No. 86-133

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES PATRICK NOLLAN and MARILYN HARVEY NOLLAN,
Appellants,

v.

CALIFORNIA COASTAL COMMISSION,
Appellee.

On Appeal from the Court of Appeal of the State of California, Second Appellate District

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS AND THE STATES OF ALABAMA, ARKANSAS, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, ILLINOIS, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSOURI, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OREGON, RHODE ISLAND, TENNESSEE, TEXAS, VERMONT, WASHINGTON, WEST VIRGINIA, AND WISCONSIN AS AMICI CURIAE URGING AFFIRMANCE

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QUESTION PRESENTED

Does a State unconstitutionally take property by applying a statutory restriction on intensified development fronting on a public resource area to a parcel which already enjoys a reasonable beneficial use and which the owners knowingly purchased subject to that restriction?

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STATEMENT OF INTEREST OF AMICI

Amici are responsible for ensuring that the natural resources within their borders are not over-used and over-developed to the detriment of the health, safety, and welfare of their residents and future generations. As the nation's economy and population continue to expand, increasing pressure is brought to bear on important diminishing resources. *Amici* are charged with decisions about how, and how much, to restrict or mitigate the impacts of this intensified development. At issue are resources both publicly and privately controlled. Among the significant resources affected are public trust lands, floodplains, air quality, wetlands, and urban infrastructures. In attempting to reconcile public and private interests in these and other resources *amici* face more and more difficult choices.

In reaching an accommodation of divergent land use interests, governments need flexibility to adjust for regional problems, practices, and expectations. Permit conditions make a widely used contribution to this process. In particular, access conditions have historically been an important land use planning tool for both states and municipalities. *See, e.g.*, Wisconsin Statutes §§236.13 and 236.45 (authority for local governments to require subdivision easements and dedications); proposed regulations implementing Massachusetts General Laws, chapter 91 (formalizing public access as part of waterfront development). More broadly a variety of non-access condition requirements, like Iowa's floodplains law, Iowa Code §455B.375(3), ensure consideration of more than a developer's own private interests in the land use planning process.

Inevitably, *amici* face a growing number of challenges to the planning choices they make, claims that assert both under- and over-regulation. The Court's review of the takings claim presented in this case is of particular concern

for *amici* in their efforts to bring both fairness and predictability to the balancing of the varied interests involved.

Takings challenges pose special problems for governmental planners because of their unpredictable outcomes. Even when statutes incorporate articulated constitutional standards, as do Massachusetts' Wetlands Restrictions Acts, M.G.L. c. 130 §105 and c. 131 §40A, virtually any land use regulation can now engender numerous lengthy "ad hoc, factual" inquiries. *Amici* believe, however, that this case, considered in light of the Court's takings jurisprudence, demonstrates that a structured threshold inquiry can differentiate between meritorious and spurious takings claims. They submit this brief because of their long-standing primary responsibility for land use planning, and their deep interest in the outcome of this case. They urge the Court to uphold the legislative judgment embodied in the permit condition at issue.

STATEMENT OF THE CASE

The *amici* States adopt appellee's statement.

SUMMARY OF ARGUMENT

Because the Nollans had no vested property interest in a new development permit and already had reasonable beneficial use of their land, and because the aggregate impact of the permit and condition on that use was to improve it, no question of a taking arises.

Even were this not the case, to raise a genuine concern about unconstitutional takings a governmental restriction, including one that imposes a permit condition on land use, must be both an unforeseeable and a substantial burden. These two elements underlie this Court's review of the "fairness and justice" of such restrictions. The absence of either vitiates a regulatory takings claim. The Nollans' takings claim founders on their lack of any reasonable expectation, at the time they purchased their beachfront

property, that it would be exempted from the Coastal Act's requirements. This lack is by itself dispositive of the case. Additionally, the Nollans demonstrated no loss of value, or of the reasonable beneficial use, of the stretch of beach they claim to own. Since the passage and repassage of the public is not a "permanent physical occupation," is in keeping with the character and historic use of the beach, and does not significantly disrupt the Nollans' privacy, the burden on them is also not sufficiently substantial to suggest a taking.

No specially heightened takings scrutiny is called for, simply because a permit condition is involved. The analysis of whether this condition rationally and effectively remedies problems created by the Nollans' project is a matter of due process, not of takings law. It is an investigation into the choice of means to an end. Scrutiny under federal due process law is deferential to the legislative determination that the Coastal Act's restrictions on new development effectively address the public access impact of intensified beachfront construction.

ARGUMENT

I. PERMIT CONDITIONS LIKE THOSE APPLIED TO THE NOLLANS' TRACT DO NOT ORDINARILY RAISE TAKINGS CONCERNS.

The deed restriction condition attached to the Nollans' new development project should not be analyzed as a takings problem. The Nollans had no vested property interest in the construction permit that would support a claim for compensation or invalidation. Under these circumstances, the Takings Clause of the United States Constitution is not normally implicated by the conditional grant of a permit.

The Takings Clause is not offended provided that, even without the permitted project, the owners had "reasonable beneficial use," *Williamson County Regional Planning*

Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985), of their property, and had no government-created reasonable expectation that they were exempt from such conditions. *Cf. Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979)("the government could have refused to allow such dredging . . . or could have conditioned its approval of the dredging on petitioner's agreement to comply with various measures that it deemed appropriate for the promotion of navigation."). This is because the Takings Clause serves to protect people whose property otherwise is left substantially and unforeseeably worse off by governmental action.[1] The aggregate impact on landowners of granting conditional permission to intensify their use of property is to provide them with more beneficial use of that property.

Because the prior existing use of the Nollans' property was reasonably beneficial, and the Nollans had no property-like expectancy in an unconditioned permit, the imposition of the condition does not pose a takings problem. One vacation cottage on a lot no larger than 3800 square feet was already a reasonable beneficial use. *See Agins v. Tiburon*, 447 U.S. 255, 262 (1980)(permission to build at most five houses on five acres satisfies Takings Clause). Given the application of the permit condition to all surrounding parcels, Joint Appendix ("J.A.") 48, and the 40 years the Nollan family had enjoyed the pre-existing use of the property, *id.* at 59, the California Coastal Act[2] also did not "interfere with what must be regarded as [appellants'] primary expectation concerning the use of the parcel." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 136 (1978).

