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Economic Due Process and the Takings Clause

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I. Introduction

The fifth amendment contains two express provisions for the protection of property: No person may be "deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."[1] As two separate pieces of constitutional text, the due process clause and just compensation clause appear, prima facie at least, to represent two separate, albeit related, constitutional requirements. While "due process of law" requires that property deprivations meet certain criteria of general legality, procedural or substantive,[2] the just compensation requirement is,

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1. U.S. Const. amend. V. The fourteenth amendment contains a similar due process clause, which is expressly binding upon the states. U.S. Const. amend. XIV. While the fourteenth amendment does not repeat the fifth amendment's requirement of just compensation *in haec verba*, the Supreme Court imposes the just compensation requirement against the states as an interpretation of the fourteenth amendment's due process clause. Chicago, Burlington & Quincy Ry. Co. v. Chicago, 166 U.S. 226, 235-41 (1897).

2. The word *process* in the term "due process" most directly denotes a requirement that proper legal procedures be observed. However, the due process concept has come to include criteria of a substantive nature as well.

The theoretical basis for substantive due process proceeds from the idea that there are "limits beyond which legislation cannot rightfully go." Mugler v. Kansas, 123 U.S. 623, 661 (1887). If a legislative action is outside the general grant of legislative power, the action would be a nullity, not a proper legal procedure as required by procedural due process. A property deprivation effectuated on the "authority" of such an *ultra vires* action, lacking a proper procedural foundation, would be a deprivation "without due process of law" in the procedural sense. Accordingly, with a government of limited powers, a requirement of so-called substantive due process follows from a requirement of procedural due process. *See id.* and *infra* text accompanying notes 4-14.

more simply, a "self-executing" duty to pay.[3]

In Supreme Court cases decided during the past ten years, there have been two major developments in the way that the just compensation requirement is applied. First, there have gradually crystallized two fairly fixed verbalizations of the factors or tests which determine whether or not a particular governmental action constitutes a "taking" of property within the meaning of the just compensation requirement. Secondly, the Court appears to be increasingly willing to review whether legislative acts regulating private property are rationally justifiable in terms of their ostensible public purpose — and to overturn those which are not. The just compensation requirement, particularly as defined in the newly verbalized factors and tests, has provided the constitutional basis for this renewed judicial review of legislative rationality.

The discussion which follows will examine the new verbalizations repeatedly employed in Supreme Court takings decisions of the past decade and the Court's enlistment of the just compensation requirement as a basis for undertaking substantive review of legislation. As an introduction, the distinctive historical roles and roots of the substantive due process and just compensation requirements will be reviewed.

II. Substantive Due Process Limitations on the Regulation of Property

For a time, the Constitution's due process mandates were viewed as encompassing only issues of procedure.[4] By the end of the nineteenth century, however, the due process concept was recognized to require also that exercises of legislative power meet certain *substantive* standards. In *Mugler v. Kan-*

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3. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2386 (1978) (citing United States v. Clarke, 445 U.S. 253, 257 (1980)). The *First Lutheran* case confirmed, if there ever was doubt, that the fifth amendment's requirement of just compensation applies to so-called regulatory takings (*i.e.* takings by excessive use regulations). *See infra* notes 25 & 62.

4. *See* Slaughter-House Cases, 83 U.S. 36, 80-81 (1872). *Cf.* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1856).

sas,[5] the Supreme Court laid the basis for extensive judicial review of the merits of legislative enactments:

> There are, of necessity, limits beyond which the legislature cannot rightfully go. . . . [T]he courts must obey the Constitution rather than the law-making department of government, and must, *upon their own responsibility*, determine whether, in any particular case, these limits have been passed.[6]

A few years later, with particular reference to the "economic" due process protection of property, the Supreme Court summarized the substantive due process limits on the legislature's general police power in *Lawton v. Steele*:[7]

> To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.[8]

To implement this substantive due process standard as a literal "test" of constitutional validity would require an expansive program of judicial review. It does not appear, however, that the Court in *Lawton v. Steele* intended merely to make a statement of political philosophy, but rather to establish a le-

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5. 123 U.S. 623 (1887).

6. *Id.* at 661 (emphasis added). In *Mugler v. Kansas*, the Court was concerned with the limits of legislative authority under the so-called police power. The states' police power is very broad, including "everything essential to the public safety, health and morals" and authorizes the state to "interfere wherever the public interests demand it." Lawton v. Steele, 152 U.S. 133, 136 (1894). The limits of the police power, in other words, impose little substantive constraint.

The *Mugler* court upheld, as a legitimate exercise of the police power, a Kansas statute that generally prohibited the production of beer, severely impairing the value and usefulness of privately-owned brewery equipment. As discussed *infra*, text accompanying notes 17-19, the court also held that a regulation merely of the *use* of property, such as that effected by the Kansas prohibition statute, could not be considered a taking or appropriation for public benefit.

7. 152 U.S. 133 (1894).

8. *Id.* at 137.

gal test, subjecting legislative activities to the "supervision" of the courts.[9] During the next forty years, the Supreme Court did provide substantive "economic" due process review in a selection of cases challenging legislation that abridged the liberties of private ownership (among other things). In the exercise of this review, the challenged regulations were sometimes,[10] but not always,[11] struck down.

The Supreme Court's willingness to engage in such "economic due process" review did not, however, last long. By 1938, the Court had made it clear that it would no longer implement substantive due process in economic matters by judicial review of legislatures' judgments.[12] The Court's power of economic due process review was never quite forsaken, and its post-1938 opinions have still occasionally quoted or referred to the standard of *Lawton v. Steele*.[13] The official policy is, however, deference to the legislature, and "[t]he doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely — has long since been discarded."[14]

III. Regulation of Property and the Just Compensation Clause

In simplest terms, the just compensation requirement is a commitment by government to respect the rights of private owners much as the governed are expected to do. Although

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9. *Id.* at 137. In deciding *Lawton v. Steele*, the court provided an extensive discussion of the balance between public necessity and private interests. *Id.* at 140-41. The law in question provided for the confiscation of fishing equipment used in violation of the state's fish and game law. The court held that, on balance, the law was justified and, therefore, constitutionally valid.

10. *E.g.* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); Nectow v. City of Cambridge, 277 U.S. 183 (1928).

11. A notable exception was Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the seminal case upholding the state's power to impose zoning.

12. United States v. Carolene Products Co., 304 U.S. 144, 152 (1938) ("regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis").

13. *E.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962).

14. Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

the government does have a privileged position in the acquisition of property —it can force an owner to sell — it must respect private owners' rights at least to the extent of paying for what it takes. At the same time, however, the just compensation clause could hardly mean that the government must pay compensation every time the normal process of governing results in an impairment of private property interests.[15] It would practically defeat the government's central purpose, to enact and implement laws for the public good, if it were required to "regulate by *purchase*."[16]

Over the years, the Supreme Court has not found it easy to arrive at a reliable verbal formulation to delineate between those property impairments which are compensable "takings" and those which are not. As early as *Mugler v. Kansas*,[17] however, the major category of *non*-compensable property impairments was fairly clearly defined. In the words of the Court:

> 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.[18]

Since *Mugler*, the major category of *compensable* property impairments has turned out to be those which fall within the residuum that *Mugler* left outside the non-compensable domain, *viz.* impairments other than "prohibitions simply upon the use of property." Indeed, viewed in terms of the *Mugler* distinction between use-impairments "simply" and other property impairments, the Supreme Court's takings determinations have shown a remarkable consistency.[19]

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15. As Justice Holmes has written: "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).

16. Andrus v. Allard, 444 U.S. 51, 65 (1979) (emphasis in original).

17. 123 U.S. 623 (1887).

18. *Id.* at 668-69 (emphasis added).

19. A review of the Supreme Court cases, demonstrating their adherence to the distinction made in the text, and a detailed elaboration of the two different types of

In the pattern of holdings since *Mugler*, a distinction between two conceptually discrete kinds of property interest can be observed; whether or not particular property impairments are compensable "takings" has depended, as a factual matter, on which kind of property interest was impaired.[20] Compensation has been consistently denied when the government's action merely impairs the owner's interest in freely making use of the property,[21] "[a] prohibition simply upon the use."[22] When, however, the government impairs the interest in having the property to oneself — the legal protection from interference by others — compensation has consistently been required.[23] In short, the total property ownership interest in-

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property interests which underlie the distinction, is set forth in my earlier article, J. Humbach, *A Unifying Theory for the Just Compensation Cases: Takings, Regulation and Public Use*, 34 Rutgers L. Rev. 243 (1982) [hereinafter cited as *Unifying Theory*].

