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He Who Calls the Tune Must Pay the Piper: Compensation for Regulatory Takings of Property after First English Evangelical Lutheran Church v. County of Los Angeles

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COMMENT

HE WHO CALLS THE TUNE MUST PAY THE PIPER: COMPENSATION FOR REGULATORY TAKINGS OF PROPERTY AFTER *FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH V. COUNTY OF LOS ANGELES*

I. INTRODUCTION

In 1957, the First English Evangelical Lutheran Church of Glendale, California, bought 21 acres of land in a canyon on the banks of the Middle Fork of Mill Creek in the Angeles National Forest.[1] The creek is the natural drainage channel for a watershed area owned by the National Forest Service.[2]

1. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2381 (1987).
2. *Id.*

The church used the property to build Lutherglen, a camp used as a retreat center and recreation area for handicapped children.[3]

In 1977, a forest fire burned the hills upstream from Lutherglen, destroying approximately 3860 acres of watershed and thereby creating a flood hazard.[4] Less than one year later, a severe rainstorm dumped eleven inches of rain on the area, causing a flood which destroyed the buildings at Lutherglen.[5]

Nearly a year after the flood, in early 1979, Los Angeles County adopted an interim ordinance forbidding construction or reconstruction of any buildings in an interim flood protection area described by the ordinance, which included Lutherglen.[6] Because the county felt the ordinance was necessary for "preservation of the public health and safety," the ordinance was made effective immediately.[7]

About one month after adoption of the ordinance, the church sued the county in a California state court.[8] The suit claimed, among other allegations, that the ordinance had deprived the church of all use of its property.[9] The complaint sought damages for the loss of the use of Lutherglen.[10]

The defendants moved to strike the portions of the complaint alleging that the regulation had denied the church all use of its property.[11] They argued that the California Supreme Court previously had held[12] that a compensation remedy is never available to a landowner who asserts that a regulation has in effect taken his property. Therefore, they asserted, the allegations concerning denial of use of Lutherglen were irrelevant.[13]

The trial court agreed that the California had established the unavailability of a compensation remedy.[14] It granted the motion, and struck all portions of the church's complaint related to a request for damages.[15]

On appeal, the California Court of Appeals agreed that a compensation remedy was not available, and upheld dismissal of the damages claim.[16] The California Supreme Court denied review, and the church appealed to the United States Supreme Court.[17] The Supreme Court granted certiorari to answer whether compensation is the constitutionally required remedy when a

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3. *Id.* The camp consisted of several buildings and a footbridge across the creek.
4. *Id.*
5. *Id.*
6. *Id.* at 2381-82.
7. *Id.*
8. *Id.* at 2382.
9. *Id.*
10. *Id.*
11. *Id.*
12. Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979) [hereinafter *Agins I*].
13. *First English*, 107 S. Ct. at 2382.
14. *Id.*
15. *Id.*
16. *Id.* at 2382-83.
17. *Id.* at 2383.

regulation deprives a property owner of the use of his property.[18] That issue was universally regarded as the most controversial constitutional question affecting land use.[19] The Court had tried and failed to answer the question in a series of four cases during the 1980's, and had been severely criticized for its failure to do so.[20] Its ruling in *First English* was eagerly awaited.[21]

The United States Supreme Court in *First English* declared that when a regulation deprives a property owner of all of his property, the Constitution requires a compensation remedy.[22] It held that even where the courts eventually invalidate the regulation, compensation is required for the period during which the regulation was effective.[23] This requirement had been implicit in Supreme Court opinions dating back to the 1920's,[24] but had never been made incontrovertible by an explicit majority holding.[25]

The Court's ruling in *First English* was generally reported as a tilt toward property owners and away from government regulation of land use.[26] Many observers predicted that the case would have widespread effects on land use regulation.[27] Indeed, the dissent by Justice Stevens predicted that the decision was certain to "generate a great deal of litigation," and to have a "significant adverse impact on the land-use regulatory process."[28]

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18. *Id.*

19. *See infra* note 32.

20. *See infra* notes 71-74 and accompanying text.

21. *See, e.g.*, Deutsch, *Recent Cases, Legislation, and Literature in Land Use, Planning, Environmental Law*, PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 1.02(1)(b) (1987); *Taking or Regulating?: Key Land Use Questions Before the Supreme Court*, A.B.A. J., Apr. 1, 1987, at 22.