Although both the Nollans and the Solicitor General argue in effect for a novel takings analysis in this case as though existing Supreme Court jurisprudence had never

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[1] This point is discussed at length in Part II.A., *infra*.

[2] Cal. Public Resources Code §30000 *et. seq.* (West 1987)("the Coastal Act").

dealt with permit conditions,[3] the Court has recognized the inapplicability of the Takings Clause to similar circumstances. In *United States v. Appalachian Power Co.*, 311 U.S. 377, 420 (1940), the applicant objected to conditions attached to the permit which were unrelated to any problems posed by its project. The applicant specifically objected that the unrelated provisions, including one allowing the government eventually to acquire the project (a dam) and associated lands, worked a taking without just compensation. *Id.* at 392, 421. The Court recognized the potential for "coercive" use of the licensing power. *Id.* at 423. Nevertheless, after finding that the Government could have withheld the permission completely, *id.* at 424, the Court upheld the conditions. "In our view this 'is the price which [applicants] must pay to secure the right to maintain their dam.' " *Id.* at 427-28 (quoting *Fox River Co. v. Railroad Comm'n*, 274 U.S. 651 (1927), which reviewed and upheld a similar state permit condition).

The parallels between *Appalachian Power* and this case are striking in several relevant respects. The legislature in each case acted to protect inalienable water-related public rights. Both permittees complained that the conditions imposed were not closely enough related to protection of those public rights.[4] In each case the conditions had an

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[3] The Nollans rely on early cases dealing with fees and assessments as providing the basis for their proposed analysis. *See* Brief of Appellants 22-26. These cases are particularly inapposite in the permit condition context because they concern monetary assessments imposed unilaterally on prior existing uses and activities.

[4] *Appalachian Power* involves Commerce Clause and Tenth Amendment issues as well as claims under the Takings Clause. The primary concern of the Court, in dismissing the argument that the conditions were unrelated to problems of navigability, was to affirm the broad power of Congress to regulate the nation's waters in a manner not directly related to "control for navigation." 311 U.S. at 426. In so doing, however, the Court presumed and was untroubled by the regulating agency's power to impose permit conditions which did not di-

obvious relation to the broader power the legislature was asserting. *Id.* at 427. Both legislatures exercised that broader power to provide coordinated control and planning over all development affecting the public's special rights. *Id.* at 426. The statutes involved in both cases require permittees to acknowledge public rights in waterfront lands. *Id.* at 427.

Appalachian Power has recently been applied to uphold the constitutionality of similar permit conditions. See *United States v. 5.96 Acres of Land*, 593 F.2d 884 (9th Cir. 1979); *Portland General Electric Co. v. Federal Power Comm'n*, 328 F.2d 165 (9th Cir. 1964). The Court of Appeals in *Portland G.E.* relied on *Appalachian Power*, in denying claims essentially indistinguishable from the Nollans'. 328 F.2d at 173. The petitioners challenged permit conditions giving the United States the right to appropriate, free of cost, fast lands, rights-of-way, and rights of passage through and around the petitioners' dams, as well as free electrical power.[5] 328 F.2d at 169 n.5.

The property owners in *Portland G. E.* argued, much as do appellants here, that such conditions could only be applied to alleviate obstruction to navigation caused by the projects. *Id.* at 172. They urged that imposition of the conditions could only be justified by express findings of fact that the project obstructed navigation and the conditions were necessary to address that problem. *Id.* at 173-74. The government action amounted to a taking, they argued. *Id.* at 173. The court, squarely relying on *Appalachian Power*, found these claims meritless: "they must

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rectly relate to burdens, e.g. navigation problems, arising from the project.

[5] The permit conditions were imposed pursuant to Section 11 of the Federal Power Act, 16 U.S.C.A. §804. Section 11, notably, authorizes such conditions when the Federal Power Commission deems them "reasonably necessary to promote the present and future needs of navigation."

accept the license upon such terms as Congress has determined should be imposed in the public interest." *Ibid.* Like the Nollans, the petitioners were "not required to accept the tendered license." *Ibid.*

Courts must of course be open to claims, absent from this case, that the development permit is necessary to prevent a loss of the property's beneficial use or is voluntary in form only, or that the condition in effect penalizes the exercise of specially cherished constitutional rights. *Cf. Perry v. Sinderman*, 408 U.S. 593 (1972); *Sherbert v. Verner*, 379 U.S. 398 (1963); *Speiser v. Randall*, 357 U.S. 513 (1958). These circumstances would make the permit application functionally mandatory. The *Appalachian Power* analysis would then be inapplicable. Such unilateral impositions, if substantial and unforeseeable, properly engender concerns about the possibility of a taking. The appellants here, however, have made no showing that the reasonable beneficial use of the property is at stake. And they have not claimed they were *compelled* to undertake this project, despite the contrary suggestion of the Solicitor General on their behalf. Brief for the United States as *Amicus Curiae* ("Br.U.S.") 19.[6] Nor does the burden of a permit restriction, even one that provides access to private property, raise a genuine concern about "unconstitutional conditions" simply because the applicant

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[6] The Solicitor General apparently sees support in *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926), for his cautionary suggestion to this effect. Brief of the United States as *Amicus Curiae* 19. This misses the historical context of *Frost*. *Frost*, over the vigorous dissent of Justice Holmes joined by Justice Brandeis, lies squarely in the Lochnerian tradition of economic substantive due process review. The case rests on an intrusive second-guessing of legislative purpose, long since repudiated by this Court. *See Parks v. Watson*, 716 F.2d 646, 666 (1983) (Wallace, J., dissenting); *see also* Part III.B., *infra*. The prior owner's insistence that the Nollans agree to upgrade their use of the property if they purchased it did not compel their purchase and permit application, and cannot be the source of a constitutional right to compensation.

does not receive monetary compensation. This Court considered, and had no difficulty in rejecting, just such a claim in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984).