20. In *Unifying Theory*, *supra* note 19, the two property interests critical to the analysis, designated "rights" and "freedoms," were formally defined in order to provide a verbal formulation which would successfully differentiate between compensable "takings" and other, non-compensable impairments. The formal conceptual distinction which works to distinguish the cases is very similar to Hohfeld's conceptions of "right" and "privilege." *See* W. Hohfeld, Fundamental Legal Conceptions 35-50 (Cook ed. 1964) (also found at 23 Yale L.J. 16, 28-44 (1913)); *see also Unifying Theory*, *supra* note 19, at 253 n.49.

As formally defined, the "right/freedom dichotomy" appears to have an explanatory power which extends to virtually all Supreme Court takings cases. The only notable exceptions are a handful of decisions that involve abridgements of private rights for the direct benefit of other private persons, as occurs, for example, when property law reforms incidentally reallocate existing rights among private owners, rather than take "for public use." *Unifying Theory*, *supra* note 19, at 281-87. *See also* Humbach, *Constitutional Limits on the Power to Take Private Property: Public Purpose and Public Use*, 66 Or. L. Rev. ____ (1988). which reviews the extent to which the government may reassign property rights from one private person to another as occurs, for example, in law reform.

The formal definitions appear in the footnotes which follow.

21. In *Unifying Theory*, *supra* note 19, this non-compensable interest was referred to as a "freedom." The formal definition of a property "freedom" which serves to divide the cases is: "[T]he legal advantage which one has when, in reference to particular behavior, others cannot by legal action invoke the physical or moral power of the government in order to redress or induce the behavior on one's own part." *Unifying Theory*, *supra* note 19, at 257.

22. Mugler v. Kansas, 123 U.S. 623, 668 (1887).

23. In *Unifying Theory*, this compensable interest was referred to as a property "right," echoing the usage of Hohfeld who, among others, recognized the distinction between rights and freedoms. *Unifying Theory*, *supra* note 19, at 253 n.49. The for-

cludes both "freedoms" to use and property "rights" to have others' forbearance, each representing a distinct kind of property interest.[24] The post-*Mugler* cases on takings divide neatly according to which type of property interest, freedoms or rights, is affected. The just compensation requirement applies if, but only if, property "rights" (as opposed to merely "freedoms") are impaired.[25]

IV. The Tests for "Takings" Determinations after 1978

Although the Supreme Court's takings decisions have consistently followed the distinction adumbrated in *Mugler*, between mere *freedom* impairments and governmental acts which take *rights*, they have followed the distinction tacitly. No case to date has given explicit recognition to the rights/freedoms dichotomy or to its *de facto* significance in takings jurisprudence. On the contrary, the Court has insisted repeatedly that it has no "set formula" for deciding which governmental actions constitute takings requiring compensation and

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mal definition of a property "right" which serves to divide the cases is: "[T]he legal advantage of having the physical or moral power of the government invocable by legal action in order to induce the compliance of others or to redress others' non-compliance with some particular set of behavioral requirements." *Unifying Theory*, *supra* note 19, at 254.

24. *See Unifying Theory*, *supra* note 19, at 258-61.

25. A discussion of the right/freedom dichotomy would be incomplete without reference to the possibility that a freedom deprivation might go "too far" and thus become the functional equivalent of a "rights" deprivation, with the attendant requirement of just compensation. The landmark case is Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), in which the Court wrote: "To make it commercially impractical to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414. In other words, a deprivation of the freedom to use property can be so extensive as to make the right of exclusivity a mere hollow shell, an empty hoax, with the result that — for all practical purposes — the right to exclude no longer exists.

The Supreme Court has apparently never actually *held* a mere use-regulation ("freedom" deprivation) to be a compensable taking, not even in Pennsylvania Coal Co. v. Mahon. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1241 (1987) (describing the applicable portion of *Pennsylvania Coal* as an "advisory opinion").

A use-regulation might also be the functional equivalent of a taking of property "rights" in other ways, for example if it is part of an "out-and-out plan of extortion" and private property is acquired by the government as a result. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3148 (1987).

which do not.[26]

Even while the Supreme Court has denied having any set formula to decide takings cases, however, two formulations have appeared repeatedly in its takings opinions of the past ten years. One of these formulations is a "firmly established, . . . regularly and recently reaffirmed" three-factor "framework:"[27]

> To aid in this determination [whether a governmental regulation of property constitutes a "taking"], 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.'[28]

The other frequently recited formulation combines two alternative factors "that . . . have become integral parts of our takings analysis":[29]

> "[L]and use regulation can effect a taking if it 'does not substantially advance legitimate state interests, . . . *or* denies an owner economically viable use of his land.' "[30]

Both the three-factor framework and the two-alternatives formulation appear to have been originally composed, from antecedent elements, in *Penn Central Transp. Co. v. New York City*.[31] The *Penn Central* case held that New York City

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26. *E.g.*, Bowen v. Gilliard, 107 S. Ct. 3008, 3020 (1987); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); and Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

27. Hodel v. Irving, 107 S. Ct. 2076, 2082 (1987) (quoting Kaiser v. United States, 444 U.S. 164, 175 (1979)).

28. *Bowen*, 107 S. Ct. at 3020 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

29. Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1242 (1987).

30. *Id.* (emphasis added) (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

31. 438 U.S. 104 (1978). The usually quoted version of the two-alternatives formulation is from Agins v. Tiburon, 447 U.S. 255, 260 (1980), but the substance of the

could prohibit high-rise construction in the airspace above Grand Central Terminal, significantly diminishing the overall economic potential of the property, without paying "just compensation" to the Terminal's owners. However, before addressing itself to the private owners' specific contentions in *Penn Central*, the Court provided a general "review [of] the factors that have shaped the jurisprudence of the Fifth Amendment" just compensation clause.[32] The now familiar three-factor framework and two-alternatives formulation were presented and, to an extent, defined in the course of that review.[33]

Although the three-factor framework and the two-alternatives formulation do not appear to be exactly congruent, and they are only rarely employed in the same case,[34] the *Penn Central* Court seemingly did not regard them as belonging to distinct or alternate modes of "takings" analysis. On the contrary, its reference to the considerations underlying the two-alternatives formulation was interwoven into its discussion of the "economic impact" and "investment-backed expectations" factors of the three-factor framework.[35] To illus-

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two alternatives themselves, articulated as alternative tests of taking, first appeared in *Penn Central*, 438 U.S. at 127 & 137.

32. *Penn Central*, 438 U.S. at 123.

33. *Id.* at 123-29.

34. *But cf. id.* at 124, 127. *See also* Keystone Bituminous Coal Ass'n. v. DeBenedictis, 107 S. Ct. 1232, 1242-48 (1987) (quoting both, but analyzing at length only in terms of the two-alternatives formulation).

The pattern over the past ten years has generally been to expound at length on each branch of either the three-factor framework or the two-alternatives formulation, and then to reach a conclusion.

Using the two-alternatives formulation: *Keystone*, 107 S. Ct. at 1242 (1987); *Agins*, 447 U.S. at 260 (1980). *See also* United States v. Security Indus. Bank, 459 U.S. 70, 74-77 (1982).

Using the three-factor framework: Bowen v. Gilliard, 107 S. Ct. 3008, (1987); Hodel v. Irving, 107 S. Ct. 2076 (1987); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986).

35. *Penn Central*, 438 U.S. at 127. Although the Court's analysis of the specific facts in *Penn Central* was, if anything, in terms of the three-factor framework, its conclusion was in terms of the alternatives comprising the two-alternatives formulation: "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." *Id.* at 138.

trate the conceptual connection between the three-factor framework and the two-alternatives formulation, it will be helpful to summarize briefly the Court's original presentation of these two new "set formulas" for takings analysis.

The Court began with an explanation of the "investment-backed expectations" factor of the three-factor framework. It observed that, "in a wide variety of contexts . . . government may execute laws or programs that adversely affect recognized economic values."[36] To entitle an owner to compensation, however, the economic harm caused by government must "interfere with interests that [are] sufficiently bound up with the *reasonable* expectations of the claimant."[37]As a prime example of economic interests *not* protected by the just compensation clause, the Court cited the advantages enjoyed by riparian owners on navigable streams. Such riparian owners traditionally hold subject to the so-called navigation servitude, *viz.*, the federal government's power to preserve and enhance navigability; federal impingements on private riparian advantages are therefore not compensable.[38] In like fashion, according to *Penn Central*, an owner's hope to be able to use his or her property for any particular purpose is subject to the government's power to impose prohibitions designed to promote health, safety, morals or general welfare.[39] It would not be reasonable for an owner to "expect" otherwise.[40] There is

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36. *Id.* at 124.

37. *Id.* at 125 (emphasis added). An open issue about this factor is the importance to be placed on the notion that, to be protected, expectations must be not merely reasonable but also "investment-backed." The Court has not explained why the government should be freer to expropriate adventitious advantages, such as market appreciation or inheritance.