22. *First English*, 107 S. Ct. 2378, 2389 (1987).

23. *Id.* at 2389 n.10.

24. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

25. *See infra* notes 176-95 and accompanying text.

26. *See, e.g.*, National Law Journal, June 22, 1987, at 5, col. 1 ("tilted the scales toward property owners and away from government regulation"); Chicago Tribune, June 10, 1987, at 1, col. 2 ("a victory for the building and real estate industries and a serious setback for state and local governments, environmental groups and conservationists"); Los Angeles Times, June 10, 1987, at 8, col. 1 (likely to "force a reevaluation of government actions in such areas as coastal management, flood plain restriction, open space development and the common practice of requiring real estate developers to donate land for parks or other public uses"); Wall Street Journal, June 10, 1987, at 2, col. 2 ("hailed by developers" but "a heavy blow to state and local land use planners").

27. *See, e.g.*, Washington Post, June 10, 1987, at 1, col. 1 (Lee Buck, General Counsel of the National Association of Counties quoted as saying: "This will upset the entire balance over land use control developed over the last 75 years.").

28. First English Evangelical Lutheran Church v. City of Los Angeles, 107 S. Ct. 2378, 2389-90 (1987) (Stevens, J., dissenting).

II. THE BACKGROUND

A. *"Taking" and "Just Compensation"*

The constitutional issue in *First English* was the interpretation and effect of the just compensation clause of the fifth amendment in the context of land use regulation. The just compensation clause provides: "Nor shall private property be taken for public use without just compensation."[29] The key terms in the clause around which controversy has swirled in recent decades are "taken" and "just compensation." The meaning and application of these terms and of the clause as a whole in a regulatory context is generally referred to as the "takings issue."[30]

Dispute over the takings issue has centered on two interrelated questions: Can the effect of a land use regulation amount to a "taking," and, if so, is "just compensation" the required remedy?[31] The controversy over these questions is one of the hottest in land use or constitutional law today.[32]

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29. U.S. CONST. amend. V. It has long been settled that the just compensation clause is applicable to the states by incorporation into the due process clause of the fourteenth amendment. Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226 (1897); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980). Also, "all but three state constitutions expressly prohibit the taking of private property for public use without just compensation, and the other three [Kansas, North Carolina, and Virginia] have been construed to impose the same prohibition, although they do not do so expressly." R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY § 9.1 (1984) [hereinafter THE LAW OF PROPERTY].

30. *See, e.g.*, F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKINGS ISSUE (1973) [hereinafter THE TAKINGS ISSUE]; Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165 (1974).

31. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 11.12, at 406 n.34 (3d ed. 1986) ("The questions that are undecided are: (1) what type of standard should be employed to determine if a regulatory diminishment in the economic value of property is so great that it should constitute a taking and (2) whether the government must pay for temporary, though severe, diminishments in value through regulation."); *see also* Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 RUTGERS L.J. 15, 16 (1983).

32. THE LAW OF PROPERTY, *supra* note 29, § 9.1 ("[W]hether, and if so when, governmental regulations that diminish a landowner's use and enjoyment of land can amount to a *de facto* taking of property . . . is perhaps the most burning legal question that today surrounds the growing number of land-use regulations."); Bauman, *supra* note 31, at 70 (the constitutionality of inverse condemnation actions in regulatory takings cases is "the most incitive issue in American land use law today"); Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491 (1981) ("No constitutional problem has proved more contentious in land use regulation than the taking issue.").

One of the rare points of agreement among all parties to the debate is that takings law is one of the most incoherent and difficult areas in American jurisprudence. Scholars have described it as "a chaos of confused argument," B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 8 (1977), a "trackless waste," N. WILLIAMS, AMERICAN LAND PLANNING LAW: LAND USE AND THE POLICE POWER § 5.05(a) (1974 &

The debate has generated a "flood of scholarly commentary" on the issues involved.[33] One article on the subject found that many authors attempt to an-

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Supp. 1985), a "great Serbonian bog where armies whole have sunk," Cabaniss, *Inverse Condemnation in Texas — Exploring the Serbonian Bog*, 44 TEX. L. REV. 1584 n.1 (1966), and a "welter of confusing and apparently incompatible results," Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964). Case law on the takings issue is reported to be "liberally salted with paradox," Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1170 (1967), and filled with "conclusionary terminology, circular reasoning, and empty rhetoric," Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 2 (1970). The search for a coherent takings doctrine has been compared to "the physicist's hunt for the quark," C. HARR, LAND-USE PLANNING 766 (3d ed. 1976), and the general view is that "there is no clear and consistent constitutional interpretation or doctrinal base underlying this area of law," Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 U.C.L.A. L. REV. 711, 724 (1982) [hereinafter Comment, *Just Compensation*]. In the view of legal scholars, this state of affairs is certain to continue "unless and until the United States Supreme Court resolves the existing confusion." THE LAW OF PROPERTY, *supra* note 29, § 9.2.

