The issue is also sometimes referred to as the “**denominator problem**.” Suppose I have a parcel of land that I could sell for $200,000, but I could also sell the mining rights alone for $100,000. Suppose further that the state enacts a ban on mining, which reduces the market value of the land to $100,000. How do we evaluate the diminution of value? Is it 50% ($100,000/$200,000)? Or is the denominator the mining rights alone, making the diminution 100% ($100,000/$100,000)? If we were to permit conceptual severance, how should the relevant estates be identified? In *Pennsylvania Coal*, Holmes noted that the mining interest at issue was an established one under state law. Is that a satisfactory basis? Can state law define federal rights in this way? What if an anti-regulatory state legislature took advantage of its time in power to create broad new “estates” (e.g., one for oil drilling, one for factory smoke, etc.)?

1. **Support estates revisited.** On this question, note that the Court revisited the takings implications of Pennsylvania statutes designed to protect surface structures from mining. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987), upheld a statute whose implementing regulations required coal companies to leave approximately 50% of coal in the ground beneath protected buildings. The Court did so notwithstanding Pennsylvania law’s “unique” approach of treating the “support estate” as a discrete interest in land. By a 5-4 vote, the Court concluded that the interest is part and parcel of other mining interests (thus expanding the denominator at issue in considering diminution of value). “Because petitioners retain the right to mine virtually all of the coal in their mineral estates, the burden the Act places on the support estate does not constitute a taking. Petitioners may continue to mine coal profitably even if they may not destroy or damage surface structures at will in the process.” *Id.* at 501.

This result may seem at odds with *Pennsylvania Coal*. The dissent certainly thought so. The majority read *Pennsylvania Coal* narrowly as reaching only a specific application of the Kohler Act to bargained-for rights to mine under a particular house. The rest, pertaining to the general applicability of the Kohler Act was described as an “uncharacteristically” advisory opinion on Justice Holmes’s part. *Id.* at 484. In any case, the majority viewed the Subsidence Act as different than the earlier law in two key respects. First, the Court read the history of the statute as disclosing a public purpose. “None of the indicia of a statute enacted solely for the benefit of private parties identified in Justice Holmes’ opinion are present here.” *Id.* at 486. That some private parties *did* benefit was seen as incidental. Second, as noted above, the Court viewed the challengers as retaining valuable mining rights. Unlike “the Kohler Act[, which] made mining of “certain coal” commercially impracticable,” the Subsidence Act was not shown to have worked a similar harm, at least for purposes of a facial challenge.

1. **Baseline Games.** Is Justice Brandeis’s distinction between “confer[ring] benefits on property owners” and “protect[ing] the public from detriment and danger” persuasive? What Justice Brandeis views as prevention of a harm—preventing the collapse of surface structures overlying coal formations owned by mining interests—Justice Holmes views as conferral of an unbargained-for benefit—a support estate that was willingly bargained away. Is one of them wrong? What is the baseline against which the economic effects of a regulation ought to be evaluated?
2. **“Reciprocity of advantage.”** Reciprocity of advantage refers to a sort of implicit compensation of regulation. Suppose you own land in a part of town zoned for residential use. You may not build a factory on your property, but neither can your neighbors. Your property’s residential value is enhanced accordingly. “Under our system of government, one of the State’s primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.” *Keystone Bituminous Coal Ass’n*, 480 U.S. at 491. The principle is often invoked to argue that regulations should not “single out” anyone for disproportionate burdens. Thatdoes not mean that everything comes out even. “The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens … in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received.” *Id.* at 491 n.21.

Penn Central Transp. Co. v. City of New York

438 U.S. 104 (1978)

Mr. Justice BRENNAN delivered the opinion of the Court.

The question presented is whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks—in addition to those imposed by applicable zoning ordinances—without effecting a “taking” requiring the payment of “just compensation.” Specifically, we must decide whether the application of New York City’s Landmarks Preservation Law to the parcel of land occupied by Grand Central Terminal has “taken” its owners’ property in violation of the Fifth and Fourteenth Amendments.

I

A

Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance. These nationwide legislative efforts have been precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today. “[H]istoric conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people.”

New York City, responding to similar concerns and acting pursuant to a New York State enabling Act, adopted its Landmarks Preservation Law in 1965. See N.Y.C. Admin. Code, ch. 8–A, § 205–1.0 *et seq*. (1976). The city acted from the conviction that “the standing of [New York City] as a world-wide tourist center and world capital of business, culture and government” would be threatened if legislation were not enacted to protect historic landmarks and neighborhoods from precipitate decisions to destroy or fundamentally alter their character. § 205–1.0(a). The city believed that comprehensive measures to safeguard desirable features of the existing urban fabric would benefit its citizens in a variety of ways: *e. g.*, fostering “civic pride in the beauty and noble accomplishments of the past”; protecting and enhancing “the city’s attractions to tourists and visitors”; “support[ing] and stimul [ating] business and industry”; “strengthen[ing] the economy of the city”; and promoting “the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city.” § 205–1.0(b).

The New York City law is typical of many urban landmark laws in that its primary method of achieving its goals is not by acquisitions of historic properties,[[1]](#footnote-1)6 but rather by involving public entities in land-use decisions affecting these properties and providing services, standards, controls, and incentives that will encourage preservation by private owners and users. While the law does place special restrictions on landmark properties as a necessary feature to the attainment of its larger objectives, the major theme of the law is to ensure the owners of any such properties both a “reasonable return” on their investments and maximum latitude to use their parcels for purposes not inconsistent with the preservation goals.

