SUPREME COURT OF THE UNITED STATES

No. 91–453

DAVID H. LUCAS, PETITIONER *v.* SOUTH CAROLINA COASTAL COUNCIL

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

[June 29, 1992]

JUSTICE STEVENS, dissenting.

Today the Court restricts one judge-made rule and expands another. In my opinion it errs on both counts. Proper application of the doctrine of judicial restraint would avoid the premature adjudication of an important constitutional question. Proper respect for our precedents would avoid an illogical expansion of the concept of "regulatory takings."

As the Court notes, *ante*, at 5, South Carolina's Beachfront Management Act has been amended to permit some construction of residences seaward of the line that frustrated petitioner's proposed use of his property. Until he exhausts his right to apply for a special permit under that amendment, petitioner is not entitled to an adjudication by this Court of the merits of his permanent takings claim. *MacDonald, Sommer & Frates* v. *County of Yolo,* 477 U. S. 340, 351 (1986).

It is also not clear that he has a viable "temporary takings" claim. If we assume that petitioner is now able to build on the lot, the only injury that he may have suffered is the delay caused by the temporary existence of the absolute statutory ban on construction. We cannot be sure, however, that that delay caused petitioner any harm

because the record does not tell us whether his building plans were even temporarily frustrated by the enactment of the statute.[1] Thus, on the present record it is entirely possible that petitioner has suffered no injury-in-fact even if the state statute was unconstitutional when he filed this lawsuit.

It is true, as the Court notes, that the argument against deciding the constitutional issue in this case rests on prudential considerations rather than a want of jurisdiction. I think it equally clear, however, that a Court less eager to decide the merits would follow the wise counsel of Justice Brandeis in his deservedly famous concurring opinion in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 341 (1936). As he explained, the Court has developed "for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Id*. at 346. The second of those rules applies directly to this case.

> "2. The Court will not `anticipate a question of constitutional law in advance of the necessity of deciding it.' *Liverpool, N.Y. & P.S.S. Co.* v. *Emigration Commissioners*, 113 U. S. 33, 39; [citing five additional cases]. `It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' *Burton* v. *United States*, 196 U. S. 283, 295." *Id.,* at 346–347.

Cavalierly dismissing the doctrine of judicial restraint, the Court today tersely announces that "we do not think it prudent to apply that prudential requirement here." *Ante*, at 7. I respectfully disagree

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[1]In this regard, it is noteworthy that petitioner acquired the lot about 18 months before the statute was passed; there is no evidence that he ever sought a building permit from the local authorities.

and would save consideration of the merits for another day. Since, however, the Court has reached the merits, I shall do so as well.

In its analysis of the merits, the Court starts from the premise that this Court has adopted a "categorical rule that total regulatory takings must be compensated," *ante*, at 21, and then sets itself to the task of identifying the exceptional cases in which a State may be relieved of this categorical obligation. *Ante*, at 21–22. The test the Court announces is that the regulation must do no more than duplicate the result that could have been achieved under a State's nuisance law. *Ante,* at 24. Under this test the categorical rule will apply unless the regulation merely makes explicit what was otherwise an implicit limitation on the owner's property rights.

In my opinion, the Court is doubly in error. The categorical rule the Court establishes is an unsound and unwise addition to the law and the Court's formulation of the exception to that rule is too rigid and too narrow.

The Categorical Rule

As the Court recognizes, *ante*, at 9, *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393 (1922), provides no support for its—or, indeed, any—categorical rule. To the contrary, Justice Holmes recognized that such absolute rules ill fit the inquiry into "regulatory takings." Thus, in the paragraph that contains his famous observation that a regulation may go "too far" and thereby constitute a taking, the Justice wrote: "As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions." *Id.* at 416. What he had "already. . .said" made perfectly clear that Justice Holmes regarded economic injury to be merely one factor to be weighed: "One fact for consideration in determining such limits is the extent of the

diminution [of value.] So the question depends upon the particular facts." *Id*. at 413.

Nor does the Court's new categorical rule find support in decisions following *Mahon.* Although in dicta we have sometimes recited that a law "effects a taking if [it] . . . denies an owner economically viable use of his land," *Agins* v. *Tiburon*, 447 U. S. 255, 260 (1980), our *rulings* have rejected such an absolute position. We have frequently— and recently—held that, in some circumstances, a law that renders property valueless may nonetheless not constitute a taking. See, *e.g., First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles,* 482 U. S. 304, 313 (1987); *Goldblatt* v. *Hempstead,* 369 U. S. 590, 596 (1962); *United States* v. *Caltex*, 344 U. S. 149, 155 (1952); *Miller* v. *Schoene*, 276 U. S. 272 (1928); *Hadachek* v. *Sebastian*, 239 U. S. 394, 405 (1915); *Mugler* v. *Kansas*, 123 U. S. 623, 657 (1887); cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1011 (1984); *Connolly* v. *Pension Benefit Guaranty Corporation,* 475 U. S. 211, 225 (1986). In short, as we stated in *Keystone Bituminous Coal Assn.* v. *DeBenedictis,* 480 U. S. 470, 490 (1987), "`Although a comparison of values before and after' a regulatory action `is relevant, . . . it is by no means conclusive.'"