33. Berger & Kanner, *Thoughts on "The White River Junction Manifesto": A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A.L. REV. 685, 692 (1986). For a selection of major treatments of the subject in recent years, see ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 8 (1977); R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); D. HAGMAN & D. MISCZYNSKI, WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION (1978); MANDELKER, ENVIRONMENT AND EQUITY: A REGULATORY CHALLENGE (1981); THE TAKINGS ISSUE, *supra* note 30; Badler, *Municipal Zoning Liability in Damages — A New Cause of Action*, 5 URB. LAW. 25 (1973); Berger, *A Policy Analysis of the Taking Problem*, *supra* note 30; Berger, *To Regulate, Or Not To Regulate — Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights*, 8 LOY. L.A.L. REV. 253 (1975); Blume & Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569 (1984); Damich, *Does 14 = 5? Overregulation and Compensable Taking*, 10 MEM. ST. U.L. REV. 701 (1980); Clark & Kidman, *The Relationship of Just Compensation to Land Use Regulatory Power; An Analysis and Proposal*, 2 PEPPERDINE L. REV. 79 (1974); Freilich, *Solving the "Taking" Equation: Making the Whole Equal the Sum of Its Parts*, 15 URB. LAW. 447 (1983), *reprinted in* 15 LAND USE & ENV'T L. REV. 91 (1984); Gordon, *Compensable Regulatory Taking: A Tollbooth Rises on Regulation Road*, 12 REAL EST. L.J. 211 (1983); Greenbaum, *Zoning, Taking, and Inverse Condemnation*, 1981 ZONING AND PLANNING LAW HANDBOOK 259 (F. Strom ed. 1981); Hagman, *Temporary or Interim Damages Awards in Land Use Control Cases*, 4 ZONING & PLAN. L. REP. 129 (1981); Harris, *Environmental Regulations, Zoning, and Withheld Municipal Services: Takings of Property by Multi-Government Action*, 25 U. FLA. L. REV. 635 (1973); Johnson, *Compensation for Invalid Land-Use Regulations*, 15 GA. L. REV. 559 (1981); Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty*, 1980 PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING & EMINENT DOMAIN 177; Krasnowiecki & Strong, *Compensable Regulations for Open Space: A Means of Controlling Urban Growth*, 29 J. AM. INST. PLANNERS 87 (1963); Krier, *The Regulation Machine*, 1 SUP. CT. ECON. REV. 1 (1982); Leeson & Sullivan, *Property, Philosophy and Regulation: The Case Against a Natural Law Theory of Property Rights*, 17 WILLAMETTE L. REV. 527 (1981); Mandelker, *Investment-Backed Expectations: Is*

swer "this highly charged question from an essentially political or ideological stance," and therefore produce predictable if legalistically-reasoned responses.[34] Much of the scholarly literature illustrates a resulting "polarization between legitimate environmental and developmental concerns," and indulges in "artificial manipulation of the Constitution in order to justify preconceived notions of invariable truth."[35] Such efforts to put either a pro-regulation or pro-development "spin" on takings law may have been motivated in large part by the potential consequences of a compensation remedy.[36] Obviously, the stakes for all parties are significantly increased if money might have to be paid when a regulation in effect "takes" property.