The operation of the law can be briefly summarized. The primary responsibility for administering the law is vested in the Landmarks Preservation Commission (Commission), a broad based, 11-member agency assisted by a technical staff. The Commission first performs the function, critical to any landmark preservation effort, of identifying properties and areas that have “a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation.” If the Commission determines, after giving all interested parties an opportunity to be heard, that a building or area satisfies the ordinance’s criteria, it will designate a building to be a “landmark,” situated on a particular “landmark site,” or will designate an area to be a “historic district.” After the Commission makes a designation, New York City’s Board of Estimate, after considering the relationship of the designated property “to the master plan, the zoning resolution, projected public improvements and any plans for the renewal of the area involved,” may modify or disapprove the designation, and the owner may seek judicial review of the final designation decision. Thus far, 31 historic districts and over 400 individual landmarks have been finally designated, and the process is a continuing one.

Final designation as a landmark results in restrictions upon the property owner’s options concerning use of the landmark site. First, the law imposes a duty upon the owner to keep the exterior features of the building “in good repair” to assure that the law’s objectives not be defeated by the landmark’s falling into a state of irremediable disrepair. Second, the Commission must approve in advance any proposal to alter the exterior architectural features of the landmark or to construct any exterior improvement on the landmark site, thus ensuring that decisions concerning construction on the landmark site are made with due consideration of both the public interest in the maintenance of the structure and the landowner’s interest in use of the property.

In the event an owner wishes to alter a landmark site, three separate procedures are available through which administrative approval may be obtained. First, the owner may apply to the Commission for a “certificate of no effect on protected architectural features”: that is, for an order approving the improvement or alteration on the ground that it will not change or affect any architectural feature of the landmark and will be in harmony therewith. Denial of the certificate is subject to judicial review.

Second, the owner may apply to the Commission for a certificate of “appropriateness.” Such certificates will be granted if the Commission concludes—focusing upon aesthetic, historical, and architectural values—that the proposed construction on the landmark site would not unduly hinder the protection, enhancement, perpetuation, and use of the landmark. Again, denial of the certificate is subject to judicial review. Moreover, the owner who is denied either a certificate of no exterior effect or a certificate of appropriateness may submit an alternative or modified plan for approval. The final procedure—seeking a certificate of appropriateness on the ground of “insufficient return,”—provides special mechanisms, which vary depending on whether or not the landmark enjoys a tax exemption, to ensure that designation does not cause economic hardship.

Although the designation of a landmark and landmark site restricts the owner’s control over the parcel, designation also enhances the economic position of the landmark owner in one significant respect. Under New York City’s zoning laws, owners of real property who have not developed their property to the full extent permitted by the applicable zoning laws are allowed to transfer development rights to contiguous parcels on the same city block. A 1968 ordinance gave the owners of landmark sites additional opportunities to transfer development rights to other parcels. Subject to a restriction that the floor area of the transferee lot may not be increased by more than 20% above its authorized level, the ordinance permitted transfers from a landmark parcel to property across the street or across a street intersection. In 1969, the law governing the conditions under which transfers from landmark parcels could occur was liberalized, apparently to ensure that the Landmarks Law would not unduly restrict the development options of the owners of Grand Central Terminal. The class of recipient lots was expanded to include lots “across a street and opposite to another lot or lots which except for the intervention of streets or street intersections f [or]m a series extending to the lot occupied by the landmark building [, provided that] all lots [are] in the same ownership.” New York City Zoning Resolution 74–79 (emphasis deleted). In addition, the 1969 amendment permits, in highly commercialized areas like midtown Manhattan, the transfer of all unused development rights to a single parcel.

B

This case involves the application of New York City’s Landmarks Preservation Law to Grand Central Terminal (Terminal). The Terminal, which is owned by the Penn Central Transportation Co. and its affiliates (Penn Central), is one of New York City’s most famous buildings. Opened in 1913, it is regarded not only as providing an ingenious engineering solution to the problems presented by urban railroad stations, but also as a magnificent example of the French beaux-arts style.

The Terminal is located in midtown Manhattan. Its south facade faces 42d Street and that street’s intersection with Park Avenue. At street level, the Terminal is bounded on the west by Vanderbilt Avenue, on the east by the Commodore Hotel, and on the north by the Pan-American Building. Although a 20-story office tower, to have been located above the Terminal, was part of the original design, the planned tower was never constructed. The Terminal itself is an eight-story structure which Penn Central uses as a railroad station and in which it rents space not needed for railroad purposes to a variety of commercial interests. The Terminal is one of a number of properties owned by appellant Penn Central in this area of midtown Manhattan.… At least eight of these are eligible to be recipients of development rights afforded the Terminal by virtue of landmark designation.

On August 2, 1967, following a public hearing, the Commission designated the Terminal a “landmark” and designated the “city tax block” it occupies a “landmark site.” The Board of Estimate confirmed this action on September 21, 1967. Although appellant Penn Central had opposed the designation before the Commission, it did not seek judicial review of the final designation decision.

On January 22, 1968, appellant Penn Central, to increase its income, entered into a renewable 50-year lease and sublease agreement with appellant UGP Properties, Inc. (UGP), a wholly owned subsidiary of Union General Properties, Ltd., a United Kingdom corporation. Under the terms of the agreement, UGP was to construct a multistory office building above the Terminal. UGP promised to pay Penn Central $1 million annually during construction and at least $3 million annually thereafter. The rentals would be offset in part by a loss of some $700,000 to $1 million in net rentals presently received from concessionaires displaced by the new building.

