erty or otherwise deprives it of value,[666] whether there has been a taking in the Fifth Amendment sense becomes critical.

Government Activity Not Directed at the Property.—The older cases proceeded on the basis that the requirement of just compensation for property taken for public use referred only to "direct appropriation, and not to consequential injuries resulting from the exercise of lawful power."[667] Accordingly, a variety of consequential injuries were held not to constitute takings: damage to abutting property resulting from the authorization of a railroad to erect tracts, sheds, and fences over a street;[668] similar deprivations, lessening the circulation of light and air and impairing access to premises, resulting from the erection of an elevated viaduct over a street, or resulting from the changing of a grade in the street.[669] Nor was government held liable for the extra expense which the property owner must obligate in order to ward off the consequence of the governmental action, such as the expenses incurred by a railroad in planking an area condemned for a crossing, constructing gates, and posting gatemen,[670] or by a landowner in raising the height of the dikes around his land to prevent their partial flooding consequent to private construction of a dam under public licensing.[671]

But the Court also decided long ago that land can be "taken" in the constitutional sense by physical invasion or occupation by the government, as occurs when government floods land permanently or recurrently.[672] A later formulation was that "[p]roperty is taken in the constitutional sense when inroads are made upon an own-

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[666] The Court has not yet determined whether the actions of a court may give rise to a taking. In Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, Justice Scalia, joined by three other Justices, recognized that a court could effect a taking through a decision that contravened established property law. 560 U.S. ___, No. 08–1151, slip op. (2010). Justice Kennedy and Justice Breyer, each joined by one other Justice, wrote concurring opinions finding that the case at hand did not require the Court to determine whether, or when, a judicial decision on the rights of a property owner can violate the Takings Clause. Though all eight participating Justices agreed on the result in *Stop the Beach Renourishment, Inc*, the viability and dimensions of a judicial takings doctrine thus remains unresolved.

[667] *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1871). The Fifth Amendment "has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals," the Court explained.

[668] Meyer v. City of Richmond, 172 U.S. 82 (1898).

[669] Sauer v. City of New York, 206 U.S. 536 (1907). *But see* the litigation in the state courts cited by Justice Cardozo in Roberts v. City of New York, 295 U.S. 264, 278–82 (1935).

[670] Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897).

[671] Manigault v. Springs, 199 U.S. 473 (1905).

[672] Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177–78 (1872). That recurrent, temporary floodings are not categorically exempt from Takings Clause liabiity is the primary holding in Arkansas Game and Fishing Comm'n v. United States, 568 U.S. ___, No. 11–597, slip op. (2012) (downstream timber damage caused by changes in seasonal water release rates from government dam).