Subjecting permit conditions like the one at issue here, as distinct from unilaterally imposed conditions, to takings analysis would force a serious disincentive on legislatures and administrative agencies. If they could disapprove a development or other activity, for example because of its harmful impact, they must be free to utilize conditions they decide will alleviate that impact. Otherwise, they will lose the ability to accommodate competing public and private interests, and often will choose to deny intensified development altogether, even by those owners who would not object to permit conditions.

II. BECAUSE OF ITS MINIMAL INTERFERENCE WITH APPELLANTS' REASONABLE EXPECTATIONS AND BENEFICIAL USE OF THEIR PROPERTY, THE PERMIT CONDITION WHICH CALIFORNIA APPLIED TO THEIR DEVELOPMENT AND TO THOSE OF ALL SIMILARLY SITUATED LOT OWNERS COULD NOT WORK A TAKING.

A. Regulatory Takings Occur Only When The Governmentally Imposed Burden Is Both Unusually Substantial And Violative Of The Owner's Reasonable Expectations.

Even viewed as a unilaterally imposed land use regulation, rather than as a permit condition, the restriction challenged here by the Nollans does not support a claim for invalidation or compensation. The burden the restriction places on the Nollans' use of their property is neither (a) unreasonably disruptive of their expectations, nor (b) unusually substantial.[7] The discussion below, of this Court's takings decisions, makes it plain that to work a taking the restriction would have to be *both* of these.

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[7] See Parts II.B. and II.C., *infra*.

This Court has often repeated that governmental regulation necessarily involves the adjustment of rights for the public good. The resulting burdens are the inevitable concomitants of "the advantage of living and doing business in a civilized community." *See, e.g., Kirby Forest Industries v. United States*, 467 U.S. 1, 14 (1984); *Andrus v. Allard*, 444 U.S. 51, 67 (1979); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922)(Brandeis, J., dissenting). Nevertheless, the Court has recognized that particularly onerous regulation can, in "extreme circumstances," work a "taking" of private property. *United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455, 459 (1986).[8]

In the face of a claimed taking by regulation or other restriction, the fundamental constitutional inquiry is whether the burdens are "*so substantial and unforeseeable*, and can so easily be identified and redistributed, that 'justice and fairness' require that they be borne by the public as a whole." *Kirby*, 467 U.S. at 14 (footnote and citations omitted and emphasis added). It has become axiomatic that this is in each case an "essentially ad hoc, factual" inquiry unaided by any "set formula." *Penn Central Transportation Company v. New York City*, 438 U.S. at 125. Three, by now familiar, factors of particular significance in this inquiry include the regulation's economic impact on the claimant and its interference with reasonable investment backed expectations, as well as the underlying character

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[8] Whether a regulation that "goes too far," *Pennsylvania Coal*, 260 U.S. at 415, is best viewed literally or only metaphorically as a "taking," and exactly what remedy is available in such a case, are questions as yet unanswered by this Court, *Williamson County*, 473 U.S. at 185-86, but once again before it this Term in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, No. 85-1199. *Amici* here express no views on those questions, unnecessary as they are to the resolution of this case. References in this brief to regulatory "takings" follow the Court's usage. They refer to governmental impositions which cannot stand in the absence of compensation.

of the governmental action.[9] *See, e.g., Kaiser Aetna v. United States*, 444 U.S. at 175.

The summation provided by this Court in *Kirby* and quoted directly above lends some structure to the "ad hoc" judicial evaluation. It emphasizes that "justice and fairness" do not call for shifting the burden of even easily identifiable and redistributable burdens to the public unless two circumstances are present.[10] Regulatory restrictions (with the possible exception of a narrow class of "*per se*" takings) do not raise a takings problem unless they are both unusually "substantial and unforeseeable." *Kirby*, 467 U.S. at 14.[11]

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[9] Interference with investment backed expectations appears to be a species of economic impact, rather than a wholly separate factor. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *cf.* Br.U.S. 12 ("three somewhat overlapping factors"). The reasonableness, however, of property owners' expectations about the use of their property and about governmental restrictions is so central a prerequisite to a finding of a regulatory taking that it merits separate discussion.

[10] The three "factors" this Court has frequently focused on in addressing takings claims are particularly significant precisely because they help to identify the extent to which regulations and restrictions were genuinely unforeseeable and are troublingly substantial. In the absence of either unforeseeability or substantiality, however, no purpose is served by proceeding further with the full, difficult, ad hoc, fact-bound takings inquiry.

[11] Whether a "*per se*" taking by "permanent physical occupation" is an exception to this rule may be a matter of semantics and at all events is immaterial to this case, because no such occupation is present here. *See* Part II.C.1., *infra*. *Loretto v. Teleprompter* expressly rested on the "character of the government action" factor, finding it determinative in that case. 458 U.S. at 426. The Court did not find a "substantial" burden in the more usual sense. The economic impact of the regulation was admittedly minimal. The burden, however, was not merely "substantial" but (*per se*) extreme, in chopping through every strand in the owner's "bundle" of property rights, and emptying the occupied space of any value to the owner. *Id.* at 435-36. *Cf. Andrus v. Allard*, 444 U.S. at 65-66 (destruction of only one "strand," even

If the consequences of a regulation are either insubstantial or reasonably expectable, the individual has no constitutional cause for complaint. Unforeseeable but insubstantial regulatory burdens are commonplace events, borne in some measure by everyone. "Government hardly could go on" if they were an occasion for compensation. *Pennsylvania Coal*, 260 U.S. at 413. Compensation for (or invalidation of) substantial but foreseeable burdens, on the other hand, would result in private windfalls at the public expense. One who purchases land known to be subject to a building restriction pays a price already discounted by the market, and has no separate constitutional claim for compensation.[12] *Cf.* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just*

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of a significant one, not a taking). Moreover, while the Court did not dwell on this point, the owner had purchased the property before enactment of the offending statute, at a time when Teleprompter had paid owners for the right to maintain its "physical occupation." *Loretto*, 458 U.S. at 421-23. The regulatory burden was thus unforeseeable when the property was bought. Moreover, the holding includes an express finding of "historically rooted expectations" of compensation attaching to such occupations. *Id.* at 441. It is not at all plausible that "justice and fairness" would dictate compensation for or invalidation of a regulation authorizing a permanent occupation that had genuinely been foreseeable, to the complainant and to others, all along.