Appellants UGP and Penn Central then applied to the Commission for permission to construct an office building atop the Terminal. Two separate plans, both designed by architect Marcel Breuer and both apparently satisfying the terms of the applicable zoning ordinance, were submitted to the Commission for approval. The first, Breuer I, provided for the construction of a 55-story office building, to be cantilevered above the existing facade and to rest on the roof of the Terminal. The second, Breuer II Revised, called for tearing down a portion of the Terminal that included the 42d Street facade, stripping off some of the remaining features of the Terminal’s facade, and constructing a 53-story office building. The Commission denied a certificate of no exterior effect on September 20, 1968. Appellants then applied for a certificate of “appropriateness” as to both proposals. After four days of hearings at which over 80 witnesses testified, the Commission denied this application as to both proposals.[[[2]](#footnote-2)]

The Commission’s reasons for rejecting certificates respecting Breuer II Revised are summarized in the following statement: “To protect a Landmark, one does not tear it down. To perpetuate its architectural features, one does not strip them off.” Breuer I, which would have preserved the existing vertical facades of the present structure, received more sympathetic consideration. The Commission first focused on the effect that the proposed tower would have on one desirable feature created by the present structure and its surroundings: the dramatic view of the Terminal from Park Avenue South. Although appellants had contended that the Pan-American Building had already destroyed the silhouette of the south facade and that one additional tower could do no further damage and might even provide a better background for the facade, the Commission disagreed, stating that it found the majestic approach from the south to be still unique in the city and that a 55-story tower atop the Terminal would be far more detrimental to its south facade than the Pan-American Building 375 feet away. Moreover, the Commission found that from closer vantage points the Pan Am Building and the other towers were largely cut off from view, which would not be the case of the mass on top of the Terminal planned under Breuer I. In conclusion, the Commission stated:

“[We have] no fixed rule against making additions to designated buildings—it all depends on how they are done . . . . But to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The ‘addition’ would be four times as high as the existing structure and would reduce the Landmark itself to the status of a curiosity.

“Landmarks cannot be divorced from their settings—particularly when the setting is a dramatic and integral part of the original concept. The Terminal, in its setting, is a great example of urban design. Such examples are not so plentiful in New York City that we can afford to lose any of the few we have. And we must preserve them in a meaningful way—with alterations and additions of such character, scale, materials and mass as will protect, enhance and perpetuate the original design rather than overwhelm it.”

Appellants did not seek judicial review of the denial of either certificate.… Further, appellants did not avail themselves of the opportunity to develop and submit other plans for the Commission’s consideration and approval. Instead, appellants filed suit in New York Supreme Court, Trial Term, claiming, *inter alia*, that the application of the Landmarks Preservation Law had “taken” their property without just compensation in violation of the Fifth and Fourteenth Amendments and arbitrarily deprived them of their property without due process of law in violation of the Fourteenth Amendment. Appellants sought a declaratory judgment, injunctive relief barring the city from using the Landmarks Law to impede the construction of any structure that might otherwise lawfully be constructed on the Terminal site, and damages for the “temporary taking” that occurred between August 2, 1967, the designation date, and the date when the restrictions arising from the Landmarks Law would be lifted. The trial court granted the injunctive and declaratory relief, but severed the question of damages for a “temporary taking.” [The New York Supreme Court, Appellate Division, reversed, and this ruling was affirmed by the state Court of Appeals.]

II

The issues presented by appellants are (1) whether the restrictions imposed by New York City’s law upon appellants’ exploitation of the Terminal site effect a “taking” of appellants’ property for a public use within the meaning of the Fifth Amendment, which of course is made applicable to the States through the Fourteenth Amendment, and, (2), if so, whether the transferable development rights afforded appellants constitute “just compensation” within the meaning of the Fifth Amendment. We need only address the question whether a “taking” has occurred.

A

…. The question of what constitutes a “taking” for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the “Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,” *Armstrong v. United States*, 364 U.S. 40, 49 (1960), this Court, quite simply, has been unable to develop any “set formula” for determining when “justice and fairness” require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely “upon the particular circumstances [in that] case.” *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,” *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922), and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example. A second are the decisions in which this Court has dismissed “taking” challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute “property” for Fifth Amendment purposes. See, *e. g., United States v. Willow River Power Co.,* 324 U.S. 499 (1945) (interest in high-water level of river for runoff for tailwaters to maintain power head is not property); *United States v. Chandler-Dunbar Water Power Co.,* 229 U.S. 53 (1913).

More importantly for the present case, in instances in which a state tribunal reasonably concluded that “the health, safety, morals, or general welfare” would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. Zoning laws are, of course, the classic example, see *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) (prohibition of industrial use); *Gorieb v. Fox,* 274 U.S. 603, 608 (1927) (requirement that portions of parcels be left unbuilt); *Welch v. Swasey,* 214 U.S. 91 (1909) (height restriction), which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property.

Zoning laws generally do not affect existing uses of real property, but “taking” challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm. *Miller v. Schoene,* 276 U.S. 272 (1928), is illustrative. In that case, a state entomologist, acting pursuant to a state statute, ordered the claimants to cut down a large number of ornamental red cedar trees because they produced cedar rust fatal to apple trees cultivated nearby. Although the statute provided for recovery of any expense incurred in removing the cedars, and permitted claimants to use the felled trees, it did not provide compensation for the value of the standing trees or for the resulting decrease in market value of the properties as a whole. A unanimous Court held that this latter omission did not render the statute invalid. The Court held that the State might properly make “a choice between the preservation of one class of property and that of the other” and since the apple industry was important in the State involved, concluded that the State had not exceeded “its constitutional powers by deciding upon the destruction of one class of property [without compensation] in order to save another which, in the judgment of the legislature, is of greater value to the public.”