38. *Id.* at 124-25. Because it has long been established that riparian lands are held subject to the navigation servitude, expectations of immunity from exercises of the navigation power could not be "reasonable" expectations. *See* United States v. Willow River Power Co., 324 U.S. 499, 502 (1945) ("only those economic advantages are 'rights' which have the law [in] back of them"); and United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913). The Court also mentioned, less understandably, the vulnerability of a vested remainderman to diminution of his or her interest for the benefit of a life tenant. *Penn Central*, 438 U.S. at 125 (citing Demorest v. City Bank Co., 321 U.S. 36 (1944)).

39. *Penn Central*, 438 U.S. at 124-27.

40. It could not, of course, be literally true that property in general is subject to

accordingly no ground for finding a "taking," or requiring compensation, when such police-power prohibitions are enacted.

Having affirmed the police power to restrict property use, however, the Court immediately added that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a *substantial public purpose* . . . or perhaps if it has an *unduly harsh impact* upon the owner's use of the property."[41] It was in this statement, at the close of the discussion of the "expectations" factor, that the Court provided its first explicit articulation of the two tests comprising the two-alternatives formulation.[42] It was here too, in its reference to necessity for a public purpose, that the Court first described a takings clause test which invoked considerations substantially identical to the standards applicable in traditional economic due process.[43]

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the police power in the same way that riparian land is subject to the navigation power, for that would mean that there is no just compensation requirement at all. In subsequent cases, the Court has somewhat clarified things by distinguishing the case of property held in circumstances historically affected by extensive regulation. *See, e.g.*, Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986); and Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

41. *Penn Central*, 438 U.S. at 127 (emphasis added).

42. Note, however, that the exact wording in *Penn Central* differs from that usually quoted by the Court, *viz.* the verbalization in Agins v. Tiburon, 447 U.S. 255, 260 (1980). For the *Agins* wording, *see supra* text accompanying note 30.

43. As authority for this new public-purpose test in takings analysis, the Court cited Nectow v. City of Cambridge, 277 U.S. 183 (1928). However, *Nectow* was a case in which a zoning ordinance was struck down on the basis of *economic due process* analysis without any mention whatever of the just compensation mandate or any alleged "taking."

The Court also stated that its two-alternatives formulation was "implicit" in Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962). However, *Goldblatt* was likewise argued and decided on an economic due process theory. The plaintiffs had alleged that the zoning ordinance upheld in *Goldblatt* "prevents them from continuing their business and therefore takes their property without due process of law." *Id.* at 591. The Court's analysis in *Goldblatt* was predicated on the economic due process landmark, *Lawton v. Steele*, discussed *supra* text accompanying notes 7-9. The only mention in *Goldblatt* of "takings" concerns as such was a reference to the fact that a regulation can be so onerous that just compensation is required. *Goldblatt*, 369 U.S. at 594. Finding that there was no evidence that the statute in *Goldblatt* was so onerous, the Court turned to the dispositive issue, writing: "The question, therefore, narrows to whether the prohibition . . . is a valid exercise of the town's police power." *Id.*

Also cited as support for the two-alternatives formulation in *Penn Central* was a

After stating the two tests which now comprise the two-alternatives formulation, the Court returned to its presentation of the three-factor framework, directing its attention next to the "economic impact" factor — apparently in order to elaborate on the concept of "unduly harsh impact" to which it had just referred. Even though a statute substantially furthers important public policies, it wrote: [The statute] "may so frustrate distinct investment-backed expectations as to amount to a 'taking.' "[44] Nevertheless, the Court seemed to regard only the severest of economic impacts to be indicative of "taking." It used words such as "complete destruction,"[45] "wholly useless,"[46] and "nearly the same effect as the complete destruction of [the owner's] right"[47] in describing the precedents. The decisions, it wrote, "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking'."[48] In short, the Court left little reason to believe that the "economic impact" factor was anything different from the second prong of the two-alternatives formulation, *viz.* that a taking occurs if the government "denies an owner economically viable use" of his property.[49]

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concurring opinion by Justice Stevens, written a year earlier, which stated that Justice Sutherland had "fused" the two restrictions on governmental infringements of property — due process and just compensation — into a single standard in the 1926 zoning landmark, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). *Penn Central*, 438 U.S. at 127 (citing Moore v. City of East Cleveland, 431 U.S. 494, 513-14 (1977) (Stevens, J., concurring). It is hard to find anything in the *Euclid* opinion, however, to support Justice Stevens' notion that Justice Sutherland had the just compensation requirement or any sort of "fusion" in mind.

44. *Penn Central*, 438 U.S. at 127 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) as the "leading case").

45. *Id.* at 128 (citing Armstrong v. United States, 364 U.S. 40 (1960) ("[g]overnment's complete destruction of a materialman's lien in certain property held a 'taking' ")).

46. *Id.* (citing Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908) ("if height restriction makes property wholly useless 'the rights of property . . . prevail over the other public interest' ")).

47. *Id.* at 127 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) (striking down an anti-subsidence statute which "made it commercially impractical to mine" certain coal)).

48. *Id.* at 131 (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (seventy-five percent diminution in value caused by zoning prohibitions); and Hadacheck v. Sebastian, 239 U.S. 394 (1915) (87.5 % diminution in value)).

49. *See supra* text accompanying note 30, where the two-alternatives formula-

Thus, in the Supreme Court's general review of "takings" jurisprudence in *Penn Central*, the Court connected both prongs of the two-alternatives formulation with factors of the three-factor framework. The "advancing state interests" prong of the former corresponds to the "expectations" factor of the latter; an owner cannot reasonably "expect" constitutional protection from legislation which is necessary to effectuate substantial public purposes. Similarly, the "denies economically use" prong of the two alternatives corresponds to the "economic impact" factor of the three-factor framework.

Only the "character of the governmental action" factor, discussed by the Court last in *Penn Central*, remained unconnected with any considerations underlying the two-alternatives formulation. For the Court in *Penn Central*, the "character" factor in the three-factor framework seemed to refer either to elements of physical invasion[50] or to the fact, if applicable, that the government acted to acquire resources for "uniquely public functions."[51] However, the inherent flexibility of the "character" factor was demonstrated during the 1986 Term when the Court found a governmental action to be a taking because its character was "extraordinary," *viz.* it effected a greater deprivation of important ownership incidents than was necessary to achieve the public objective to be served.[52] Like the "advancing state interests" prong of the two-alternatives formulation, the "character" factor was thus employed to invoke considerations which are substantially identical to the standards applicable in traditional economic due process analysis.

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tion is set forth.

50. *Penn Central*, 438 U.S. at 124.

51. *Id.* at 128; *see also* Connolly v. Pension Benefit Guar. Corp.,(1986); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980).

52. Hodel v. Irving, 107 S. Ct. 2076, 2083-84, (abrogation of power to pass on certain property by descent or devise). *But cf.* Andrus v. Allard, 444 U.S. 51 (1979) (abrogation of freedom to sell, purchase, barter, transport, import, or export held not to be a taking).

V. The "Advancing State Interests" Test and Economic Due Process

As a test of "taking," the "advancing state interests" prong of the two-alternatives formulation[53] is a bit peculiar. The requirement that governmental acts serve legitimate state interests is not unique — or even indigenous — to takings jurisprudence. Rather, it is the traditional core of substantive due process that *all* governmental actions must serve a legitimate state interest to be within the scope of the government's regulatory authority at all.[54] Not until *Penn Central* was this substantive due process test borrowed as a component of takings analysis for purposes of the just compensation requirement.[55]

The "advancing state interests" test is, moreover, somewhat maladapted to its new role as a test of "takings." More often than not it will fail to provide a suitable basis for distinguishing compensable property impairments from the noncompensable impairments which the government may constitutionally impose. For example, the acquisition of land to construct a public school certainly advances a legitimate state interest, but it would just as certainly violate the just compensation clause for the government to attempt such an acquisition without payment.[56] On the other hand, the acquisition of land to build a facility for purely private benefit would not be constitutionally permissible even if compensation were paid.[57] In short, the existence of a legitimate state interest in acquiring property is not a substitute for just compensation any more than its absence can be remedied by the fact that just compensation is paid.

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53. *See supra* text accompanying note 30, where the two-alternatives formulation is set forth.

54. *See supra* text accompanying notes 4-14.

55. *See supra* note 43 and accompanying text.

56. *See* Kaiser Aetna v. United States, 444 U.S. 164 (1979).

57. "[O]ne person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (quoting Thompson v. Consol. Gas Util. Corp. 300 U.S. 55, 80 (1937)). *See also* Missouri Pac. Ry. Co. v. Nebraska, 164 U.S. 403 (1896).