As a practical matter, dispute over a compensation remedy for regulatory takings is of relatively recent origin. One treatise on property law reports that "until quite recently, the remedy sought by landowners who challenged land

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There a Taking?, 31 WASH. U.J. URB. & CONTEMP. L. 3 (1987); Mandelker, *Land Use Takings: The Compensation Issue*, *supra* note 32; McNamara, *Inverse Condemnation:* A "Sophistic Miltonian Serbonian Bog," 31 BAYLOR L. REV. 443 (1979); Meyer & Dolle, *Changing Compensation Rules for Property Takings*, 11 REAL EST. REV. 28 (1981); Michelman, *Mr. Justice Brennan: A Property Teacher's Appreciation*, 15 HARV. C.R.-C.L. L. REV. 296 (1980); Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1170 (1967); Morgan & Shonkwiler, *Regulatory Takings in Oregon: A Walk Down Fifth Avenue Without Due Process*, 16 WILLAMETTE L. REV. 591 (1980); Netherton, *Implementation of Land Use Policy: Police Power vs. Eminent Domain*, 3 LAND & WATER L. REV. 33 (1968); Pilon, *Property Rights, Takings, and a Free Society*, 6 HARV. J.L. & PUB. POL'Y 165 (1983); Ross, *Modeling and Formalism in Takings Jurisprudence*, 61 NOTRE DAME L. REV. 372 (1986); Sallet, *Regulatory "Takings" and Just Compensation: The Supreme Court's Search for a Solution Continues*, 18 URB. LAW. 635 (1986); Sallet, *The Problem of Municipal Liability for Zoning and Land-Use Regulation*, 31 CATH. U.L. REV. 465 (1982); Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964); Sax, *Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 U.C.L.A. L. REV. 711, 724 (1982) [hereinafter Comment, *Just Compensation*]; Comment, *"Takings" Under the Police Power — The Development of Inverse Condemnation as a Method of Challenging Zoning Ordinances*, 30 SW. L.J. 723 (1976); Comment, *Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis*, 57 WASH. L. REV. 715 (1982); Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439 (1974); Note, *Inverse Condemnation: The Case for Diminution in Property Value as Compensable Damage*, 28 STAN. L. REV. 779 (1976).

34. Bauman, *supra* note 31, at 16-17.

35. Bauman, *supra* note 31, at 17.

36. This "spin" effort can be seen in many of the sources cited *supra* note 33. For a parallel presentation of the two sides of the argument, compare Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193 (1984) [hereinafter *The White River Junction Manifesto*], with Berger & Kanner, *Thoughts on "The White River Junction Manifesto": A Reply to the "Gang of Five's" Views On Just Compensation For Regulatory Taking of Property*, 19 LOY. L.A.L. REV. 685 (1986).

use regulations as amounting to a *de facto* 'taking' was simply the invalidation of the regulations."[37] Prior to the 1970s, "no inverse condemnation cases were brought in the United States on the basis of mere regulation of land."[38] In the mid-1970s, however, landowners began to bring inverse condemnation actions[39] to challenge land use regulations, seeking monetary damages when regulations in effect took their property.[40]

A major reason for the rise to prominence of the compensation question seems to have been the changed nature of regulatory practice. What has been called the environmental revolution of the 1970s triggered a quantitative and qualitative upsurge in land use regulation.[41] When this increase began, the courts regarded land use regulation as primarily a matter for local control and generally took a "hands off" approach, preferring to leave the field to legislative supervision.[42] Even critics of land use regulation concede that the environ-

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37. THE LAW OF PROPERTY, *supra* note 29, § 9.2, at 525. The authors note that this was true in all the leading cases in the field prior to the 1970's. *Id.*, § 9.2, at 525 n.45.

38. D. HAGMAN & D. MISCZYNSKI, WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION 272 (1978).

39. Inverse condemnation is "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." United States v. Clark, 445 U.S. 253, 257 (1980) (quoting D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 328 (1971)). "The phrase 'inverse condemnation' generally describes a cause of action against a government defendant in which a landowner may recover just compensation for a 'taking' of his property under the Fifth Amendment, even though formal condemnation proceedings in exercise of the sovereign's power of eminent domain have not been instituted by the government entity. . . . In an 'inverse condemnation' action, the condemnation is 'inverse' because it is the landowner, not the government entity, who instituted the proceeding." San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 638 n.2 (1981) (Brennan, J., dissenting).

40. THE LAW OF PROPERTY, *supra* note 29, § 9.2, at 525 ("Beginning a decade ago [around 1974], however, the intermediate appellate courts of California began holding that, when a landowner successfully challenged a local land use ordinance as amounting to a *de facto* 'taking,' he was entitled to compensation as an alternative to simply obtaining a declaration that the ordinance was invalid . . . .").