Again, *Hadacheck v. Sebastian,* 239 U.S. 394 (1915), upheld a law prohibiting the claimant from continuing his otherwise lawful business of operating a brickyard in a particular physical community on the ground that the legislature had reasonably concluded that the presence of the brickyard was inconsistent with neighboring uses.…

*Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a “taking.” There the claimant had sold the surface rights to particular parcels of property, but expressly reserved the right to remove the coal thereunder. A Pennsylvania statute, enacted after the transactions, forbade any mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from the improved property of another. Because the statute made it commercially impracticable to mine the coal, and thus had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land, the Court held that the statute was invalid as effecting a “taking” without just compensation.

Finally, government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute “takings.” *United States v. Causby,* 328 U.S. 256 (1946), is illustrative. In holding that direct overflights above the claimant’s land, that destroyed the present use of the land as a chicken farm, constituted a “taking,” *Causby* emphasized that Government had not “merely destroyed property [but was] using a part of it for the flight of its planes.” *Id.,* 328 U.S., at 262–263, n. 7.

B

…. Because this Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city, appellants do not contest that New York City’s objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal. They also do not dispute that the restrictions imposed on its parcel are appropriate means of securing the purposes of the New York City law. Finally, appellants do not challenge any of the specific factual premises of the decision below. They accept for present purposes both that the parcel of land occupied by Grand Central Terminal must, in its present state, be regarded as capable of earning a reasonable return, and that the transferable development rights afforded appellants by virtue of the Terminal’s designation as a landmark are valuable, even if not as valuable as the rights to construct above the Terminal. In appellants’ view none of these factors derogate from their claim that New York City’s law has effected a “taking.”

They first observe that the airspace above the Terminal is a valuable property interest, citing *United States v. Causby, supra.* They urge that the Landmarks Law has deprived them of any gainful use of their “air rights” above the Terminal and that, irrespective of the value of the remainder of their parcel, the city has “taken” their right to this superadjacent airspace, thus entitling them to “just compensation” measured by the fair market value of these air rights.

Apart from our own disagreement with appellants’ characterization of the effect of the New York City law, the submission that appellants may establish a “taking” simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. Were this the rule, this Court would have erred not only in upholding laws restricting the development of air rights, see *Welch v. Swasey, supra,* but also in approving those prohibiting both the subjacent, see *Goldblatt v. Hempstead,* 369 U.S. 590 (1962), and the lateral, see *Gorieb v. Fox,* 274 U.S. 603 development of particular parcels.[[3]](#footnote-3)27 “Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the “landmark site.”

Secondly, appellants, focusing on the character and impact of the New York City law, argue that it effects a “taking” because its operation has significantly diminished the value of the Terminal site. Appellants concede that the decisions sustaining other land-use regulations, which, like the New York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a “taking,” see *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) (75% diminution in value caused by zoning law); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87 1/2 % diminution in value), and that the “taking” issue in these contexts is resolved by focusing on the uses the regulations permit.… [B]ut appellants argue that New York City’s regulation of individual landmarks is fundamentally different from zoning or from historic-district legislation because the controls imposed by New York City’s law apply only to individuals who own selected properties.

Stated baldly, appellants’ position appears to be that the only means of ensuring that selected owners are not singled out to endure financial hardship for no reason is to hold that any restriction imposed on individual landmarks pursuant to the New York City scheme is a “taking” requiring the payment of “just compensation.” Agreement with this argument would, of course, invalidate not just New York City’s law, but all comparable landmark legislation in the Nation. We find no merit in it.

It is true, as appellants emphasize, that both historic-district legislation and zoning laws regulate all properties within given physical communities whereas landmark laws apply only to selected parcels. But, contrary to appellants’ suggestions, landmark laws are not like discriminatory, or “reverse spot,” zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones. In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan.

Equally without merit is the related argument that the decision to designate a structure as a landmark “is inevitably arbitrary or at least subjective, because it is basically a matter of taste,” Reply Brief for Appellants 22, thus unavoidably singling out individual landowners for disparate and unfair treatment. The argument has a particularly hollow ring in this case. For appellants not only did not seek judicial review of either the designation or of the denials of the certificates of appropriateness and of no exterior effect, but do not even now suggest that the Commission’s decisions concerning the Terminal were in any sense arbitrary or unprincipled. But, in any event, a landmark owner has a right to judicial review of any Commission decision, and, quite simply, there is no basis whatsoever for a conclusion that courts will have any greater difficulty identifying arbitrary or discriminatory action in the context of landmark regulation than in the context of classic zoning or indeed in any other context.

Next, appellants observe that New York City’s law differs from zoning laws and historic-district ordinances in that the Landmarks Law does not impose identical or similar restrictions on all structures located in particular physical communities. It follows, they argue, that New York City’s law is inherently incapable of producing the fair and equitable distribution of benefits and burdens of governmental action which is characteristic of zoning laws and historic-district legislation and which they maintain is a constitutional requirement if “just compensation” is not to be afforded. It is, of course, true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a “taking.” Legislation designed to promote the general welfare commonly burdens some more than others. The owners of the brickyard in *Hadacheck*, of the cedar trees in *Miller v. Schoene*, and of the gravel and sand mine in *Goldblatt v. Hempstead*, were uniquely burdened by the legislation sustained in those cases.[[4]](#footnote-4)30 Similarly, zoning laws often affect some property owners more severely than others but have not been held to be invalid on that account. For example, the property owner in *Euclid* who wished to use its property for industrial purposes was affected far more severely by the ordinance than its neighbors who wished to use their land for residences.