In addition to lacking support in past decisions, the Court's new rule is wholly arbitrary. A landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value. The case at hand illustrates this arbitrariness well. The Beachfront Management Act not only prohibited the building of new dwellings in certain areas, it also prohibited the rebuilding of houses that were "destroyed beyond repair by natural causes or by fire." 1988 S. C. Acts 634, §3; see also *Esposito* v. *South Carolina Coastal*

Council, 939 F. 2d 165, 167 (CA4 1991).[2] Thus, if the homes adjacent to Lucas' lot were destroyed by a hurricane one day after the Act took effect, the owners would not be able to rebuild, nor would they be assured recovery. Under the Court's categorical approach, Lucas (who has lost the opportunity to build) recovers, while his neighbors (who have lost *both* the opportunity to build *and* their homes) do not recover. The arbitrariness of such a rule is palpable.

Moreover, because of the elastic nature of property rights, the Court's new rule will also prove unsound in practice. In response to the rule, courts may define "property" broadly and only rarely find regulations to effect total takings. This is the approach the Court itself adopts in its revisionist reading of venerable precedents. We are told that—notwithstanding the Court's findings to the contrary in each case—the brewery in *Mugler,* the brickyard in *Hadacheck,* and the gravel pit in *Goldblatt* all could be put to "other uses" and that, therefore, those cases did not involve total regulatory takings.[3] *Ante,* at 21, n. 13.

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[2]This aspect of the Act was amended in 1990. See S. C. Code §48–39–290(B) (Supp. 1990).

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

This highlights a fundamental weakness in the Court's analysis: its failure to explain why only the impairment of ``*economically* beneficial or productive use,'' *ante,* at 10 (emphasis added), of property is relevant in takings analysis. I should think that a regulation arbitrarily prohibiting an owner from continuing to use her property for bird-watching or sunbathing might constitute a taking under some circumstances; and, conversely, that such uses are of value to the owner. Yet the Court offers no basis for

On the other hand, developers and investors may market specialized estates to take advantage of the Court's new rule. The smaller the estate, the more likely that a regulatory change will effect a total taking. Thus, an investor may, for example, purchase the right to build a multi-family home on a specific lot, with the result that a zoning regulation that allows only single-family homes would render the investor's property interest "valueless."[4] In short, the categorical rule will likely have one of two effects: Either courts will alter the definition of the "denominator" in the takings "fraction," rendering the Court's categorical rule meaningless, or investors will manipulate the relevant property interests, giving the Court's rule sweeping effect. To my mind, neither of these results is desirable or appropriate, and both are distortions of our takings jurisprudence.

Finally, the Court's justification for its new categorical rule is remarkably thin. The Court mentions in passing three arguments in support of its rule; none is convincing. First, the Court suggests that "total deprivation of feasible use is, from the landowner's point of view, the equivalent of a physical appropriation." *Ante,* at 12. This argument proves too much. From the "landowner's point of

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its assumption that the only uses of property cognizable under the Constitution are *developmental* uses.

[4]This unfortunate possibility is created by the Court's subtle revision of the "total regulatory takings" dicta. In past decisions, we have stated that a regulation effects a taking if it "denies an owner economically viable use of his *land,*" *Agins* v. *Tiburon,* 447 U. S., 255, 260 (1980) (emphasis added), indicating that this "total takings" test did not apply to other estates. Today, however, the Court suggests that a regulation may effect a total taking of *any* real property interest. See *ante,* at 11, n. 7.

view," a regulation that diminishes a lot's value by 50% is as well "the equivalent" of the condemnation of half of the lot. Yet, it is well established that a 50% diminution in value does not by itself constitute a taking. See *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 384 (1926) (75% diminution in value). Thus, the landowner's perception of the regulation cannot justify the Court's new rule.

Second, the Court emphasizes that because total takings are "relatively rare" its new rule will not adversely affect the government's ability to "go on." *Ante,* at 12. This argument proves too little. Certainly it is true that defining a small class of regulations that are *per se* takings will not greatly hinder important governmental functions—but this is true of *any* small class of regulations. The Court's suggestion only begs the question of why regulations of *this* particular class should always be found to effect takings.