[12] The question of when the Takings Clause is offended by a change of expectations *during* an individual's ownership is a difficult one not necessary to the resolution of this case. Cases dealing with aspects of this problem include *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1008-10; *Andrus v. Allard*, 444 U.S. 51 (1979); *Jacob Ruppert v. Caffey*, 251 U.S. 264, 301-03 (1920); *Euclid v. Ambler*, 272 U.S. 365, 394-395 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915); *Mugler v. Kansas*, 123 U.S. 623, 672 (1887); *see also HFH Ltd. v. Superior Court of Los Angeles County*, 15 Cal. 3d 508 (1975), *cert. denied*, 425 U.S. 904 (1976). They strongly suggest that when a change in governmental regulation reflects a change in what is generally perceived as a harmful use of property, individual property owners' expectations must also change, if they are to be viewed as reasonable. *See also Penn Central*, 438 U.S at 144-45 (Rehnquist, J., dissenting).

Compensation" Law, 80 Harv. L.Rev. 1165, 1238 (1967); *see also* Part II.B., *infra*, at 16.

This Court has never held that either of these two elements sufficed to trigger a taking, in the absence of the other. *Penn Central* notes that cases analyzing "land use regulations which . . . are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.' " 438 U.S. at 131, citing *Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926) (75% diminution in value), and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87 1/2 % [in point of fact 92 1/2 %] diminution in value). In *Agins v. Tiburon*, for example, the Court reviewed a case in which the magnitude of the regulatory burden was, though undetermined, undeniably substantial. Nonetheless, the Court expressly held that because the appellants were "free to pursue their reasonable investment backed expectations" they had not been denied the "justice and fairness guaranteed by the Fifth and Fourteenth Amendments." 447 U.S. at 262-63.

Outside the land use context, Justice Holmes held for the Court in *Erie R. R. Co. v. Public Utilities Comm'rs*, 254 U.S. 394, 410-11 (1921), that a total and disastrous diminution in value did not offend the Constitution. "If it reasonably can be said that safety requires the change . . . neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil." And in *Ruckelshaus v. Monsanto*, the Court could not have been more explicit that the absence of a reasonable (investment backed) expectation, by itself "disposes of the taking question." 467 U.S. at 1005 (referring to the specific facts of that case). The Court never reached the question of the substantiality of the losses sustained.

Decisions of this Court also establish that the unforeseeability of a regulatory burden is not itself enough to

ground a takings claim, in the absence of an unusually substantial impact on the claimant (or the claimant's property). "[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Connolly v. Pension Benefit Guaranty Corp.*, 106 S. Ct. 1018, 1025 (1986)(quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Thus, federal regulations prohibiting the sale of artifacts previously acquired with the expectation, and for the purpose, of just such a sale withstood a takings challenge in *Andrus v. Allard*, 444 U.S. 51 (1979). The claim of the landowners in *Penn Central* that their property was taken because they had lost "the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." 438 U.S. at 130.

Zoning regulations are a classic example of the constitutionality of disappointing a current owner's expectations. *See, e.g., Euclid v. Ambler*, 272 U.S. 365. This Court has, with a single exception, uniformly upheld the application of such regulations. *See* Freilich, *Solving the "Taking" Equation: Making the Whole Equal the Sum of Its Parts*, 15 Urb. L. 447, 454 (1983). The reason for these results is that unilateral expectations are not property interests entitled to constitutional protection.[13] *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980).

Viewed in light of these cases, the California Coastal Act's restriction on new development is unexceptional. The

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[13] The states, arguably, have even greater freedom than the federal government in disappointing property holders' expectations, owing to their residual authority to define "property" in the first instance. *Compare PruneYard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980) with *Hudgens v. NLRB*, 424 U.S. 507 (1976) and with *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *see also Ruckelshaus v. Monsanto*, 467 U.S. at 1012 (noting limits on Congress' ability to "pre-empt" state property law).

discussion below shows that the burden the Act imposes was not unforeseeable at all, nor is it so substantial that it would work a taking had it been unforeseeable. It is a conventional, tolerable, and foreseeable exercise of the police power, designed to buffer, in part, the public's constitutionally protected interests in the shoreline from the ill effects of increasingly intensive private development.[14]

B. Appellants' Takings Claim Fails Because The Application Of California's Coastal Act To Their Property Did Not Interfere With Their Reasonable Expectations.

The Nollans took their property with full knowledge of the statutory restrictions on development. In fact, they initiated this challenge to the legality of those restrictions prior to purchasing the property. J.A. 14. They therefore cannot be said to have had any reasonable expectation that they would be regulated any differently than their neighbors. This lack of expectations is fatal to their claim.

The appellants' claim here parallels, although it is weaker than, that of the claimants in *Ruckelhaus v. Monsanto*, 467 U.S. 986 (1984). *Monsanto* held, for reasons also present in this case, that except where the government had created an explicit guarantee that interested parties would not have access to the regulated property, the owner had no reasonable, investment backed expectation that it could prevent such access or claim compensation. *Id.* at 1006-11. The Court found that Monsanto (like the Nollans) might have had a state-defined property right. *Id.* at 1003-04. Significantly, the Court noted that the right to exclude others was particularly essential to that specific form of

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[14] *Cf. Agins v. Tiburon*, 447 U.S. at 261 ("The specific zoning regulations at issue are exercises of the city's police power to protect the citizens of Tiburon from the ill effects of urbanization"); *see also Euclid v. Ambler*, 272 U.S. at 394-95 (apartment buildings, constructed to take advantage of the open and attractive environment of a residential district, may by their height and bulk progressively destroy the very environment of which they sought to take advantage).

property interest. *Id.* at 1011. Nevertheless, the Court found the absence of reasonable expectations to be controlling and rejected the owner's takings claim. *Id.* at 1005.

Following enactment of the governing legislation, Monsanto's expectations concerning property thereafter acquired or submitted to the regulatory process were reasonable only insofar as they took the legislation into account. *Id.* at 1006. But even as to property developed and regulated before the statutory scheme provided for access, Monsanto had no reasonable, investment backed expectations, given the history of significant government regulation and great public concern over the potential adverse effects of the activity in which Monsanto was engaged. *Id.* at 1008; *cf. Connolly*, 106 S. Ct. at 1027 ("Pension plans were the object of legislative concern long before the passage of ERISA ... [when ERISA was amended in 1980] ... [p]rudent employers then had more than sufficient notice ...."