In any event, appellants’ repeated suggestions that they are solely burdened and unbenefited is factually inaccurate. This contention overlooks the fact that the New York City law applies to vast numbers of structures in the city in addition to the Terminal—all the structures contained in the 31 historic districts and over 400 individual landmarks, many of which are close to the Terminal. Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole—which we are unwilling to do—we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law. Doubtless appellants believe they are more burdened than benefited by the law, but that must have been true, too, of the property owners in *Miller, Hadacheck, Euclid*, and *Goldblatt*.

Appellants’ final broad-based attack would have us treat the law as an instance, like that in *United States v. Causby*, in which government, acting in an enterprise capacity, has appropriated part of their property for some strictly governmental purpose. Apart from the fact that *Causby* was a case of invasion of airspace that destroyed the use of the farm beneath and this New York City law has in nowise impaired the present use of the Terminal, the Landmarks Law neither exploits appellants’ parcel for city purposes nor facilitates nor arises from any entrepreneurial operations of the city. The situation is not remotely like that in *Causby* where the airspace above the property was in the flight pattern for military aircraft. The Landmarks Law’s effect is simply to prohibit appellants or anyone else from occupying portions of the airspace above the Terminal, while permitting appellants to use the remainder of the parcel in a gainful fashion. This is no more an appropriation of property by government for its own uses than is a zoning law prohibiting, for “aesthetic” reasons, two or more adult theaters within a specified area, or a safety regulation prohibiting excavations below a certain level.

C

Rejection of appellants’ broad arguments is not, however, the end of our inquiry, for all we thus far have established is that the New York City law is not rendered invalid by its failure to provide “just compensation” whenever a landmark owner is restricted in the exploitation of property interests, such as air rights, to a greater extent than provided for under applicable zoning laws. We now must consider whether the interference with appellants’ property is of such a magnitude that “there must be an exercise of eminent domain and compensation to sustain [it].” *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 413. That inquiry may be narrowed to the question of the severity of the impact of the law on appellants’ parcel, and its resolution in turn requires a careful assessment of the impact of the regulation on the Terminal site.

…[T]he New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central’s primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a “reasonable return” on its investment.

Appellants, moreover, exaggerate the effect of the law on their ability to make use of the air rights above the Terminal in two respects. First, it simply cannot be maintained, on this record, that appellants have been prohibited from occupying *any* portion of the airspace above the Terminal. While the Commission’s actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit *any* construction above the Terminal. The Commission’s report emphasized that whether any construction would be allowed depended upon whether the proposed addition “would harmonize in scale, material and character with [the Terminal].” Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal.

Second, to the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City’s transferable development-rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted “just compensation” if a “taking” had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.

On this record, we conclude that the application of New York City’s Landmarks Law has not effected a “taking” of appellants’ property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.

*Affirmed*.

Mr. Justice REHNQUIST, with whom THE CHIEF JUSTICE and Mr. Justice STEVENS join, dissenting.

Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks. The owner of a building might initially be pleased that his property has been chosen by a distinguished committee of architects, historians, and city planners for such a singular distinction. But he may well discover, as appellant Penn Central Transportation Co. did here, that the landmark designation imposes upon him a substantial cost, with little or no offsetting benefit except for the honor of the designation. The question in this case is whether the cost associated with the city of New York’s desire to preserve a limited number of “landmarks” within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties.

Only in the most superficial sense of the word can this case be said to involve “zoning.” Typical zoning restrictions may, it is true, so limit the prospective uses of a piece of property as to diminish the value of that property in the abstract because it may not be used for the forbidden purposes. But any such abstract decrease in value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties. All property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but also for the common benefit of one another. In the words of Mr. Justice Holmes, speaking for the Court in *Pennsylvania Coal Co. v. Mahon*, there is “an average reciprocity of advantage.”

Where a relatively few individual buildings, all separated from one another, are singled out and treated differently from surrounding buildings, no such reciprocity exists. The cost to the property owner which results from the imposition of restrictions applicable only to his property and not that of his neighbors may be substantial—in this case, several million dollars—with no comparable reciprocal benefits. And the cost associated with landmark legislation is likely to be of a completely different order of magnitude than that which results from the imposition of normal zoning restrictions. Unlike the regime affected by the latter, the landowner is not simply prohibited from using his property for certain purposes, while allowed to use it for all other purposes. Under the historic-landmark preservation scheme adopted by New York, the property owner is under an affirmative duty to *preserve* his property *as a landmark* at his own expense. To suggest that because traditional zoning results in some limitation of use of the property zoned, the New York City landmark preservation scheme should likewise be upheld, represents the ultimate in treating as alike things which are different. The rubric of “zoning” has not yet sufficed to avoid the well-established proposition that the Fifth Amendment bars the “Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960).…

I

The Fifth Amendment provides in part: “nor shall private property be taken for public use, without just compensation.” In a very literal sense, the actions of appellees violated this constitutional prohibition. Before the city of New York declared Grand Central Terminal to be a landmark, Penn Central could have used its “air rights” over the Terminal to build a multistory office building, at an apparent value of several million dollars per year. Today, the Terminal cannot be modified in *any* form, including the erection of additional stories, without the permission of the Landmark Preservation Commission, a permission which appellants, despite good-faith attempts, have so far been unable to obtain. Because the Taking Clause of the Fifth Amendment has not always been read literally, however, the constitutionality of appellees’ actions requires a closer scrutiny of this Court’s interpretation of the three key words in the Taking Clause—“property,” “taken,” and “just compensation.”