Finally, the Court suggests that "regulations that leave the owner . . . without economically beneficial . . . use . . . carry with them a heightened risk that private property is being pressed into some form of public service." *Ibid.* As discussed more fully below, see *infra*, Part III, I agree that the risks of such singling out are of central concern in takings law. However, such risks do not justify a *per se* rule for total regulatory takings. There is no necessary correlation between "singling out" and total takings: a regulation may single out a property owner without depriving him of all of his property, see *e.g., Nollan* v. *California Coastal Comm'n,* 483 U. S. 825, 837 (1987); *J.E.D. Associates, Inc.* v. *Atkinson,* 121 N. H. 581, 432 A.2d 12 (1981); and it may deprive him of all of his property without singling him out, see *e.g., Mugler* v. *Kansas,* 123 U. S. 623 (1887); *Hadachek* v. *Sebastian,* 329 U. S. 394 (1915). What matters in such cases is not the degree of diminution of value, but rather the specificity of the expropriating act. For this reason,

the Court's third justification for its new rule also fails.

In short, the Court's new rule is unsupported by prior decisions, arbitrary and unsound in practice, and theoretically unjustified. In my opinion, a categorical rule as important as the one established by the Court today should be supported by more history or more reason than has yet been provided.

The Nuisance Exception

Like many bright-line rules, the categorical rule established in this case is only "categorical" for a page or two in the U. S. Reports. No sooner does the Court state that "total regulatory takings must be compensated," *ante*, at 21, than it quickly establishes an exception to that rule.

The exception provides that a regulation that renders property valueless is not a taking if it prohibits uses of property that were not "previously permissible under relevant property and nuisance principles." *Ante,* at 24. The Court thus rejects the basic holding in *Mugler* v. *Kansas,* 123 U. S. 623 (1887). There we held that a state-wide statute that prohibited the owner of a brewery from making alcoholic beverages did not effect a taking, even though the use of the property had been perfectly lawful and caused no public harm before the statute was enacted. We squarely rejected the rule the Court adopts today:

> "It is true, that, when the defendants . . . erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. [T]he supervision of the public health and the public morals is a governmental power, `continuing in its nature,' and `to be dealt with as the special exigencies of the moment may require;' . . . `for this purpose, the largest

> legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.'" *Id.*, at 669.

Under our reasoning in *Mugler*, a state's decision to prohibit or to regulate certain uses of property is not a compensable taking just because the particular uses were previously lawful. Under the Court's opinion today, however, if a state should decide to prohibit the manufacture of asbestos, cigarettes, or concealable firearms, for example, it must be prepared to pay for the adverse economic consequences of its decision. One must wonder if Government will be able to "go on" effectively if it must risk compensation "for every such change in the general law." *Mahon,* 260 U. S., at 413.

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

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

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

Of course, some legislative redefinitions of property will effect a taking and must be compensated—but it certainly cannot be the case that every movement away from common law does so. There is no reason, and less sense, in such an absolute rule. We live in a world in which changes in the economy and the environment occur with increasing frequency and importance. If it was wise a century ago to allow Government "`the largest legislative discretion'" to deal with "`the special exigencies of the moment,'" *Mugler,* 123 U. S., at 669, it is imperative to do so today. The rule that should govern a decision in a case of this kind should focus on the future, not the past.[5]

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[5]Even measured in terms of efficiency, the Court's rule is unsound. The Court today effectively establishes a form of insurance against certain changes in land-use regulations. Like other forms of insurance, the Court's rule creates a "moral hazard" and inefficiencies: In the face of uncertainty about

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The Court's categorical approach rule will, I fear, greatly hamper the efforts of local officials and planners who must deal with increasingly complex problems in land-use and environmental regulation. As this case—in which the claims of an *individual* property owner exceed $1 million—well demonstrates, these officials face both substantial uncertainty because of the ad hoc nature of takings law and unacceptable penalties if they guess incorrectly about that law.[6]

Viewed more broadly, the Court's new rule and exception conflict with the very character of our takings jurisprudence. We have frequently and consistently recognized that the definition of a taking cannot be reduced to a "set formula" and that determining whether a regulation is a taking is "essentially [an] ad hoc, factual inquir[y]." *Penn Central Transportation Co.* v. *New York City,* 438 U. S.

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changes in the law, developers will overinvest, safe in the knowledge that if the law changes adversely, they will be entitled to compensation. See generally Farber, Economic Analysis and Just Compensation, 12 Int'l Rev. of Law & Econ. 125 (1992).