41. Bauman, *supra* note 31, at 16 (the "urgent environmental revolution of the late 1960's and the 1970's . . . coupled with the parallel intensification of government regulation, has led unavoidably to legal clashes.").

42. One scholar has suggested that the courts of the 1970's were in the third of four periods or stages of land use control law. 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW: LAND USE AND THE POLICE POWER §§ 5.01-.06 (1974 & Supp. 1985) (summarized in Bauman, *supra* note 31, at 74-76). According to Williams, during stage one, "Pre-Zoning," the common law of nuisance governed land use regulation. 1 N. WILLIAMS, *supra*, § 5.02. Beginning with stage two, "Acceptance of the Zoning Principle," which dates from Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the leading case on zoning, the zoning of privately-owned land was held not to violate the fifth and fourteenth amendments. However, the burden of proof remained on the government to show the specific harm justifying any use restriction. 1 N. WILLIAMS, *supra*, § 5.03. Stage three, "Faith in Local Autonomy," was the majority rule

mental revolution and many of the regulations it engendered significantly benefitted the public.[43] However, the combination of increased regulation and a judicial "laissez faire" approach also brought serious negative consequences.

One such consequence was a land use regulation system aptly described as "Balkanized."[44] The system confronted the landowner with a bewildering array of uncoordinated regulatory processes. As one recent commentary put it:

> From every governmental office, bureau, department, board or commission, bureaucrats (often responding to no more than selfish demands of established neighborhood groups or single issue environmentalist constituencies) issue a series of decrees that can, and often do, transform a desirable and well thought out plan of land development into an economically infeasible fiasco. On rare occasions a court will come to the property owner's aid on particularly outrageous facts, but not with such reliability as to diminish the horrendous risk of such enterprises. . . . [A] property owner is no longer confronted merely with obtaining approval from one readily identifiable local regulatory entity operating under a single set of clear, coherent regulations. The historical dominance of this area of the law by zoning ordinances of towns and counties governing their own territories has been overlaid by a bureaucratic layer cake that ranges all the way from regional and state bodies . . . to bistate entities . . . federal agencies . . . [and] a multitude of mini-authorities, such as local wetlands and historical conservation districts.[45]

This complicated and fragmented system resulted in unacceptable levels of bureaucratic arrogance, excess and arbitrariness. Even commentators who favor land use controls acknowledge this negative aspect of increased regula-

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during the 1970's and early 1980's. It was characterized by a judicial presumption that land use regulations were valid; the burden of proving otherwise was on the property owner. *N. Williams, supra*, §§ 5.04, 6.03. Williams observed that:

> the underlying assumptions on local competence to govern, the disinterested integrity of local decisions, and the validity of local definitions of "the general welfare" [were] of course highly unrealistic in many situations. Yet, at the least, at this stage American communities [were] able to capture some control over the development of their environment . . . .

Id.

43. *See, e.g.*, Bauman, *supra* note 31, at 85. According to Bauman:

> Reasonable land use controls that are careful to take into account community responsibilities and individual rights are necessary for the wise growth of our vibrantly complex society, and they are here to stay. Just as any successful business or institution must plan for the future, so, too, must government. Land use plans and zoning provisions that are fairly adopted, substantively sensible, consistently reliable and, when necessary, amendable, pose a major threat to none but those few on society's fringes who are greedy for unjust power or riches. It should be evident by now that the question of public regulation of private land is not "whether" but "how" and "to what measure."

Id.

44. Berger & Kanner, *Thoughts on "The White River Junction Manifesto": A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A.L. REV. 685, 696 (1986).

45. *Id.* at 697-98.

tion. For example, five leading advocates of regulation admitted in a recent article that "a pervasive sin . . . is the practice, one might almost say the art, of delay, delay, equivocation and never-ending 'negotiation' that has characterized too many land use regulators. These actions are ubiquitous, vicious and devoid of any resemblance of procedural due process."[46] The same authors observed that "[the] assumption that local government is often arbitrary in dealing with the developers is by no means groundless. No one with first-hand experience in the field would deny that municipal caprice is far more common than it should be."[47]

Landowners began seeking compensation for regulatory takings because this complicated and arbitrary regulatory system made judicial invalidation of regulations a futile remedy.[48] When a regulation "took" their property rights, owners sought two principal goals: restoration of their right to use their land and redress for losses suffered while the regulation took this right away. The invalidation remedy failed in both respects.