A

Appellees do not dispute that valuable property rights have been destroyed. And the Court has frequently emphasized that the term “property” as used in the Taking Clause includes the entire “group of rights inhering in the citizen’s [ownership].” *United States v. General Motors Corp.*, 323 U.S. 373 (1945).…

While neighboring landowners are free to use their land and “air rights” in any way consistent with the broad boundaries of New York zoning, Penn Central, absent the permission of appellees, must forever maintain its property in its present state. The property has been thus subjected to a nonconsensual servitude not borne by any neighboring or similar properties.

B

….[A]n examination of the two exceptions where the destruction of property does *not* constitute a taking demonstrates that a compensable taking has occurred here.

1

As early as 1887, the Court recognized that the government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use.…

The nuisance exception to the taking guarantee is not coterminous with the police power itself. The question is whether the forbidden use is dangerous to the safety, health, or welfare of others. Thus, in *Curtin v. Benson*, 222 U.S. 78 (1911), the Court held that the Government, in prohibiting the owner of property within the boundaries of Yosemite National Park from grazing cattle on his property, had taken the owner’s property. The Court assumed that the Government could constitutionally require the owner to fence his land or take other action to prevent his cattle from straying onto others’ land without compensating him.…

Appellees are not prohibiting a nuisance. The record is clear that the proposed addition to the Grand Central Terminal would be in full compliance with zoning, height limitations, and other health and safety requirements. Instead, appellees are seeking to preserve what they believe to be an outstanding example of beaux-arts architecture. Penn Central is prevented from further developing its property basically because *too good* a job was done in designing and building it. The city of New York, because of its unadorned admiration for the design, has decided that the owners of the building must preserve it unchanged for the benefit of sightseeing New Yorkers and tourists.

Unlike land-use regulations, appellees’ actions do not merely *prohibit* Penn Central from using its property in a narrow set of noxious ways. Instead, appellees have placed an *affirmative* duty on Penn Central to maintain the Terminal in its present state and in “good repair.” Appellants are not free to use their property as they see fit within broad outer boundaries but must strictly adhere to their past use except where appellees conclude that alternative uses would not detract from the landmark. While Penn Central may continue to use the Terminal as it is presently designed, appellees otherwise “exercise complete dominion and control over the surface of the land,” *United States v. Causby*, 328 U.S. 256, 262 (1946), and must compensate the owner for his loss. “Property is taken in the constitutional sense when inroads are made upon an owner’s use of it to an extent that, as between private parties, a servitude has been acquired.” *United States v. Dickinson*, 331 U.S. 745, 748 (1947).

2

Even where the government prohibits a noninjurious use, the Court has ruled that a taking does not take place if the prohibition applies over a broad cross section of land and thereby “secure[s] an average reciprocity of advantage.”  *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 415. It is for this reason that zoning does not constitute a “taking.” While zoning at times reduces *individual* property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another.

Here, however, a multimillion dollar loss has been imposed on appellants; it is uniquely felt and is not offset by any benefits flowing from the preservation of some 400 other “landmarks” in New York City. Appellees have imposed a substantial cost on less than one one-tenth of one percent of the buildings in New York City for the general benefit of all its people. It is exactly this imposition of general costs on a few individuals at which the “taking” protection is directed.…

As Mr. Justice Holmes pointed out in *Pennsylvania Coal Co. v. Mahon*, “the question at bottom” in an eminent domain case “is upon whom the loss of the changes desired should fall.” The benefits that appellees believe will flow from preservation of the Grand Central Terminal will accrue to all the citizens of New York City. There is no reason to believe that appellants will enjoy a substantially greater share of these benefits. If the cost of preserving Grand Central Terminal were spread evenly across the entire population of the city of New York, the burden per person would be in cents per year—a minor cost appellees would surely concede for the benefit accrued. Instead, however, appellees would impose the entire cost of several million dollars per year on Penn Central. But it is precisely this sort of discrimination that the Fifth Amendment prohibits.

Appellees in response would argue that a taking only occurs where a property owner is denied *all* reasonable value of his property. The Court has frequently held that, even where a destruction of property rights would not *otherwise* constitute a taking, the inability of the owner to make a reasonable return on his property requires compensation under the Fifth Amendment. But the converse is not true. A taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner to make some “reasonable” use of his property.…

C

Appellees, apparently recognizing that the constraints imposed on a landmark site constitute a taking for Fifth Amendment purposes, do not leave the property owner empty-handed. As the Court notes, the property owner may theoretically “transfer” his previous right to develop the landmark property to adjacent properties if they are under his control. Appellees have coined this system “Transfer Development Rights,” or TDR’s.

Of all the terms used in the Taking Clause, “just compensation” has the strictest meaning. The Fifth Amendment does not allow simply an approximate compensation but requires “a full and perfect equivalent for the property taken.” *Monongahela Navigation Co. v. United States*, 148 U.S., at 326.…

Appellees contend that, even if they have “taken” appellants’ property, TDR’s constitute “just compensation.” Appellants, of course, argue that TDR’s are highly imperfect compensation. Because the lower courts held that there was no “taking,” they did not have to reach the question of whether or not just compensation has already been awarded.…

Because the record on appeal is relatively slim, I would remand to the Court of Appeals for a determination of whether TDR’s constitute a “full and perfect equivalent for the property taken.”