[6]As the Court correctly notes, in regulatory takings, unlike physical takings, courts have a choice of remedies. See *ante,* at 25, n. 17. They may "invalidat[e the] excessive regulation" or they may "allo[w] the regulation to stand and orde[r] the government to afford compensation for the permanent taking." *First English Evangelical Lutheran Church* v. *County of Los Angeles,* 482 U. S. 304, 335 (1987) (STEVENS, J., dissenting); see also *id.,* at 319–21. In either event, however, the costs to the government are likely to be substantial and are therefore likely to impede the development of sound land-use policy.

104, 124 (1978) (quoting *Goldblatt* v. *Hempstead,* 369 U. S. 590, 594 (1962)). This is unavoidable, for the determination whether a law effects a taking is ultimately a matter of "fairness and justice," *Armstrong* v. *United States,* 364 U. S. 40, 49 (1960), and "necessarily requires a weighing of private and public interests." *Agins,* 447 U. S., at 261. The rigid rules fixed by the Court today clash with this enterprise: "fairness and justice" are often disserved by categorical rules.

It is well established that a takings case "entails inquiry into [several factors:] the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *PruneYard,* 447 U. S., at 83. The Court's analysis today focuses on the last two of these three factors: the categorical rule addresses a regulation's "economic impact," while the nuisance exception recognizes that ownership brings with it only certain "expectations." Neglected by the Court today is the first, and in some ways, the most important factor in takings analysis: the character of the regulatory action.

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

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[7]This principle of generality is well-rooted in our broader understandings of the Constitution as

For example, in the case of so-called "developmental exactions," we have paid special attention to the risk that particular landowners might "b[e] singled out to bear the burden" of a broader problem not of his own making. *Nollan,* 483 U. S., at 835, n. 4; see also *Pennell* v. *San Jose,* 485 U. S. 1, 23 (1988). Similarly, in distinguishing between the Kohler Act (at issue in *Mahon*) and the Subsidence Act

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designed in part to control the "mischiefs of faction." See The Federalist No. 10, p. 43 (G. Wills ed. 1982) (J. Madison).

An analogous concern arises in First Amendment law. There we have recognized that an individual's rights are not violated when his religious practices are prohibited under a neutral law of general applicability. For example, in *Employment Division, Department of Human Resources of Oregon* v. *Smith,* 494 U. S. 872, 879–880 (1990), we observed:

"[Our] decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a `valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' *United States* v. *Lee*, 455 U. S. 252, 263, n. 3 (1982) (STEVENS, J., concurring in judgment). . . . In *Prince* v. *Massachusetts,* 321 U. S. 158 (1944), we held that a mother could be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding. We found no constitutional infirmity in `excluding [these children] from doing there what no other children may do.' *Id.*, at 171. In *Braunfeld* v. *Brown,* 366 U. S. 599 (1961) (plurality opinion), we upheld Sunday-closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days. In *Gillette* v. *United States,* 401 U. S. 437, 461 (1971), we

(at issue in *Keystone*), we found significant that the regulatory function of the latter was substantially broader. Unlike the Kohler Act, which simply transferred back to the surface owners certain rights that they had earlier sold to the coal companies, the Subsidence Act affected all surface owners—including the coal companies—equally. See *Keystone*, 480 U. S., at 486. Perhaps the most familiar application of this principle of generality arises in zoning cases. A diminution in value caused by a zoning regulation is far less likely to constitute a taking if it is part of a general and comprehensive land-use plan, see *Euclid* v. *Amber Realty Co.,* 272 U. S. 365 (1926); conversely, "spot zoning" is far more likely to constitute a taking, see *Penn Central*, 438 U. S., at 132, and n. 28.

The presumption that a permanent physical occupation, no matter how slight, effects a taking is wholly consistent with this principle. A physical taking entails a certain amount of "singling out."[8] Consistent with this principle, physical occupations by third parties are more likely to effect takings than other physical occupations. Thus, a regulation requiring the installation of a junction box owned by a third party, *Loretto* v. *Teleprompter Manhattan CATV Corp.,* 458 U. S. 419 (1982), is more troubling than a regulation requiring the installation of sprinklers or smoke detectors; just as an order granting third

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sustained the military Selective Service System against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds."

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

[8]See Levmore, Takings, Torts, and Special Interests, 77 Va. L. Rev. 1333, 1352–1354 (1991).

parties access to a marina, *Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979), is more troubling than an order requiring the placement of safety buoys in the marina.