Invalidation frequently failed to restore owners' property rights because regulators often responded to such judicial decrees with another regulation, in a seemingly endless cycle.[49] The regulators saw no need to be covert about this tactic: as one city attorney advised his fellows at a national conference, "IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN."[50] Regulatory bodies often followed this course because they wanted to prevent most or all development or use of the land they had regulated.[51] In this situation, invalidation amounted to a mere judicial slap-on-the-wrist, and regulators behaved accordingly.

Invalidation also failed to redress owners' economic losses, and the multiplication of regulators and regulations made this an increasing concern. During the time required to negotiate the regulatory maze, owners frequently suffered major economic damage. Delay brought increased construction costs, lost return on capital, continuing tax and mortgage payments, and the threat or even reality of foreclosure, none of which were remedied by mere invalidation of the regulation.[52]

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46. *The White River Junction Manifesto*, *supra* note 36, at 242-43.

47. *Id.* at 201-02.

48. *See, e.g.*, Bauman, *supra* note 31, at 46.

49. *See, e.g.*, Comment, *Just Compensation*, *supra* note 33, at 732-34.

50. Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, 38B NIMLO MUN. L. REV. 192-93 (1975) (emphasis in original) (quoted by Justice Brennan in San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 655 n.22 (1981) (Brennan, J., dissenting)).

51. *See, e.g.*, Delogu, *Local Land Use Controls: An Idea Whose Time Has Passed*, 36 ME. L. REV. 261, 279-80, 286-88 (1984); Bauman, *supra* note 39, at 69-70; Comment, *Just Compensation*, *supra* note 33, at 732-34. *See generally* R. BABCOCK, THE ZONING GAME (1966); R. BABCOCK & C. SIEMON, THE ZONING GAME REVISITED (1985).

52. *See, e.g.*, Comment, *Just Compensation*, *supra* note 33, at 734-37. For an illustrative case study of governmental arbitrariness and its potentially catastrophic fi-

The futility of invalidation had consequences beyond its impact on aggrieved landowners. Because invalidation provided no redress, developers had to cover the risk that regulations might deprive them of economically viable use of their property, a risk inherent in the uncertainty of regulatory takings law. They did so by increasing the return they required and passing on substantially increased costs to the consuming public.[53]

Prior to the Supreme Court's reentry into the area of regulatory takings law after a half-century-long absence,[54] the state of the law concerning the compensation question was confused and unclear. The states were split on the issue. Such states as Arizona,[55] California,[56] Connecticut,[57] Minnesota,[58] and New York[59] had refused a compensation remedy for regulatory takings, while such other states as Georgia,[60] Maryland,[61] Massachusetts,[62] Nebraska,[63] New

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nancial consequences, see *id.* at 740-45 (describing the regulatory results in Prince Georges County v. Blumberg, 44 Md. App. 79, 407 A.2d 1151 (1979), *modified on other grounds*, 288 Md. 275, 418 A.2d 1155 (1980), *cert. denied*, 449 U.S. 1083 (1981) (among other consequences, the landowners suffered a 10-year delay and a $1,500,000.00 increase in cost of capital)).

53. The New Jersey Supreme Court found that restrictive land use regulations had been responsible for increasing the average price of new single-family housing in one New Jersey area from $33,843 to $57,618. Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, ____ n.25, 456 A.2d 390, 441-42 n.25 (1983). *See generally* S. SEIDEL, HOUSING COSTS AND GOVERNMENT REGULATIONS: CONFRONTING THE REGULATORY MAZE (1978) (regulations frequently cause significant increases in the price of and reductions in the number of new housing units); Berger & Kanner, *supra* note 33, at 697 n.51 (citing one study which found that 18 to 20 percent of the cost of housing in the San Francisco Bay area was attributable to land use controls); Karlin, *Zoning and Other Land Use Controls: From the Supply Side*, 12 SW. U.L. REV. 561, 561-64 (1980-81) (land use regulation was a primary cause of the doubling, tripling, and even quadrupling of housing prices in California from 1975-1981).

54. Callies, *Supreme Court Report: Takings Clause—Take Three*, A.B.A. J., Nov. 1987, at 48; *see also* Bauman, *supra* note 31, at 17-18 ("[F]rom a historical perspective, the Court, by its own choosing, [was long] absent . . . from the land use control field — it heard no zoning case between 1928 and 1974 . . . ."); *The White River Junction Manifesto*, *supra* note 36, at 200 ("Once the United States Supreme Court had upheld zoning in principle in the 1920's, it remained aloof from the fray, and for nearly fifty years left zoning matters severely alone.").