If the "advancing state interests" test for takings analysis has an operational domain at all, that domain must lie in a middle ground between the extremes described in the preceding paragraph. A classic case occupying this middle ground is *Pennsylvania Coal Co. v. Mahon*,[58] which involved the validity of a state statute that prohibited the mining of certain coal. The purpose of the prohibition was to prevent subsidence of the land surface as a result of undermining, but its effect was to render the affected coal essentially worthless. In a now famous opinion by Justice Holmes, the Court declared the anti-subsidence statute to be invalid on the grounds that "the statute does not disclose a public interest *sufficient to warrant so extensive a destruction* of the defendant's constitutionally protected rights."[59] The public interest being served was balanced against the private imposition that resulted.

Although Justice Holmes' opinion rested on what was, in effect, an "advancing state interests" rationale, the holding in *Mahon* was not based on the Constitution's just compensation requirement for "takings." Indeed, Holmes' rationale for invalidity is practically a paraphrase of the classic economic due process standard announced in *Lawton v. Steele*.[60] The *Mahon* case was, after all, decided during the heyday of economic due process judicial review. The only references in *Pennsylvania Coal Co. v. Mahon* to the just compensation requirement for "takings" came in the course of a speculative discussion,[61] going beyond the facts at issue, which the Supreme Court has subsequently described as an "advisory opinion."[62] Thus, despite the fact that the *Mahon* case has become

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58. 260 U.S. 393 (1922).

59. *Id.* at 414 (emphasis added).

60. *See supra* text accompanying note 8, where the *Lawton* due process standard is set forth.

61. *Pennsylvania Coal*, 260 U.S. at 415-16.

62. Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. at 1232, 1241 (1987). The "advisory opinion" portion of the *Mahon* opinion is by far the more famous portion, in which Holmes wrote that a regulation of property use would be treated as a compensable taking if it goes "too far." *Pennsylvania Coal*, 260 U.S. at 415.

In Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 197-200 (1985), the Court reviewed, without deciding, arguments that the "advi-

widely regarded as the seminal case on so-called "regulatory takings," it actually provides only *obiter dictum* on that point. Its holding was one of economic due process.

The days of probing economic due process review are now officially in the past. Yet, cases may still arise in which the Court finds it judicious to decide, as it did in *Pennsylvania Coal Co. v. Mahon*, that a private imposition cannot be rationally justified by a putative public interest. To provide a constitutional basis for such judicial review the Court could explicitly return to its pre-1938 willingness to accord economic due process review of legislative decisions. It has not. In the alternative, the Court could enlist the "advancing state interests" test of the two-alternatives formulation as a basis for reviewing the rationality of legislation. Or, using the three-factor framework, it could support a more probing judicial review of statutes by treating the "character of the governmental action" factor as bearing on the statute's rationality. During the 1986 Term, the Supreme Court rendered decisions employing each of the latter two approaches, in the cases described below.

VI. Cases Using the "Three-Factor Framework"

The Supreme Court used the analysis of the three-factor framework as the basis for decision in two of the takings cases decided during the 1986 Term, *Hodel v. Irving*[63] and *Bowen v. Gilliard*.[64] The Court concluded that there was an unconstitutional taking in *Irving*, but not in *Gilliard*. In terms of the three-factor framework, the principal distinction between the two cases appeared to lie in the different "character" of the governmental actions at issue. The underlying considerations which really made the difference, however, were traditional

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sory" portion of *Pennsylvania Coal* was also actually based on due process rather than just compensation considerations. The Court since has implicitly rejected such arguments by holding definitively that use restrictions which go "too far" require just compensation. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378 (1987). The due-process basis for the *holding* of *Pennsylvania Coal* has not, however, been questioned.

63. 107 S. Ct. 2076 (1987).

64. 107 S. Ct. 3008 (1987).

considerations of substantive due process.

A. *Bowen v. Gilliard*

The question in *Bowen v. Gilliard* was whether the takings prohibition is violated by a law that requires parents to assign their children's support payments to the state as a condition to the family's eligibility for benefits under the Aid for Dependent Children program (AFDC).[65] Although the first fifty dollars of support collected by the state was to be remitted to the family,[66] the child's separate interest in his or her support payments was destroyed, and "the practical effect was that many families' total income was reduced."[67] According to the Court, Congress' goal was to reduce federal expenditures, and the statute "unquestionably" served that goal. In its first three years it was designed to divert nearly one-half billion dollars from needy families to the Federal Treasury.[68] Observing that, among other things, the AFDC program is "entirely voluntary,"[69] the Court concluded that the required assignment of a child's support payments by a parent to the state "is not a taking of the child's property without just compensation."[70]

Because support monies "belong to the children" with the custodial parent as a "mere trustee for them," the District Court had reasoned that the "forced assignment" by the parent to the state in exchange for AFDC benefits was a taking of the child's private property.[71] Abstractly, the facts of *Gilliard* are not far removed from those of *Webb's Fabulous Pharmacies, Inc. v. Beckwith*,[72] in which the Court struck down a Florida law that appropriated the interest accruing on monies

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65. *Id.* at 3018-19.

66. *Id.* at 3013.

67. *Id.*

68. *Id.* at 3016. The requirement was added to the AFDC program by the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (codified as amended at 26 U.S.C. §§ 1-1082 (Supp. III 1985)). *Bowen*, 107 S. Ct. at 3011.

69. *Bowen*, 107 S. Ct. at 3019, 3021.

70. *Id.* at 3021.

71. *Id.* at 3014, 3014 n.10.

72. 449 U.S. 155 (1980).

which litigants were compelled to deposit with the clerks of courts. There was the distinction in *Webb's* that resort to the courts, unlike AFDC, is not always "entirely voluntary."[73] Given economic realities, however, resort to AFDC may likewise not be quite as voluntary as the Supreme Court assumed. At any rate, the upshot of the new AFDC assignment rules was that, through the combined action of a child's custodial parent and the state, the child's separate interest in payments for his or her support was annihilated.[74] Reviewing the *Bowen v. Gilliard* facts in terms of the three-factor framework, however, the Court concluded that no taking was involved.

1. *Economic Impact in Bowen*

Although the AFDC assignment requirement formally meant that support monies paid for the benefit of a given child would be diverted from their intended object, the Court felt that "this argument places form over substance, and labels over reality."[75] The "reality," according to the Court, is that "the typical AFDC parent will have used the support money as part of the general family fund even without its being transferred."[76] In other words, the economic impact of the assignment on the child is not significant because, to be blunt, custodial parents typically convert such funds from their intended use anyway.

The Court further observed that the economic impact of appropriating the child's support payments was "mitigated" by the fact that fifty dollars of the support payments received is remitted to the family, and the state does the collection. Thus, "whatever the diminution of the value of the child's right to have the support funds used for his or her 'exclusive' benefit may be, it is not so substantial to constitute a taking."[77] One might be startled by the Court's frank acknowl-

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73. *E.g.*, for defendants, resort to the courts is not voluntary.

74. Except to the extent that the child might share in the first fifty dollars of the support payments paid on his or her behalf. *See supra* text accompanying note 66.

75. *Bowen*, 107 S. Ct. at 3019.

76. *Id.* at 3020.

77. *Id.*

edgement that the rationale for assessing support from non-custodial parents is a charade, but it does seem to follow that the economic impact of the support assignments is generally slight.

2. *Investment-Backed Expectations*

Based primarily on the fact that child-support decrees may be modified, the Court decided that children receiving support payments hold no "vested protectable expectation" that the support will continue in any particular amount.[78] The Court's reasoning is, however, a bit tricky, slipping between two distinct concepts, *viz.* the child's right to support in general and his or her right to particular *amounts* of support. The fact that support decrees are modifiable may logically preclude a child from having firm expectations as to any particular amounts of support. In the current socio-legal setting, however, the right to support, itself, is as firm an expectation — and as practically "vested" — as any can be.

The AFDC scheme does not merely reduce the amount of support which might be available for the child, it commutes the child's personal support payment to an AFDC payment for *family* use. The Court does not explain how the modifiability of support decrees entails the conclusion that a child's "expectations concerning the future use of support *payments*" are not the sort of expectation protected under the just compensation clause.[79] The Court would have been on more solid ground here if it again averted to the "reality" that custodial parents routinely convert the child's support payments to family use anyway.[80]

3. *Character of the Governmental Action*

In concluding that the character of the governmental action "militates against" a finding of an unconstitutional tak-

78. *Id.*

79. *Id.* at 3021 (emphasis added). The expectations, however firm, are not of course "investment-backed." But if this was the reason for denying them protection, the Court did not say so.