II

Over 50 years ago, Mr. Justice Holmes, speaking for the Court, warned that the courts were “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.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 416. The Court’s opinion in this case demonstrates that the danger thus foreseen has not abated. The city of New York is in a precarious financial state, and some may believe that the costs of landmark preservation will be more easily borne by corporations such as Penn Central than the overburdened individual taxpayers of New York. But these concerns do not allow us to ignore past precedents construing the Eminent Domain Clause to the end that the desire to improve the public condition is, indeed, achieved by a shorter cut than the constitutional way of paying for the change.

Notes

1. **The *Penn Central* test**. The *Penn Central* factors are generally listed as an inquiry into “[1] the regulation’s economic effect on the landowner, [2] the extent to which the regulation interferes with reasonable investment-backed expectations, and [3] the character of the government action.” Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001). The first factor concerns diminution of value, an issue raised by *Pennsylvania Coal*. As you see, the Court resisted the conceptual severance claim, rejecting the notion that “air rights” were something to be evaluated independently of the property as a whole.
2. **Distinct Investment-Backed Expectations**. The meaning of the second factor as something distinct from the first is a matter of debate. Unhelpfully, the Court later described the question as being one of “reasonable” investment-backed expectations in *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

The idea is frequently credited to an article by Frank Michelman, who argued that the principle more accurately captures what may rise to the level of a taking than simple diminution of value:

The customary labels—magnitude of the harm test, or diminution of value test—obscure the test’s foundations by conveying the idea that it calls for an arbitrary pinpointing of a critical proportion (probably lying somewhere between fifty and one hundred percent). More sympathetically perceived, however, the test poses not nearly so loose a question of degree; it does not ask “how much,” but rather (like the physical-occupation test) it asks “whether or not”: whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation.

The nature and relevance of this inquiry may emerge more clearly if we notice one other familiar line of doctrine … when a new zoning scheme is instituted, for “established” uses which would be violations were the scheme applied with full retrospective vigor. The standard practice of granting dispensations for such “nonconforming uses” seems to imply an understanding that simply to ban them without payment of compensation, thus seriously reducing the property’s market value, would be wrong and perhaps unconstitutional. But a ban on potential uses not yet established may destroy market value as effectively as does a ban on activity already in progress. The ban does not shed its retrospective quality simply because it affects only prospective uses. What explains, then, the universal understanding that only those nonconforming uses are protected which were demonstrably afoot by the time the regulation was adopted? The answer seems to be that actual establishment of the use demonstrates that the prospect of continuing it is a discrete twig out of his fee simple bundle to which the owner makes explicit reference in his own thinking, so that enforcement of the restriction would, as he looks at the matter, totally defeat a distinctly crystallized expectation.

Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation*” Law, 80 Harv. L. Rev. 1165, 1232-34 (1967) (footnotes omitted); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005-06 (1984) (“A ‘reasonable investment-backed expectation’ must be more than a “unilateral expectation or an abstract need.” (citing *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). As the excerpted text notes, the principle of nonconforming uses in zoning law reflects the importance of property owner expectations in uses that preexist the arrival of new zoning rules.

Michelman’s argument, and some precedent, suggests that investment-backed expectations are less likely to be found where the property in question is purchased against a backdrop of regulation. Does that mean that takings challenges are doomed whenever the property is acquired after the offending regulations are in place? In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Court held in the negative. Ever straining for eloquence, Justice Kennedy concluded that “[t]he State may not put so potent a Hobbesian stick into the Lockean bundle.… Were we to accept the State’s rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.” *Id.* at 627.

1. **Character of the Governmental Action.** Here, too, the Court is less than clear, as its example of how this factor might be weighed in the property owner’s favor, a permanent physical invasion, was later held to be a taking as a categorical matter in *Loretto*. That sort of invasion is juxtaposed against an interference “from some public program adjusting the benefits and burdens of economic life to promote the common good,” suggesting room for judgment when a program falls short (e.g., when someone is unfairly singled out for the burdens, whether there is a reciprocity of advantage, etc.). *See, e.g.*, Thomas W. Merrill, *The Character of the Governmental Action*, 36 Vt. L. Rev. 649, 664 (2012) (“Several lower courts have picked up on the idea that the character factor is designed to measure the distributional impact of the challenged governmental action. These courts favor broad-based laws that offer reciprocity of advantage and find suspect laws that single out particular owners for severe burdens while conferring benefits on others.”).
2. **Takings and Due Process inquiries distinguished.** The question whether a regulation amounts to a taking is distinct from the issue of whether it violates a liberty or property interest under the Due Process Clause. The latter asks whether the government may impose the challenged regulation at all. The former identifies a subset of cases in which the government regulation is such an intrusion as to require compensation.

In takings cases, you may encounter citations to *Agins v. City of Tiburon* for the proposition that “[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests.” 447 U.S. 255, 260 (1980). Does this mean that compensation must be paid if the state cannot meet a higher burden than the one required for regulation under the Due Process Clause? No. In *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 540-42 (2005), the Court observed the phrase was “regrettably imprecise” and clarified that “it has no proper place in our takings jurisprudence.”