These factors found decisive in Monsanto are all present in this case. The most significant is the express, statutory access condition applicable at the time the Nollans took title to their property. But since 1879, long before passage of the Coastal Act, the California Constitution has guaranteed the public's access to the state's beaches.[15] More recently, public concern over the disappearance of beaches and beach access, *see* J.A. 65, resulted in the passage of the statewide referendum which eventually provided the basis for the Coastal Act at issue in this case. *Id.* at 355-56. Moreover, it has been established that beachfront construction interferes not only with access, but also, espe-

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[15] Article X, Section 4 of the California Constitution provides in relevant part: "The People Shall Always Have Access To Navigable Waters. No individual, partnership, or corporation, claiming or possessing the frontage ... of ... navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose ...."

cially when it includes seawalls and other locally protective structures, with preservation and replenishment of the beaches themselves. *Id.* at 72, 366-67. Thus, even if the appellants here had acquired their land before enactment of legislation which included access requirements for new developments, subsequent application of such requirements to them would not have interfered with their reasonable expectations. In point of fact, both the owner at the time of enactment, the Faria Family Partnership, and the owner from whom the Nollans purchased the lot, the Faria Trust, not only acquiesced in, but helped to formulate this precise implementation of the statutory access requirement. *Id.* at 312, 321-22.

Viewed as a question specifically of *investment backed* expectations, appellants' claim here is even weaker. The applicability of the access requirement was known to both parties to the transaction by which the Nollans acquired the property. If the restriction interfered with the property's value, and hence with some investment, it must have done so at the time of that transaction. Thus it would have lowered the price the Nollans paid or should have paid for the property. Their reasonable investment backed expectations cannot have been interfered with. To immunize them from the restriction applicable to their property when they bought it would simply be to grant them a windfall. Notably, the owners at the time the restriction became applicable have not joined in this action, although they have been co-applicants for development permits. *Id.* at 48.

On the specific facts of this case, other factors also contribute to a lowering of whatever expectations appellants had or have for their claim to exclusive use of a portion of the beach in front of their seawall. The extent of their beach ownership is uncertain. This is in part because of uncertainties surrounding the location of the mean high tide line, below which the beach is completely public. *Id.* at 85-86. The tide seasonally reaches to appellants'

seawall, *id.* at 67, and the mean high tide line may even lie landward of that wall, meaning that appellants may be encroaching on publicly owned lands. *Id.* at 85. There is also a substantial possibility that any dry sand beach that once attached to the appellants' parcel has long since been impliedly dedicated to public use by prior owners. *Id.* at 86. Finally, as a result partly of development along the coast, Faria Beach is being progressively eroded. *Id.* at 72-73. The mean high tide line is thus creeping inland, and any private holdings of dry sand are disappearing.

C. Transient Public Passage Across The Strip Of Beach The Appellants Claim To Own Is Not A Substantial Burden On Their Property Rights.

1. No "Permanent Physical Occupation"

The change in the Nollans' asserted right to exclude the public altogether from a portion of the beach is not a taking by "permanent physical occupation." *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982). *Loretto* adopts a distinction between a user who "passes to and fro . . . [whose] . . . use and occupation thereof are temporary and shifting," and one whose use is "permanent and exclusive." *Id.* at 428-29. At least when the invasion does not rise to the level of a permanent and exclusive physical occupation, it is subject to the same "ad hoc" analysis called for by other regulatory takings claims.[16] *Id.* at 432 and 435 n.12. That analysis does recognize that physical invasions may be "unusually serious" government authorized actions. *Id.* at 426; *but cf.* Michelman, 80 Harv. L. Rev. at 1186-87. But it does not call for compensation or invalidation in the absence of a burden which is both unforeseeable and unusually substantial.[17]

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[16] *See also supra*, at 10 n.11.

[17] The kind of analysis undertaken by this Court in *Kaiser Aetna* and *PruneYard* illustrates this point. In *Kaiser Aetna*, although the government had the power to withhold project approval altogether (444

Appellants attempt to characterize the "pass and repass" provision at issue here as more egregious in its application to them than was the statute found to work a taking in *Loretto*. Brief of Appellants ("Br.A.") 19-20. The implication seems to be that this, too, is a "*per se*" taking by permanent physical occupation. The appellants' brief blurs over the distinctions made in *Loretto*, and ignores the plain language of the opinion. An "easement of passage, not being a permanent occupation of land" is not, without more, a taking of property. *Loretto*, 458 U.S. at 433. The deed restriction imposed on appellants' development project is apparently somewhat less, even, than an easement of passage. *See* J.A. 48. The occupation authorized by the statute in *Loretto*, however, was considered fundamentally more intrusive than an easement and, only by virtue of that extra intrusiveness, a taking *per se*. *Loretto*, 458 U.S. at 441.[18]

2. Insubstantial "Physical Invasion"

The public's temporary and shifting passage is not a substantial burden on the Nollans, given the history and physical characteristics of the disputed strip of sand. As in *PruneYard Shopping Center v. Robins*, the owners here have failed to demonstrate that excluding others from the beach is an essential component of the use or economic

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U.S. at 179) before construction began, the Court found that official consent led to the fruition of property expectancies sufficiently important *in that case* to warrant constitutional protection. *Id.* at 179-80. At stake were the construction costs and the petitioner's ability to recoup them by charging an annual fee of all users. *See id.* at 180. In *PruneYard*, by contrast, a comparable "physical invasion" was found not to constitute a taking. The Court carefully distinguished *Kaiser Aetna*'s demonstrated interference with "reasonable investment backed expectations," and pointed to the inadequate showing of any burden, by the shopping center. 447 U.S. at 84.