80. *Cf. supra* text accompanying note 76.

ing, the Court's opinion describes the governmental action as merely a "decision" and a "hard choice" on the allocation of public benefits.[81] It failed, however, to deal with the crux of the takings issue,[82] *viz.* that children's rights to support are actually *assigned* to the state.[83] In overlooking the fact of assignment when it analyzed the character of the governmental action, the Court seemed at first to have forgotten its commitment to "reality" that it stressed elsewhere in its opinion.[84] Implicitly, however, the reality does appear to control. As the Court previously cautioned, form should not be placed before substance and, in this context, to focus attention on the assignment would do exactly that. Assuming, as the Court does, that custodial parents generally use their children's support for family purposes anyway, the parent's decision to divert the support to the government, in order to obtain AFDC benefits for the family, really introduces no new deprivation of property. Accordingly, the government's act of receiving the diversions would not have the "character" of a taking.

B. *Hodel v. Irving*

The challenged statute in *Hodel v. Irving*[85] was designed to address the problem that parcels of land alloted to individual Indians in the late nineteenth century had, over the years, become splintered into multiple undivided interests, with some parcels having dozens or even hundreds of owners.[86] The administrative costs associated with such highly fractionalized

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81. *Bowen*, 107 S. Ct. at 3021.

82. The Court identified the crux of the takings issue, writing that: "The only possible legal basis for appellees' takings claim, therefore, is the requirement that an applicant for AFDC benefits must assign support payments to the State, . . ." *Id.* at 3019.

83. The Court also suggests that the state is merely responding to the custodial parent's decision to apply for AFDC, a decision which "the law does not require." *Id.* at 3021. The parent's volition is at best, however, a very vulnerable volition, which economic stresses make easy prey to governmental extractions of their children's rights.

84. *See supra* text accompanying notes 75-76.

85. 107 S. Ct. 2076 (1987).

86. *Id.* at 2079.

parcels became disproportionate.[87] To gradually alleviate the problem, Congress enacted the Indian Land Consolidation Act[88] which provided, in part, for an "escheat" to the tribe of any fractional interest of a decedent representing less than two percent of the total or earning less than one hundred dollars in the previous year.[89] In other words, the statute abolished transfer by descent or devise of the smallest fractional shares.[90] The question was whether this so called "escheat" provision, by abolishing descent and devise, effected a taking without just compensation.[91]

On the basis of *Andrus v. Allard*,[92] decided in 1979, it would be hard to predict that the Court would reach the conclusion it did in *Hodel v. Irving*, namely that the "escheat" provision effectuated a taking. In *Andrus*, the Court had unanimously decided that no taking results when the government imposes a total ban on selling or otherwise trading in certain kinds of property.[93] As in *Andrus*, the governmental action in *Hodel* caused no physical invasion of private property, nor an interference with its possession or use. Although the legislation challenged in *Hodel* deprived the private owners of the freedom to transfer certain property by will or have it pass by intestacy, the owners remained able, by resort to alternate means, to control the disposition of the affected property following their deaths, for example, by use of a revocable *inter vivos* trust.[94] The owner's ability to make *inter*

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87. For one forty acre parcel mentioned by the Court, the estimated administrative cost per year was $17,580 for a piece of land worth about $8000. *Id.* at 2081.

88. Pub. L. No. 97-459, 96 Stat. 2515, 2517 (codified as amended at 25 U.S.C. §§ 2201-10 (1982)).

89. *Hodel*, 107 S. Ct. at 2079.

90. *Id.*

91. *Id.* at 2078.

92. 444 U.S. 51 (1979).

93. The statutes at issue prohibited the sale, purchase, export, import, barter or trade of eagle feathers. The statutes did not, however, prohibit the "possession or transport" of eagle feathers. Emphasizing the absence of any physical invasion or surrender of the artifact, and that the owners retained the right to possess, transport, donate or devise their property, the Court held in *Andrus* that the prohibitions on other disposition did not constitute a compensable taking. *Id.* at 65-68.

94. *Hodel*, 107 S. Ct. at 2083. The Court was not impressed with the alternatives: "The fact that it may be possible for the owners of these interests to effectively con-

vivos transfers, by sale or otherwise, was not affected.

It is doubtful that, for the property at issue in *Hodel*, the elimination of testate and intestate succession *per se* had any significant effect whatever on either the value of the property or its use.[95] Nevertheless, after reviewing the facts of *Hodel v. Irving* in terms of the three-factor framework, the Court concluded that the "abolition of both descent and devise of a particular class of property may be a taking."[96]

1. *Economic Impact*

The Court[97] asserted that there was "no question" that the escheat provision could have a "substantial" relative economic impact on the owners; the parties in the case owned fractional interests ranging between $100 and $2,700 in value.[98] As the Court said, "[t]hese are not trivial sums."[99] It

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trol disposition upon death through complex *inter vivos* transactions such as revocable trusts, is simply not an adequate substitute for the rights taken given the nature of the property." *Id.* The Court did not explain, however, what it was about the "nature" of this property that made some forms of intergenerational transmission so highly preferable to other forms as to be practically invulnerable to legislative change.

95. The Court stated that "there is no question . . . that the right to pass on valuable property to one's heirs is itself a valuable right. *Id.* at 2082. The Court did not, however, state how valuable that right would be. The Court cited to a table in the Code of Federal Regulations, 26 C.F.R. § 20.2031-7(f) Table A (1987), showing values of remainder interests, apparently as "evidence" of the value magnitudes which it thought to be involved in *Hodel*. This choice of authorities was, however, seemingly not apt. The value of a remainderman's interest represents the value of the right to *receive* future possession and use of the property, not the value of the right to *transmit* such possession and use. It is far from self-evident that the value of the right to transmit property *at death* is equal to the value of the right to receive such property upon the death of another.

96. *Hodel*, 107 S. Ct. at 2084.

97. Use of the expression "the Court" in reference to the "opinion of the Court" is somewhat questionable in *Hodel v. Irving*. Although the case was decided without a dissenting opinion, only one of the justices, the opinion's author (O'Connor, J.), was in unqualified agreement with the "opinion of the Court." Nevertheless, six other justices, in two concurring opinions, appeared to join in all portions of the "opinion of the Court" referenced in the discussion that follows. Their primary disagreement concerned the effect of the holding in *Hodel* on the earlier case of *Andrus v. Allard*, 444 U.S. 51 (1979) (prohibition on all *inter vivos* dispositions of eagle feathers held *not* a taking). The opinion of the Court itself gave Andrus v. Allard only a "But cf." *Hodel*, 107 S. Ct. at 2084.

98. *Hodel*, 107 S. Ct. at 2082. It should, however, be noted that the holding in *Hodel v. Irving* was apparently broad enough to protect interests having values as

must be remembered, however, that these sums do not represent the actual magnitude of economic impact on the owners, who retained full beneficial use of the property as well as the power to control disposition of the property.[100] The "economic impact" was only the loss, if any, which resulted from the statutory abolition of two of the several available methods for controlling property devolution after death.[101] The methods still available, such as the creation of a revocable *inter vivos* trust, are not intrinsically any more complex than making a will, leaving the question: Was there any economic impact at all in *Hodel v. Irving*?[102]

2. *Investment-Backed Expectations*

The Court conceded that "[t]he extent to which any of the [fractional share owners] has 'investment-backed expectations' in passing on the property is dubious."[103] None of the parties in the case could point to any such expectations, apart from the fact that their ancestors had "ceded" large parts of the Great Sioux Reservation in exchange for the alloted lands now at issue.[104] Given this absence of any real "investment" by the current private owners, the Court was presented with

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little as $.000418, producing an income of one cent every 177 years. *Id.* at 2081.

99. *Id.* at 2082.

100. *See supra* text accompanying notes 93-94.

101. As previously noted, *see supra* note 95, the Court appears to have erroneously equated the value of the right to receive possession in the future with the value of the power to convey future possession, thereby probably overvaluing the economic impact of the escheat provision. Even accepting the Court's equation of the two values, however, the economic impact that results from a partial abridgement of the power to convey future possession is greatly attenuated if effective mechanisms for achieving the same ends remain available.

102. Creating a revocable *inter vivos* trust is, to be sure, more complex than simply letting one's property descend to the heirs selected by the law pursuant to intestate succession. In that respect, however, the escheat provision in *Hodel v. Irving* can be seen as a provision which simply substitutes one group of heirs (the tribe) for another (members of the immediate family). The Court apparently agrees that the government could lawfully have abolished "the descent of such interests by rules of intestacy, thereby forcing the owners to formally designate an heir to prevent escheat to the Tribe." *Hodel*, 107 S. Ct. at 2084.

103. *Id.* at 2083.

104. *Id.*

an ideal opportunity to explain why expectations, if they are reasonable, should also have to be "investment-backed" in order to achieve full protection under the just compensation clause. The Court did not, however, offer any explanation.