55. Davis v. Pima County, 121 Ariz. 343, 590 P.2d 459, *cert. denied*, 442 U.S. 942 (1979), *overruled*, Corrigan v. City of Scottsdale, 149 Ariz. 538, 720 P.2d 513 (1986).

56. *Agins I*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

57. DeMello v. Town of Plainville, 170 Conn. 675, 368 A.2d 71 (1976).

58. McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980).

59. Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *appeal dismissed*, 429 U.S. 990 (1976).

60. Clifton v. Berry, 244 Ga. 78, 259 S.E.2d 35 (1979).

61. Prince Georges County v. Blumberg, 44 Md. App. 79, 407 A.2d 1151 (1979), *modified on other grounds*, 288 Md. 275, 418 A.2d 1155 (1980), *cert. denied*, 449 U.S. 1083 (1981).

Jersey,[64] Ohio,[65] and Texas[66] had been receptive to a compensation remedy. The situation was so confused that scholars differed as to whether a majority rule on the subject could be said to exist.[67]

B. *The Supreme Court and the Compensation Question*

1. Previous Supreme Court Attempts At An Answer

The Supreme Court approached the compensation issue four times between 1980 and 1986.[68] In each of the four cases involved, the Court said it had granted certiorari to answer the question of whether a damages remedy is required by the just compensation clause of the federal constitution in the case of a temporary regulatory taking.[69] In each of the four cases, the Court "backed away from a definitive ruling, believing the cases for one reason or another were not ripe for decision."[70]

Many commentators criticized the Court's decisions in these four cases for what they saw as indecisiveness.[71] Some thought the Court had in fact set

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62. Hamilton v. Conservation Comm'n, 12 Mass. App. 359, 425 N.E.2d 358 (1981).

63. State v. Mayhew Prods. Corp., 204 Neb. 266, 281 N.W.2d 783 (1979).

64. Sixth Camden Corp. v. Township of Evesham, 420 F. Supp. 709 (D.N.J. 1976).

65. Village of Willoughby Hills v. Corrigan, 29 Ohio St. 2d 39, 278 N.E.2d 658, *cert. denied*, 409 U.S. 919 (1972).

66. *See, e.g.*, City of Austin v. Teague, 556 S.W.2d 400 (Tex. Civ. App. 1977), *rev'd on other grounds*, 570 S.W.2d 389 (Tex. 1978); San Antonio River Auth. v. Garrett Bros., 528 S.W.2d 266 (Tex. Civ. App. 1975).

67. *Compare* Freilich, *Solving the "Taking" Equation: Making the Whole Equal the Sum of Its Parts*, 15 URB. LAW. 447, 448 n.4 (1983), *reprinted in* 15 LAND USE & ENV'T L. REV. 91, 92 n.4 (1984) (majority rule was to refuse compensation remedy) *with* Comment, *Just Compensation*, *supra* note 33, at 719 ("It is impossible to extract from state court decisions any coherent or consistent approach to the question of whether, and under what circumstances, a monetary inverse condemnation remedy should be available to property owners challenging zoning and other land use regulations.") *and* Berger, *Anarchy Reigns Supreme*, 29 WASH. U.J. URB. & CONTEMP. L. 39, 44-46 (1985) (the states were split; no majority rule existed).

68. Agins v. City of Tiburon, 447 U.S. 255 (1980) [hereinafter *Agins II*]; San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986).

69. *Agins II*, 447 U.S. at 257; *San Diego Gas*, 450 U.S. at 623; *Hamilton Bank*, 473 U.S. at 185; *MacDonald*, 106 S. Ct. at 2565-66; *see also MacDonald*, 106 S. Ct. at 2569 (White, J., dissenting) (resolving this question was the objective of the Court in *Agins I*, *San Diego Gas* and *Hamilton Bank*).

70. Weidenbach, *The Meaning of "First English" in the Context of Takings Clause Jurisprudence*, 28 MUN. ATT'Y, No. 4, at 6 (1987).