In analyzing takings claims, courts have long recognized the difference between a regulation that targets one or two parcels of land and a regulation that enforces a state-wide policy. See, *e.g.*, *A.A. Profiles, Inc.* v. *Ft. Lauderdale*, 850 F. 2d 1483, 1488 (CA11 1988); *Wheeler* v. *Pleasant Grove,* 664 F. 2d 99, 100 (CA5 1981); *Trustees Under Will of Pomeroy* v. *Westlake,* 357 So. 2d 1299, 1304 (La. App. 1978); see also *Burrows* v. *Keene,* 121 N. H. 590, 432 A. 2d 15, 21 (1981); *Herman Glick Realty Co.* v. *St. Louis County,* 545 S. W. 2d 320, 324–325 (Mo. App. 1976); *Huttig* v. *Richmond Heights,* 372 S. W. 2d 833, 842–843 (Mo. 1963). As one early court stated with regard to a waterfront regulation, "If such restraint were in fact imposed upon the estate of one proprietor only, out of several estates on the same line of shore, the objection would be much more formidable." *Commonwealth* v. *Alger,* 61 Mass. 53, 102 (1851).

In considering Lucas' claim, the generality of the Beachfront Management Act is significant. The Act does not target particular landowners, but rather regulates the use of the coastline of the entire State. See S. C. Code §48–39–10 (Supp. 1990). Indeed, South Carolina's Act is best understood as part of a national effort to protect the coastline, one initiated by the Federal Coastal Zone Management Act of 1972. Pub. L. 92–583, 86 Stat. 1280, codified as amended at 16 U. S. C. §1451 *et seq.* Pursuant to the Federal Act, every coastal State has implemented coastline regulations.[9] Moreover, the Act did not

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[9]See Zalkin, Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute, 79 Cal. L. Rev. 205, 216–217, nn. 46–47 (1991) (collecting statutes).

single out owners of undeveloped land. The Act also prohibited owners of developed land from rebuilding if their structures were destroyed, see 1988 S. C. Acts 634 §3,[10] and what is equally significant, from repairing erosion control devices, such as seawalls, see S. C. Code §48–39–290(B)(2) (Supp. 1990). In addition, in some situations, owners of developed land were required to "renouris[h] the beach . . . on a yearly basis with an amount . . . of sand . . . not . . . less than one and one-half times the yearly volume of sand lost due to erosion." 1988 S. C. Acts 634 §3, p. 5140.[11] In short, the South Carolina Act imposed substantial burdens on owners of developed and undeveloped land alike.[12] This generality indicates that the Act is not an effort to expropriate owners of undeveloped land.

Admittedly, the economic impact of this regulation is dramatic and petitioner's investment-backed expectations are substantial. Yet, if anything, the costs to and expectations of the owners of developed land are even greater: I doubt, however, that the cost to owners of developed land of renourishing the beach and allowing their seawalls to deteriorate effects a taking. The costs imposed on the owners of undeveloped land, such as petitioner, differ from

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[10]This provision was amended in 1990. See S. C. Code §48–39–290(B) (Supp. 1990).

[11]This provision was amended in 1990; authority for renourishment was shifted to local governments. See S. C. Code §48–39–350(A) (Supp. 1990).

[12]In this regard, the Act more closely resembles the Subsidence Act in *Keystone* than the Kohler Act in *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393 (1922), and more closely resembles the general zoning scheme in *Euclid* v. *Amber Realty Co.,* 272 U. S. 365 (1926) than the specific landmark designation in *Penn Central Transportation Co.* v. *New York City,* 438 U. S. 104 (1978).

these costs only in degree, not in kind.

The impact of the ban on developmental uses must also be viewed in light of the purposes of the Act. The legislature stated the purposes of the Act as "protect[ing], preserv[ing], restor[ing] and enhanc[ing] the beach/dune system" of the State not only for recreational and ecological purposes, but also to "protec[t] life and property." S. C. Code §48–39–260(1)(a) (Supp. 1990). The State, with much science on its side, believes that the "beach/dune system [acts] as a buffer from high tides, storm surge, [and] hurricanes." *Ibid.* This is a traditional and important exercise of the State's police power, as demonstrated by Hurricane Hugo, which in 1989, caused 29 deaths and more than $6 billion in property damage in South Carolina alone.[13]

In view of all of these factors, even assuming that petitioner's property was rendered valueless, the risk inherent in investments of the sort made by petitioner, the generality of the Act, and the compelling purpose motivating the South Carolina Legislature persuade me that the Act did not effect a taking of petitioner's property.

Accordingly, I respectfully dissent.

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[13]Zalkin, 79 Cal. L. Rev., at 212–213.