3. *Character of the Governmental Action*

Although the economic impact of the escheat provision on investment-backed expectations was probably not enough to indicate a taking,[105] the "character" of the escheat provision was "extraordinary"[106] — extraordinary enough to tip the balance. The Court described the escheat statute as "virtually an abrogation of the right to pass on a certain type of property . . . to one's heirs."[107] Although that description was an exaggeration,[108] it is hard to argue that the abrogation was "extraordinary," even if it was limited to descent and devise.

There was another extraordinary aspect to the escheat provision, mentioned by the Court at least three times.[109] The abolition of descent and devise in *Hodel v. Irving* applied "even in circumstances when the governmental purpose sought to be advanced, consolidation of ownership of Indian lands, does not conflict with the further descent of the property."[110] The "extraordinary step" of abolishing both descent and devise even when such transfers might result in ownership consolidation, thereby *promoting* the statutory purpose, "goes too far."[111] In short, the deciding element in *Hodel v. Irving* was that the escheat law's adverse effect on individuals was not merely substantial but it went well beyond merely addressing the public purpose which it was supposed to address.

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105. Based solely on its analysis of the "economic impact" and "expectations" factors, wrote the Court "we might well find section 207 [the challenged legislation] constitutional." *Id.* at 2083.

106. *Id.*

107. *Id.*

108. As noted earlier, other methods for passing on the property to the owner's heirs or designees did remain available. *See supra* note 94.

109. *Hodel*, 107 S. Ct. at 2083-84.

110. *Id.* at 2084.

111. *Id.* (quoting Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

In the traditional economic due process style, the Court weighed whether the challenged legislation was a rational means, not unduly oppressive on individuals, for accomplishing the legislative objective.[112]

C. *Reconciling Hodel v. Irving and Bowen v. Gilliard*

In both *Hodel v. Irving* and *Bowen v. Gilliard* the absolute economic values or impacts involved were small, and the investment-backed expectations were considered dubious or non-existent. The main operative difference between the two cases appears to lie in the Court's analysis of the "character" of the governmental action.

In the language of the Court, the character of the governmental action was considered "extraordinary" in *Hodel* while merely a necessary "hard choice" concerning the allocation of public benefits in *Bowen*. The "extraordinary" thing about the *Hodel* escheat provision was that it was a heavy imposition on property ownership[113] *plus* it effected that imposition on owners even in circumstances where it would not further the supposed public purpose. Penetrating words to reach the substance, the vice of the *Hodel* escheat provision was that it violated the traditional *Lawton v. Steele* standard of economic due process.[114] In *Bowen*, the Court did not even consider, in its takings clause discussion, the possibility that the "character" of a governmental action requiring child support payments to be assigned to the state might violate a standard such as that announced in *Lawton v. Steele*. To the contrary, the opinion expressly disavowed any intent to review "the relevant social and economic objectives" or to decide whether "a

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112. *Cf.* quotation from Lawton v. Steele, stating the standard of substantive due process, quoted *supra* text accompanying note 8.

113. The Court stressed that the escheat destroyed *both* devise and descent, and it appeared to regard the power to pass on property by devise and descent as "similarly" important with the right to exclude others, described as "one of the most important sticks in the bundle of rights that are commonly characterized as property." *Hodel*, 107 S. Ct. at 2083 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

114. *See supra* text accompanying notes 4-14.

more just and humane system" could be devised.[115] In *Bowen*, however, a substantive due process challenge was presented explicitly and was decided separately from the "takings" issue. In rejecting the due process challenge, the Court concluded that it was "rational" for Congress to adjust the AFDC program to reflect the fact that individual child support generally benefits entire family units.[116] Under the prevailing standards of economic due process review, that was sufficient to sustain the legislation.[117]

To summarize, the *Bowen* Court held, in the context of a due process challenge, that the legislation in question was "rational" and that there was no independent "takings" ground for declaring it constitutionally infirm. The challenged statute in *Hodel*, by contrast, went too far, beyond what was reasonably necessary to serve its public purpose, and it was therefore struck down. It is clear that, at least in *Hodel*, the Court undertook an active judicial review of the escheat statute's suitability as a measure to promote its intended purpose. In both cases, by actually expressing a holding on the issue of rationality, the Court did more than would be required under the extreme expressions of judicial deference found in some its post-1938 opinions.[118]

VII. Cases Using the Two-Alternatives Formulation

During the 1986 Term, the Supreme Court used the analysis of the two-alternatives formulation in two cases, *Keystone Bituminous Coal Ass'n v. DeBenedictis*[119] and *Nollan v. California Coastal Comm'n.*[120] The governmental action was upheld in *Keystone Bituminous* but not in *Nollan*. In both cases the economic impacts were small in relation to the en-

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115. Bowen v. Gilliard, 107 S. Ct. 3008, 3021 (1987) (quoting Dandridge v. Williams, 397 U.S. 471, 487 (1970)). "The Constitution does not empower this Court to second-guess . . . officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Id.*

116. *Id.* at 3016-17.

117. *Id.* at 3015.

118. *See supra* text accompanying notes 4-14.

119. 107 S. Ct. 1232 (1987).

120. 107 S. Ct. 3141 (1987).

tirety of the property interests affected. The difference lay in the Court's application of the "advancing state interests" prong of the two-alternatives formulation.

A. *Keystone Bituminous Coal Association v. DeBenedictis*

Roughly sixty-five years after invalidating a Pennsylvania anti-subsidence statute in *Pennsylvania Coal Co. v. Mahon*,[121] the Court was faced with a new challenge to a new anti-subsidence program[122] in *Keystone*. The new law and regulations were designed to diminish mining-induced surface subsidence and regulate its consequences;[123] their effect was to generally prohibit the mining of fifty percent of the coal beneath various structures and lands, including dwellings, non-commercial public buildings and cemeteries.[124] These prohibitions made the unmineable coal essentially useless to its owners, and the question was whether the law and regulations, on their face, violated the constitutional prohibition on takings without just compensation.[125]

In upholding the new anti-subsidence program, the Court's central task was to distinguish the superficially similar case of *Pennsylvania Coal Co. v. Mahon*.[126] In *Mahon*, Pennsylvania's earlier anti-subsidence statute was held invalid because it "did not disclose a public interest sufficient to warrant" the extent of invasion of the coal owners' rights. In addition, the Court had written in *Mahon*, as *dictum*, that "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."[127] The Court found the crucial

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121. *See supra* text accompanying notes 53-62.

122. The Bituminous Mine Subsidence and Land Conservation Act, Pa. Stat. Ann. tit. 52, §§ 1406.1-.21 (Purdon Supp. 1987), and the regulations thereunder. *Keystone*, 107 S. Ct. at 1236-37.

123. *Keystone*, 107 S. Ct. at 1237-38.

124. *Id.*

125. *Id.* at 1239. The case also presented a claim under the contracts clause, U.S. Const. art. I, § 10, which was rejected by the Court.

126. 260 U.S. 393 (1922).

127. *Id.* at 414-15. The Court in *Keystone* described this portion of *Mahon* as an "advisory opinion." *Keystone*, 107 S. Ct. at 1241.

distinction between *Mahon* and *Keystone* in their differing "particular facts"[128] as analyzed in terms of the two-alternatives formulation.[129]

One "particular fact," which distinguished *Keystone* from *Mahon* in a fundamental way, was that the complaining mine owners in *Keystone* had "not even claimed, at this stage, that the Act makes it commercially impracticable for them to continue mining their bituminous coal interests in western Pennsylvania."[130] Accordingly, *Keystone* did not present the Court with any occasion to apply the *Mahon* dictum on commercial impracticability quoted above. In terms of the two-alternatives formulation, there was no factual basis for deciding one way or the other whether the subsidence regulations actually deprived the complaining mine owners of "economically viable use" of their property.[131] The Court suggested that this lack of essential proof was enough by itself for the coal owners' "taking" claim to fail.[132] Nevertheless, the Court also considered at some length the public purpose of the subsidence regulation.

In both *Mahon* and in *Keystone* the Court accepted that the statutes at issue would, respectively, advance legitimate state interests, as required under the first prong of the two-alternatives formulation.[133] The difference lay in the vastly

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128. *Keystone*, 107 S. Ct. at 1236.

129. *Id.* at 1242.

130. *Id.* at 1247-48. The case came to the Supreme Court after the District Court granted summary judgment to the state's representatives on a *facial* challenge to the Subsidence Act. *Id.* at 1246. The Supreme Court had no evidence that there was any coal, otherwise extractable, that could not be mined at a profit as a result of the challenged governmental action. *Id.* at 1248.

131. Thus, *Keystone* represents another in a series of takings cases which came to the Court not quite ripe for determination. *E.g.*, MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264 (1981); Agins v. Tiburon, 447 U.S. 255 (1980).