[18] The "very narrow" holding of *Loretto*, 458 U.S. at 441, appears, at all events, to conceive of "permanent physical occupations" as involving "a fixed structure on land or real property." *Id.* at 437.

value of their property. *See* 447 U.S. 74, 84 (1980). The Nollans have not attempted to exclude the public in the past. J.A. 67. It is not, in fact, clear how they could confidently have done so. The strip of beach in question lies below the Nollans' eight foot seawall. J.A. 61, 270. It directly abuts, if it is not included in, the intertidal zone open to full public use. The border between the public and private land is uncertain, as the Nollans' title reflects. The Nollans could not have known, therefore, from what portion of the beach they could lawfully exclude the public. *See* J.A. 61-62.

The relative unimportance of the asserted "physical invasion" in this case is also evident in the minimal impact of the access condition on the Nollans' expectations of privacy.[19] The pass and repass provision could not have materially altered the privacy the Nollans would have enjoyed on the beach itself.[20] The publicly owned intertidal beach is at most a few feet away. J.A. 61. Equally significantly, people passing along the disputed strip would be close to the eight foot seawall and therefore partially or completely obscured from view, from the Nollans house above. They would thus impinge less on the privacy of the Nollans' home than those already out in plain view on the clearly public portion of the beach.

Any argument that might be made to distinguish this case from one which, like *PruneYard*, 447 U.S. 74 (1980) involved large scale commercial interests, because of the involvement of private citizens and a private residence, would misapprehend the facts of this case and lead to unreasonable results. Here, at the time of the legislative

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[19] Expectations of privacy are, of course, much of the reason why the right to exclude is such a treasured stick in the Hohfeldian bundle of property rights. *Cf.* Michelman, *supra* p. 11, at 1228; *id.* at n.109.

[20] The "pass and repass" limitation on the access condition specifically addresses the proximity of residential use. Cal. Public Resources Code 30214(a)(3).

enactment the property owner was the Faria Family Partnership. J.A. 312. The Partnership owned the entire Faria Tract which it then sold to the Faria Trust. The Trust then subdivided the ownership, in effect, to numerous individuals like appellants. *Id.* at 47.

To treat the Nollans differently because they, rather than the subdivider, now hold title to the land, would be to allow the creation of new rights against the state by the expedient of dividing a parcel up into smaller segments. That, of course, would vitiate the very distinction sought to be maintained. It would allow easy circumvention of, for example, governmentally imposed density requirements like those upheld in *Agins*. 447 U.S. at 262. Cases like *Agins* should not be subject to multiple complete relitigation simply because the owner sold off several undeveloped portions of the property. Such a result would also violate the necessary and established principle that takings jurisprudence "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central*, 438 U.S. at 130.

3. No "Diminution of Value"

This case presents no evidence at all of a diminution in value in the complainants' property. The routine application of the Coastal Act's access requirement to all similarly situated properties was clear at the time of purchase. J.A. 48. What the Nollans have lost, then, is at best the possibility a windfall increase in the property's value.

At all events, the significant inquiry for constitutional purposes, in the face of claimed diminution of value, is the amount of residual "reasonable beneficial use" in the parcel as a whole. *See Penn Central*, 438 U.S. at 130-31; *Williamson County*, 473 U.S. at 194. The access condition could not greatly alter the Nollans' use of the beach. Because even this upper strip of sand is subject to tidal action (J.A. 61, 67), the Nollans could not have occupied it con-

tinuously themselves.[21] And the permitted construction of a year round residence incontestably increases their beneficial use of the parcel as a whole.

III. THE PERMIT CONDITION APPELLANTS CHALLENGE MEETS THE ONLY FEDERAL CONSTITUTIONAL STANDARDS GOVERNING THE RELATIONSHIP OR NEXUS BETWEEN SUCH CONDITIONS AND THE PROBLEMS CREATED BY THE PROPOSED ACTIVITY.

A. Permit Conditions Which Do Raise Takings Questions Are Subject To The Same Analysis As Other Restrictions, Not To A Specially Heightened Takings Scrutiny.

When takings scrutiny of a permit condition *is* appropriate, for example, because the government compels the permit application, or because the permit is necessary to maintain the property's reasonable beneficial use, no different takings standard or analysis is called for simply because a *condition* is involved. Courts are already well-equipped to review charges that a permit condition involves a singling out of an individual, a physical invasion, or a governmental acquisition of a benefit. The established analysis of regulatory takings claims outlined above already takes account of such factors. If a permit condition passes that scrutiny, then it satisfies the Takings Clause.[22]

The landowners here, however, would import into the takings inquiry a special, heightened scrutiny of permit conditions. The Nollans propose that courts carefully meas-

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[21] If the Nollans' asserted concern about being left with nothing but the litter and liability from public use, Br.A. 28, were sincere, the Coastal Act provides a straightforward solution. By formally offering to dedicate an easement across the beach, rather than simply entering a deed restriction, the Nollans could now throw both of those burdens onto public agencies. *See* Cal. Public Resources Code §30212(a).

[22] It may, of course, still run afoul of due process, if it is arbitrary enough, i.e., if it is a wholly irrational means to the legislative end. *See* Part III.B., *infra*.

ure such conditions against "special benefits to the property or special public needs caused by the property owners." Br.A. 25. These two, they suggest, must be "in proportion." *Id.* at 22. The government, apparently, would carry the burden of proof to justify each individual application of a permit condition requirement. *Id.* at 25.

The Nollans are joined by the Solicitor General, on behalf of the United States as *amicus curiae*, who proposes that the Takings Clause should call for an even more elaborate investigation. That investigation would require courts to decide whether such conditions are "carefully linked" (Br. U.S. 24) to the same legislative purpose that would be served by denying the permit *and also*, in both kind and degree, to specific problems created by the particular permitted activity. *Id.* at 22-23. The Nollans' proposal, and the Solicitor General's, are analytically unsound, without foundation in the holdings of this Court, and demonstrably unwise.