1. Several articles report that the government generally prevails under the Penn Central test in the lower courts. F. Patrick Hubbard et al., Do Owners Have A Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company? 14 Duke Envtl. L. & Pol’y F. 121 (2003); Basil H. Mattingly, Forum Over Substance: The Empty Ritual of Balancing in Regulatory Takings Jurisprudence, 36 Willamette L. Rev. 695 (2000). One such study argues that calling the factors a balancing test misstates what is actually going on.

The analysis reveals that the Courts of Appeals for the First, Ninth, and Federal Circuits, and the trial courts within the Ninth Circuit, all decided *Penn Central* cases utilizing fewer than three factors in a majority of the cases reaching the merits: on average, the circuit courts of appeals utilized three factors only slightly more than one-third of the time (37.8%). Complementing these findings is data on how often the courts actually applied *Penn Central* as a balancing test. The data shows that applying *Penn Central* as a balancing test is statistically rare. Averaging the cases that reached the merits of a takings claim, the courts applied *Penn* as a balancing test less than 7% of the time. As an average percentage of cases applying all three *Penn Central* factors (cases that themselves are less than half of all cases reaching the merits), courts applied it as a balancing test less than 14% of the time. Together this data indicates that the predominant practice of the federal courts is not to use *Penn Central* as a balancing test.

Adam R. Pomeroy, *Penn Central After 35 Years: A Three Part Balancing Test or A One Strike Rule?*, 22 Fed. Circuit B.J. 677, 704 (2013). Pomeroy argues that regulatory takings claims prevail only when the court concludes that the regulation looks like an act that is normally a taking as a categorical matter. *Id.* at 696 (“It seems that instead of balancing factual situations, the courts of appeals have found regulatory takings under *Penn Central* only when a claim falls barely short being a taking under one of the categorical rules.”).

**Questions**

1) Do you agree with the majority opinion in Pennsylvania Coal as a matter of law, policy, and/or justice?

2) Do you agree with the majority opinion in Penn. Central as a matter of law, policy, and/or justice?

3) Suppose Developer owns 200 acres of undeveloped land. The US Postal Service installs a large blue mail collection box (see photo below) on one corner of the property, attaching it to the ground with a 2’ by 2’ concrete slab. Does the Postal Service need to pay the Developer compensation? If so, how would the amount of compensation be measured?



4) The East Dakota Supreme Court has held that shopping mall owners have no right to exclude political demonstrators and must allow demonstrations in their malls. Must East Dakota pay compensation to shopping mall owners?

5) Suppose the city of Rolling Meadows enacts an ordinance limiting all new construction to no more than 2 stories. Must the city pay compensation to landowners who had planned to build 3-story homes?

6) Suppose Developer purchases a large tract of ocean-front property and formulates plans to build and sell 100 homes. The city denies Developer permits to build 99 of the homes because of their impact on native plants and animals. The city does, however, allow construction of one home. Must the city pay compensation to the Developer?

7) a) Suppose the government requires homeowners to construct high metal fences around areas contaminated by hazardous waste. Must the government compensate affected landowners?

b) Supposed that, because of opposition by homeowners over the expense of installing high metal fences, the government repeals the statute requiring homeowners to construct high metal fences around areas contaminated by hazardous waste and instead authorizes and instructs the state environmental agency to enter onto affected properties and build high metal fences around areas contaminated by hazardous waste at government expense. Must the government compensate affected landowners?

c) Do your answers to parts (a) and (b) make sense together? If so, how? Of not, is there anything that can or should be done to harmonize the solutions?

##

1. 6 The consensus is that widespread public ownership of historic properties in urban settings is neither feasible nor wise. Public ownership reduces the tax base, burdens the public budget with costs of acquisitions and maintenance, and results in the preservation of public buildings as museums and similar facilities, rather than as economically productive features of the urban scene. See Wilson & Winkler, The Response of State Legislation to Historic Preservation, 36 Law & Contemp. Prob. 329, 330–331, 339–340 (1971). [↑](#footnote-ref-1)
2. **[**] Reproductions of the proposals appear below:



(From: http://www.architakes.com/?p=13036). [↑](#footnote-ref-2)
3. 27These cases dispose of any contention that might be based on Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), that full use of air rights is so bound up with the investment-backed expectations of appellants that governmental deprivation of these rights invariably—i. e., irrespective of the impact of the restriction on the value of the parcel as a whole—constitutes a “taking.” Similarly, *Welch*, *Goldblatt*, and *Gorieb* illustrate the fallacy of appellants’ related contention that a “taking” must be found to have occurred whenever the land-use restriction may be characterized as imposing a “servitude” on the claimant’s parcel. [↑](#footnote-ref-3)
4. 30Appellants attempt to distinguish these cases on the ground that, in each, government was prohibiting a “noxious” use of land and that in the present case, in contrast, appellants’ proposed construction above the Terminal would be beneficial. We observe that the uses in issue in *Hadacheck*, *Miller*, and *Goldblatt* were perfectly lawful in themselves. They involved no “blameworthiness, . . . moral wrongdoing or conscious act of dangerous risk-taking which induce[d society] to shift the cost to a pa[rt]icular individual.” Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 50 (1964). These cases are better understood as resting not on any supposed “noxious” quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property.

Nor, correlatively, can it be asserted that the destruction or fundamental alteration of a historic landmark is not harmful. The suggestion that the beneficial quality of appellants’ proposed construction is established by the fact that the construction would have been consistent with applicable zoning laws ignores the development in sensibilities and ideals reflected in landmark legislation like New York City’s. [↑](#footnote-ref-4)