132. "In this case, by contrast, petitioners have not shown any deprivation significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking. For this reason, their takings claim must fail." *Keystone*, 107 S. Ct. at 1246.

133. *See supra* text accompanying note 30. As Holmes wrote in *Mahon*: "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." Pennsylvania Coal Co. v. Mahon, 260 U.S. 373, 413 (1922) (emphasis added).

different *magnitude* of the public interests in the two cases. The *Keystone* opinion described *Mahon* as involving a balancing of merely private interests against other private interests[134] and, as Holmes had written, "the public interest does not warrant much of this kind of interference."[135] This deflation of the interest served by the *Mahon* statute paved the way for Holmes' conclusion that "the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights."[136] By contrast, the *Keystone* statute was "designed to accomplish a number of widely varying interests."[137] The Court in *Keystone* made no explicit statement, similar to that in *Mahon*, that the weight of the public's interest was enough to justify the impairment of private property resulting from the fifty percent mining prohibition, but that was the clear implication.

It is not surprising, in the post-economic due process era, that the Court in *Keystone* found a sufficient public interest to justify the private imposition.[138] What is interesting, however, is the Court's explicit acknowledgement of the pre-1938 approach that it took to this quintessentially economic due process issue:

In *Keystone*, the Court observed that the legislature found "important public interests" were served by the subsidence regulations, and that there was nothing in the statutory details to "call the stated public purposes into question." *Keystone*, 107 S. Ct. at 1242-43, 1243 n.16.

134. *Viz.* the coal owners versus the surface owners. *Keystone*, 107 S. Ct. at 1242-43. The *Keystone* Court did not mention the portion of Holmes' opinion which stated that even the public interest in securing subjacent support for the public streets would not justify imposition on private interests effected by the *Mahon* statute. *Mahon*, 260 U.S. at 414-15.

135. *Mahon*, 260 U.S. at 413.

136. *Id.* at 414.

137. *Keystone*, 107 S. Ct. at 1243. The opinion referred to environmental concerns, health, safety and general welfare concerns, and abatement of nuisance-like conditions. *Id.* at 1238-39, 1242, 1244.

Perhaps significantly, the action to enforce the statute in *Mahon* was brought by private owners whereas the enforcement contested in *Keystone* was by the state itself.

138. *E.g.*, "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." Berman v. Parker, 348 U.S. 26, 32 (1954). *See supra* text accompanying notes 4-14.

> *Pennsylvania Coal* instructs courts to examine the operative provisions of a statute, not just its stated purpose, in assessing its true nature. . . . In this case, *we . . . have conducted the same type of inquiry the Court in Pennsylvania Coal conducted,* and have determined that the details of the statute do not call the stated purpose into question.[139]

This language leaves little doubt that the Court views the "advancing state interests" prong of the two-alternatives formulation as a warrant to actively review the rationality of legislation and its suitability for a public purpose.[140] Although the Court saw itself as undertaking this review in order to determine a "takings" challenge, it is noteworthy that the portion of *Pennsylvania Coal Co. v. Mahon* cited by the Court in the above quotation was not the "advisory" portion on takings but rather the holding itself — a holding whose analysis was of the traditional substantive due process genre.[141]

It was, of course, almost inevitable that traces of the pre-1938 substantive due process method would appear in *Keystone*. The superficial similarity of *Keystone* to the landmark *Pennsylvania Coal Co. v. Mahon* practically required that the earlier case be distinguished on its own terms, even if the era of traditional economic due process had passed. *Keystone* is not, however, an isolated case which, contrary to the modern trend of "takings" cases, bears an atavistic seed of substantive due process concerns. As already described, the Court undertook the same judicial review of legislative rationality and suitability in *Hodel v. Irving*.[142] However, in *Nollan v. Cali-*

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139. *Keystone*, 107 S. Ct. at 1243, n.16 (emphasis added).

140. Whatever doubt might have remained was dispelled by Nollan v. California Coastal Comm'n. *See infra* text accompanying notes 144-59.

141. *See supra* text accompanying notes 26-52. Similarly, in referring to the limitations on the proper scope of judicial review for these purposes, the Court cited the highly economic due process oriented discussion in Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388-89 (1926), concluding: "That a land use regulation may be *somewhat* overinclusive or underinclusive is, of course, no justification for rejecting it." *Keystone*, 107 S. Ct. at 1243 n.16 (emphasis added).

142. *See supra* text accompanying notes 85-112.

fornia Coastal Comm'n,[143] decided at the end of the 1986 Term, the Court gives the clearest signal yet that it is prepared to actively consider the rationality and suitability of legislative measures.

B. *Nollan v. California Coastal Commission*

The issue in *Nollan* was whether the state could constitutionally require private owners, the Nollans, to grant an easement to the public as a condition of a building permit.[144] The Nollans sought the permit because they wanted to replace the house on their oceanfront land. The public easement to be exacted from the Nollans was to run along the ocean, facilitating public passage down the beach. After the building permit was issued subject to the objectionable easement condition, the Nollans sought relief from the condition in mandamus. The Supreme Court agreed that the condition was constitutionally invalid and should be struck.[145]

In its analysis, the Court initially observed that there would be "no doubt" that there was a taking if the state had "simply required" the Nollans to dedicate a beachfront easement to the public.[146] The question was whether it would alter the outcome that the easement requirement was imposed as a condition to a building permit. Although the Court addressed this question in terms of the two-alternatives test,[147] the Court confined its discussion to the "legitimate state inter-

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143. 107 S. Ct. 3141 (1987).

144. *Id.* at 3143.

145. The applicants filed a petition for administrative mandamus requesting that the Superior Court declare the easement condition invalid. The writ of mandamus was granted and the permit condition was struck. The Court of Appeals reversed the Superior Court. Nollan v. California Coastal Comm'n, 177 Cal. App. 3d 719, 223 Cal. Rptr. 28 (1986). The United States Supreme Court reversed the Court of Appeals, reinstating the mandamus which struck the condition. *Nollan*, 107 S. Ct. at 3143-44, 3150.

146. *Nollan*, 107 S. Ct. at 3145. Quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982), the Court wrote that "where a governmental action results in '[a] permanent physical occupation' of the property, by the government itself or by others . . . our cases uniformly have found a taking to the extent of the occupation." It concluded in *Nollan* that a "permanent and continuous" right of passage would constitute a "permanent physical occupation" for this purpose. *Id.*

147. *Nollan*, 107 S. Ct. at 3146.

ests" alternative. Apparently no one even claimed that either the easement condition or the public easement itself would deny the Nollans "economically viable use" of their land. It was enough, however, to invalidate the easement condition that it failed to substantially advance the alleged "legitimate state interests," *viz.* to preserve the public's view of the beach.[148]

Though the Court concluded that the easement condition in *Nollan* was unconstitutional, it would not be strictly accurate to say that the state's action was held to constitute a "taking" in any way. The fact that the Court did not identify any particular acts which constituted a taking is perhaps the most interesting analytical feature of the case.

The building permit requirement itself was not, of course, a taking.[149] Indeed, the Commission could probably have constitutionally prohibited new construction on the Nollans' lot altogether.[150] Nor would it constitute a taking that the permit to build was conditioned on the Nollans' granting a public easement: "[A] permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking."[151] Even a permit condition requiring a concession of property rights, including the right to exclude others from the property, would not necessarily effectuate a taking.[152]

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148. *Id.* at 3148.

149. "A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense." United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985).

150. "[T]he Commission unquestionably would be able to deny the Nollans their permit outright if their new house . . . would substantially impede [permissible public] purposes, unless the denial would interfere so drastically with [the Nollans' use] as to constitute a taking." *Nollan*, 107 S. Ct. at 3147.

151. *Id.*

152. *Id.* at 3148. "[T]he Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end." *Id. Cf.* PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), which upheld against a takings clause challenge, a state requirement that shopping center owners allow access to shopping center property for purposes of public expression.

According to the Court, the constitutional deficiency in the state's action in *Nollan* was that "the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. . . . The *lack of nexus* between the condition and the original purpose of the building restriction *converts that purpose* into something other than what it was."[153] In other words, the concern was not that the state's actions served no "legitimate state interests," nor that they effectuated a taking — the Court never says that there was a taking. The concern was rather that the burden imposed by the state was not sufficiently tailored to the state interest purportedly sought to be advanced.