The position of the Nollans and the Solicitor General, if accepted, would establish a heightened takings scrutiny of land use control exactly when it is least called for. Whenever a legislature chooses to utilize permit conditions[23] rather than another form of regulation, courts would look for a demonstrated close fit between specific regulatory burdens and project impacts. This is a fit unquestionably

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[23] Unlike the Solicitor General, the Nollans do not clearly tie their theory exclusively to permit conditions. They refer broadly to undefined "special burdens," Br.A. 23, "special costs," *id.* at 25, and "special obligations," *id.* at 28. Their concern, however, appears to be focused on permit conditions, as was the lower courts'. The trial court, which they urge be affirmed, would require that any "access condition must be supported by an evidentiary showing of direct and definable adverse impact on public access." J.A. 415. The Court of Appeal, which the Nollans ask be overruled, rejected this requirement of a direct relationship in each case. *Id.* at 424. At one point, however, the Nollans do suggest that a far less intrusive test of "no reasonable relationship" is the constitutional standard. Br.A. 29.

not required of, for example, zoning ordinances. On this theory a restriction on property owners' rights that passed ordinary takings scrutiny if unilaterally imposed would still require special justification if it were implemented as a permit condition.

This theory would attach special limitations to a legislature's ability to regulate in just those circumstances where the burden on the regulated entity is most clearly alleviated. When a restriction is incorporated in a permit, the landowner is assured of some return benefit. A regulatory burden which would pass takings scrutiny in the absence of such a reciprocal benefit cannot reasonably be held to a higher standard of takings review when an explicit and definable benefit is incorporated with it. *Cf. Wickard v. Filburn*, 317 U.S. 111, 133 (1942)("That appellee is the worse off for the aggregate of this legislation does not appear; it only appears that if he could get all that the Government gives and do nothing that the Government asks, he would be better off than this law allows."). Nothing in the Takings Clause as this Court has interpreted it, calls for such a quixotic second-guessing of legislative land-use decisions.

Neither the Nollans nor the Solicitor General have found relevant case authority for their theories. The special assessment cases upon which the Nollans rely are both inapposite (because they involve unilateral impositions) and outmoded (because of their ties to economic substantive due process). But even these cases found only those assessments objectionable which were "without *any* compensating advantage," *Georgia Railway & Electric Co. v. Decatur*, 295 U.S. 165, 170 (1935), "*solely and only* for the purpose of deriving revenue," *Myles Salt Co. v. Board of Commissioners*, 239 U.S. 478, 483 (1916), or "in *substantial* excess of the special benefits accruing," *Norwood v. Baker*, 172 U.S. 269, 279 (1898) (emphasis added to all three quotations).

The Solicitor General's argument similarly rests on cases from other contexts and other times. *Nashville, C. & St. L. Ry v. Walters*, 294 U.S. 405 (1935), for example, simply holds that given the extraordinary evidence offered by the appellants, the state courts should at least have considered their straight due process claim that a unilateral assessment was arbitrary and capricious. *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926) as noted *supra* at 7 n.6, is solidly Lochnerian. *Stephenson v. Binford*, 287 U.S. 251, 272 (1932), a partial retreat from *Frost*, says unequivocally that the "extent to which, as means, [the permit provisions] conduce to that end, the degree of their efficiency, the closeness of their relation to the end sought to be attained, are matters addressed to the judgment of the legislature and not to the that of the courts." *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), concerns whether the federal government must pay for state-created property rights taken over in eminent domain proceedings. It simply does not address the question of which land use regulations are unconstitutionally burdensome.

If anything cited in the Solicitor General's brief supports his theory, it is this Court noting in passing that a zoning ordinance can effect a taking if it "does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928) or denies an owner economically viable use of his land [citation omitted]." *Agins v. Tiburon*, 447 U.S. at 260. This Court however, has not read *Nectow*, a frankly substantive due process case rather than a takings claim, as a justification for second-guessing a legislative choice of means. At most it means that assertions of the public health, safety, or welfare must be more than illusory. Certainly it does not require the government to tie each application of an ordinance to specific evils. The Court in *Agins*, for example, easily found that the ordinances substantially advanced legitimate governmental goals. *Id.* at 261. The city government was not

expected to show how each particular project would tangibly and adversely affect the specific public interests being asserted. *See id.* n.8.

The Solicitor General suggests that "the terms of a condition that would excuse compliance with the restriction may indicate that the actual purpose is unrelated to the purported police power goal." Br.U.S. 22 n.20. This suggestion is wholly inapt in this case, given the complete lack of evidence to suggest such a subterfuge. *See Hadacheck v. Sebastian*, 239 U.S. at 414 ("We must accord good faith to the city in the absence of a clear showing to the contrary."). Moreover, as a justification for a general doctrine of stricter takings scrutiny, the theory ignores the possibility that the permitted activity has certain identifiable and remediable adverse impacts which can be effectively addressed by the attachment of conditions. It also arrogates to the judiciary the legislative task of striking a balance between competing public and private interests. There is nothing constitutionally offensive in the government deciding to tolerate a certain level of adverse impact on the public interest, in response to the needs of individual citizens or to avoid potentially unconstitutional deprivations. Nor is there any justification for heightened judicial scrutiny each time the legislature or its delegated agency decides that some adverse impact is tolerable if partially offset by a public gain.[24]

The thrust of appellants', and their *amicus*', position is actually a due process concern, not a takings claim. They are urging a rigorous, economic substantive due process analysis in the permit condition context, apparently as an expansion of the Takings Clause's fairness inquiry. They propose that courts closely examine the effectiveness and

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[24] *Cf. Berman v. Parker*, 348 U.S. 26, 32 (1954) ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.").

the rationality of a legislative choice of means to an end. The Solicitor General's proposal goes further. It would include a judicial re-evaluation of the legislature's determination that the end served, the public purpose, was weighty enough to justify the choice of a particular kind of means. Perhaps these proposals are presented to the Court in the guise of takings doctrine with the hope that they will not be recognized as urging the resurrection of a discredited mode of due process analysis. The analysis, however, is equally ill-conceived and counter to this Court's teachings, whether conducted under the rubric of takings law or as an aspect of due process.

B. The Relevant Constitutional Inquiry Specific To Ordinary Permit Condition Requirements Is Whether, As A Matter Of Due Process, The Condition Is So Unrelated To The Legislative Goal As To Be Arbitrary And Irrational.

The United States Constitution does provide for some judicial scrutiny of a legislature's choice of means to an end, where that choice allegedly interferes with property rights. The Due Process Clauses require that such action not be "wholly arbitrary or irrational."[25] *Martinez v. California*, 444 U.S. 277, 282 (1980), *accord Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1927) (zoning ordinance which greatly affected market value was not "clearly arbitrary and unreasonable"). A presumption of constitutionality, however, attaches to such a choice. *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 529 (1959). This leaves on a complainant the burden of showing arbitrariness or

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[25] Where an administrative decision maker has broad discretion in making individualized determinations, procedural due process may be implicated. Tribe, *American Constitutional Law*, 511 (1978). The classification scheme can also be attacked for failure to comport with the Equal Protection Clauses. *See, e.g. Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). The applicable standards of review parallel those discussed below for due process claims. *See, e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974).

irrationality. *See, e.g., Hadacheck v. Sebastian*, 239 U.S. at 410 ("in any given case it must plainly appear to apply"). Here, the Nollans have not overcome this presumption, nor did the trial court so find. To the contrary, the trial court applied a much higher standard, and shifted the burden to the government. "A valid access condition must be supported by an evidentiary showing of direct and definable adverse impact on public access." J.A. 415. The Court of Appeal correctly held this standard inapplicable. J.A. 424.[26]

The strictures of due process do not, however, authorize judicial inquiry into the wisdom of legislation. *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). As noted above,[27] the theory of the Nollans (and even more so, that of the Solicitor General) would require exactly such an inquiry. By arguing that the access requirement is only constitutional if the state "demonstrates that the need . . . directly results from the action the Nollans proposed," Br.A. 12, the Nollans challenge the remedial effectiveness of the permit condition. Since the legislature unequivocally required such conditions (in the absence of demonstrated alternatives—a determination not challenged by the Nollans here), the essence of the Nollans' claim is "whether *in fact* the provision will accomplish its objectives." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242 (1984) (quoting *Western & Southern Life Ins. Co. v. State Bd. of Equal-*

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[26] Because some of the elements of the Coastal Commission's permit action called for an agency decision, the Court of Appeal reviewed the administrative record for substantial evidence of the condition's reasonableness. J.A. 423. Because the Nollans argue, and the trial court held, that a demonstrated direct relationship is a constitutional requirement, J.A. 419, although nothing in the legislation requires or even suggests such a demonstration requirement as to "new development" (*see* Cal. Public Resources Code §30212), the claim before this Court is a challenge first to the legislation itself and only second to the administrative decision.

[27] Part III.A., *supra*.

ization, 451 U.S. 648, 671-72 (1981). To decide that claim, this Court, and subsequently lower courts, would have to sit as a "superlegislature," *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952), a role this Court has repeatedly and consistently eschewed.[28] *See, e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124 (1978).

This Court has already been faced with and rejected a federal constitutional complaint very like the Nollans', that land use measures are irrational or unreasonable because they are "not reasonably necessary for the prevention of the acts complained of," or because "the means adopted are out of proportion to the danger involved." *Hadacheck v. Sebastian*, 239 U.S. at 398-99. The Nollans' theory, unpersuasive in *Hadacheck*, is even more ill-advised where the legislature, as here, is addressing a problem of cumulative impact. The actual adverse impact of a pattern of development, and the contribution of a particular project to that impact, may well be demonstrable and quantifiable only after the damage is done. At that point remediation may be difficult or impossible. The distribution of remedial costs, moreover, is then a genuinely unilateral exaction

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[28] *See also Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion of Powell, J., sounding a cautionary note, while undertaking a heightened substantive due process analysis in protecting family liberties, "lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court"). State courts are, of course, free to engage in more vigorous scrutiny under their state equivalents of the Due Process Clause. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981). Some state courts have in fact adopted a theory somewhat similar to the Nollans'. *See* Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 Yale L.J. 1119, 1124 (1964); Pavelko, *Subdivision Exactions: A Review of Judicial Standards*, 25 J. Urb. Contemp. L. 269, 284-86 (1983). Moreover, a number of states, including California, also extend analogous protections to landowners by incorporating such standards into zoning enabling acts and other legislation governing local land use controls. *See, e.g.*, Cal. Government Code §66475.4 (West 1987).

imposed on property owners. Project proponents would thus have no pre-construction assurance of the ultimate conditions or other costs that their development would entail.

Even where cumulative impact is prospectively ascertainable, it is not the role of the federal judiciary to determine whether a particular project is or is not desirable. *Berman v. Parker* 348 U.S. 26, 33 (1954). The policy decisions and scientific or technical considerations involved are for legislatures. *United States v. Twin City Power Co.*, 350 U.S. 222, 224 (1956). When this Court reviews the decisions of state courts of last resort an additional, similar deference attaches. "When the scope of the police power is in question the special knowledge of local conditions possessed by the state tribunals may be of great weight." *Nashville, C. & St. L. Ry v. Walters*, 294 U.S. at 433.

Even if the Nollans could affirmatively demonstrate that their project, taken alone, had no adverse impact,[29] that would not remove them from the regulatory jurisdiction of the police power or render the Coastal Act irrational as applied to them. The trivial contribution of each project does not and could not reasonably strip the legislature of authority to deal with the aggregate. *Wickard v. Filburn*, 317 U.S. at 127-28; *Stephenson v. Binford*, 287 U.S. at 270. Indeed, even if the Nollans' development were not "one more brick in the wall," Opinion of the California Court of Appeal, J.A. at 425, even if it did not contribute at all to the cumulative problem, due process would not necessarily be offended by its inclusion in the regulatory

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[29] The California legislature has already found that, as a general matter, such an impact exists. Landowners challenging that determination are in effect seeking to establish their activities as exceptional. The burden of doing that could only lie on each landowner. Any other rule would put an impossibly high burden on legislative attempts to deal with widespread problems. Here, the appellants have made no such case.

plan. The legislation may well still be quite rational even if it restricts or prohibits individual cases of land use which "turn out to be innocuous in themselves." *Euclid v. Ambler*, 272 U.S. at 388. Legislatures are not held to "scientific precision," *Sproles v. Binford*, 286 U.S. 374, 388 (1932), either in the choice of remedial or preventive measures or in setting the scope of regulation.

CONCLUSION

For the foregoing reasons, the decision of the California Court of Appeal should be affirmed.

Respectfully submitted,

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