A striking feature of the *Nollan* opinion is its lengthy exegesis[154] on whether the state's action was "reasonably related to the public need or burden."[155] Even more striking, however, is the Court's assertion that in the "takings field" the standards for deciding this reasonable relationship issue are significantly more stringent than those applicable to economic due process or equal protection challenges.[156] In takings cases, wrote the Court, "we have required that legislation 'substantially advance' the 'legitimate state interest' sought to be achieved, . . . not that the State 'could rationally have decided' the measure adopted might achieve the State's objective.' "[157] The Court specifically rejects, in other words, the idea[158] that the degree of judicial deference associated since 1938 with economic due process claims should also apply to judicial review of the "advancing state interests" factor under the two-alternatives formulation. Accordingly, whenever governmental action impinges on property rights enough to invoke a takings analysis, a substantially less deferential judicial

153. *Nollan*, 107 S. Ct. at 3148 (emphasis added).

154. *Id.* at 3148-50.

155. *Id.* at 3148.

156. *Id.* at 3147.

157. *Id.* (citations omitted). This language from *Nollan* confirms that the Court was doing exactly what it said it was doing when, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, it stated that it had conducted "the same type of inquiry the Court in *Pennsylvania Coal* conducted." *Id.* at 1243 n.16 (1987).

158. Which was propounded in Justice Brennan's dissent. *Nollan*, 107 S. Ct. at 3150.

review as to "rationality" is now available.

In summary, *Nollan* was a case in which the state's attempted action would have deprived private owners of some use of their land and, because the deprivation would not substantially advance the state's asserted objective, it was held to be constitutionally infirm. The Court agreed that the condition was invalid, but it did not hold that the imposition of the condition or any other aspect of the case resulted in a taking.[159]

C. *Reconciling Keystone Bituminous and Nollan*

The main operative difference between *Keystone* and *Nollan* lay in the extent to which, under the Court's analysis, the governmental actions at issue substantially advanced legitimate state interests. In *Keystone*, after examining "the operative provisions of the statute, not just its stated purpose,"[160] the Court held that the statute "plainly seeks to further" a substantial public interest.[161] In *Nollan*, by contrast, the court found that the private owners' deprivation would not substantially advance the state's asserted objective.

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159. The closest the Court comes to identifying a potential "taking" under the *Nollan* facts is its implication that the state's program amounted to "an out-and-out plan of extortion." *Id.* at 3148. Thus, if the Nollans had actually conveyed the public easement pursuant to the condition in their permit, the result could be viewed to be the functional equivalent of a taking, despite that fact that the conveyance was technically volitional. Obviously, the objectives of the just compensation clause could be totally undercut if a state could evade its mandate by extorting "voluntary" conveyances of desired assets from their erstwhile owners.

What the Court found in *Nollan*, however, was not an extorted conveyance that was functionally equivalent to a taking, but an attempt by the state to evade the mandate of the takings clause and acquire property without paying for it. The Court did not invalidate the state's prospective acquisition of the easement as violative of the just compensation clause, but rather it invalidated the state's already completed action, *viz.* the imposition of the condition. Although the imposition of the condition implicated the just compensation clause, its real constitutional deficiency was that it was *outside of the government's power* to impose the condition. The reason that imposing the condition was outside of the government's power was that the government has no "legitimate" interest in acquiring assets without paying for them and, thus, imposition of the condition did not serve a legitimate state interest. *Id.* at 3148.

160. *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 107 S. Ct. 1232, 1243 n.16 (1987).

161. *Id.* at 1246.

It is clear that, at least in *Nollan*, the Court undertook an active judicial review of whether the challenged governmental action was rationally suited for the promotion of its intended purpose.

VIII. Conclusion

In recent constitutional challenges to governmental actions alleged to constitute takings without just compensation, the Supreme Court appears to have settled upon two fairly fixed analytical approaches for deciding whether or not a "taking" was involved. The considerations invoked by these two analytical approaches are typically recited by the Court as, respectively, a three-factor framework or a formulation of two-alternative tests. The composition of these considerations as fairly fixed approaches to takings analysis can be traced to the 1978 case of *Penn Central Transp. Co. v. New York City.*

As presented in *Penn Central*, the underlying considerations appear to be essentially similar for both approaches, despite their different wording. Both consider whether the government's action has a particularly harsh economic effect on a private owner's property. Moreover, both have provision — explicit in the case of the two-alternatives formulation — for considering whether the government's action is a rational measure for addressing a legitimate public purpose. The latter consideration, variously described as going to the "character"[162] of the governmental action or to whether the action "advances state interests"[163] is of particular interest. Both the genesis of this public nexus factor[164] and the use which the Court has made of it suggest that the just compensation requirement is being put to service as a basis for judicial review of the rationality of economic legislation.

It may be still too early to conclude that recent cases like *Nollan v. California Coastal Comm'n* and *Hodel v. Irving* mark the beginnings of a swing back to the pre-1938 style of judicial review in economic matters. First, the Court seems

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162. *See supra* text accompanying notes 105-12.
163. *See supra* text accompanying notes 119-61.
164. *See supra* text accompanying notes 53-62.

still far from explicitly reversing its post-1938 attitude of deference to the legislature in the economic area. Even the author of the *Nollan* opinion, Justice Scalia, wrote only weeks earlier in a commerce clause case that an evaluation of the "putative local benefits" of a statute is "an inquiry . . . ill suited to the judicial function and should be undertaken rarely if at all."[165] Second, some passages in the *Nollan* opinion imply that the *Nollan* facts were extreme, *viz.* that the supposed connection between state's asserted purpose and its action in pursuit of that purpose was beyond any imaginable rationality.[166] Third, the Court expressed concern that *Nollan* involved an "actual conveyance" of property, entailing a "heightened risk that the purpose is avoidance of the compensation requirement."[167]

At the same time, however, there is ample reason — especially in the *Nollan* opinion — to believe that the Court is again willing to undertake expanded economic review of legislation. Foremost, the Court stated in *Nollan* that the verbal formulations expressing the standards applicable in the takings field "have generally been quite different" from those applied to due process claims.[168] In other words, in the future

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165. CTS Corp. v. Dynamics Corp. of America, 107 S. Ct. 1637, 1652 (1987) (Scalia, J., concurring). In the *CTS* case, the Court rejected a dormant commerce clause challenge to a state statute intended to discourage tender offers (including interstate tender offers) for corporate control. In determining whether a state law causes an unconstitutional burden on interstate commerce, one recognized factor is whether the statute's burden on commerce "is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Justice Scalia concurred with the majority's holding but, for the reason quoted in the text, he objected to the majority's consideration of the "putative local benefits" factor.

166. The Court wrote twice that it was "impossible to understand" the connection between the purpose and the action, *Nollan*, 107 S. Ct. at 3149, and that "this case does not meet even the most untailored standards." *Id.* at 3148. At another point, the Court implied that, in *Nollan*, the condition imposed "*utterly* fails to further the end advanced." *Id.* (emphasis added).

At least three of the justices felt, however, that a rational relationship *could* have existed between the state's action in imposing the condition and its purpose of preserving the public's view of the shoreline. *See* opinions of Justice Brennan (joined by Justice Marshall) and Justice Blackmun. *Id.* at 3150, 3162.

167. *Id.* at 3150.

168. *Id.* at 3147 n.3. From the citations (Williams v. Lee Optical, 348 U.S. 483 (1955) and Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952)), it is evident

less deference will be given in cases where property is allegedly taken by a governmental act. The *Nollan* Court affirmed, moreover, that it "view[s] the Fifth Amendment's property clause to be more than a pleading requirement,"[169] meaning that it would look behind announced governmental purposes to determine the *real* purposes of governmental acts — as it said it would in *Keystone Bituminous*[170] and it openly did in *Nollan*.[171] Lastly, and perhaps most importantly, the Court stressed that the state could abridge property rights through the police power only if doing so would result in a " '*substantial* advanc[ing]' of a legitimate State interest."[172]

From the Court's analytical approach and its own statements it appears fair to conclude that traditional economic due process review was at least a part of what the Supreme Court was doing in several of its takings cases decided during the 1986 Term. Whether such scrutiny of legislative rationality under the takings clause will evolve into a full return to the more probing style of judicial review of pre-1938 period remains to be seen.

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that the Court is referring to the difference between current takings clause standards and the standards applicable in *post-1938* economic due process jurisprudence.

The Court also made a critical reference to Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), as a case which the Court believed to more or less equate — erroneously — the economic due process inquiry with the inquiry for purposes of takings determinations. As noted previously, however, the issue argued and decided in *Goldblatt* was precisely economic due process — not "taking" as such — and it was therefore natural that *Goldblatt* used the post-1938 economic due process "deference" approach. *See supra* note 43.

169. *Nollan*, 107 S. Ct. at 3150.

170. *See supra* text accompanying notes 121-43.

171. The conclusion reached by looking behind the putative purpose in *Nollan* was "[t]he lack of nexus between the condition and the original purpose of the building restriction *converts that purpose to something other than what it was.*" *Nollan*, 107 S. Ct. at 3148 (emphasis added).

172. *Id.* at 3150 (emphasis in original).