71. *See, e.g.*, Bauman, *Deja Vu, or Et Tu Supreme Court?*, 37 LAND USE L. & ZONING DIG., No. 7, at 3 (1985) ("most would agree that, from the institutional point of view, the Supreme Court has fallen down on the job"); Callies, *The Taking Issue Revisited*, 37 LAND USE L. & ZONING DIG., No. 7, at 6 (1985) (*Hamilton Bank* re-

"a record for futility by deciding four cases without once reaching the issue for which review was granted."[72] Some suggested that the reason for the hesitancy the Court displayed may have been a degree of rustiness and inexperience with land use regulation cases.[73] They also called for an end to the hesitation. As one author put it:

> This could, at one time, have been viewed as an illustration of the Supreme Court's preference for permitting thorough lower court disputation in search of consensus or, at least, the airing of all possible views. The situation [by 1985], however, approaches abdication of the duty to decide cases. There will be no consensus. Competing views have been aired. There is a clear conflict among the federal courts of appeals on what constitutional law requires. The states are irreconcilably split. It is time for a definitive answer.[74]

A brief survey of the Court's holdings in these four cases will aid clear understanding of the Court's ruling in *First English.*

The plaintiffs in *Agins v. City of Tiburon*[75] owned five acres of unim-

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ferred to as "this latest non-decision"); *Avoiding the Taking Issue: Criticisms of the Supreme Court's "MacDonald" Case*, 38 LAND USE L. & ZONING DIG., No. 9, at 3 (1986) (at the 1986 Land Use Institute, speakers criticized the Court as mediocre in general, lacking in understanding of land use regulations, even as intellectually dishonest).

72. Sallet, *Regulatory "Takings" and Just Compensation: The Supreme Court's Search for a Solution Continues*, 18 URB. LAW. 635, 655 (1986); *see also* Berger, *Anarchy Reigns Supreme*, 29 WASH. U.J. URB. & CONTEMP. L. 39 (1985) (*Agins II*, *San Diego Gas* and *Hamilton Bank* belong to the "pantheon of indecision"); Deutsch, *supra* note 21, § 1.02(1)(b) ("The cases as a group may set a Supreme Court record for futility in attempting to provide a definitive answer to a major issue.").

73. One commentator wrote:

> [F]rom a historical perspective, the Court, by its own choosing, has been absent for so long from the land use control field — it heard no zoning cases between 1928 and 1974 — that it has had difficulty adjusting to new land use realities and seeing through the maze of appellate arguments. Having decided the constitutional appropriateness of zoning in 1926, the Court has been content to let the lower, largely state, courts flesh out the skeleton. Now that the Supreme Court has reentered the field in the past several years, presumably because of perceived abuses, it may take more time than anticipated for the Court to "get up to speed" with the lower courts' experience.

Bauman, *supra* note 31, at 17-18. Other commentators observed that "What is most striking (but not entirely unexpected) about the recent spate of decisions is the extraordinary degree of inexperience and even naivete which the Court has demonstrated in handling land use issues." *The White River Junction Manifesto*, *supra* note 36, at 200; *see also* Bauman, *supra* note 31, at 71.

74. Berger, *supra* note 72, at 46 n.39 (citations omitted).

75. 447 U.S. 255 (1980) [*Agins II*]. For a discussion of *Agins II*, see generally Bayerd, *Inverse Condemnation and the Alchemist's Lesson: You Can't Turn Regulations Into Gold*, 21 SANTA CLARA L. REV. 171 (1981); Ciamporcero, *"Fair" Is Fair: Valuing the Regulatory Taking*, 15 U.C. DAVIS L. REV. 741 (1982); Gordon, *Compensable Regulatory Taking: A Tollbooth Rises on Regulation Road*, 12 REAL EST. L.J. 211 (1983); Kelso, *Substantive Due Process as a Limit on Police Power Regulatory Takings*, 20 WILLAMETTE L. REV. 1 (1984); Levin & Gergacz, *Open Space Zoning: Agins v. City of Tiburon*, 19 AM. BUS. L.J. 493 (1982); Mandelker, *supra* note 32, at

proved ridgeland overlooking San Francisco Bay, which they had acquired for residential development.[76] After a consultants' report recommended acquisition of a substantial part of the ridgeland overlooking the Bay as "open space," the City of Tiburon issued bonds for that purpose and rezoned plaintiffs' property to restrict its use to a maximum of five single-family dwellings or accessory buildings or to open space use.[77] Rather than submitting a development plan limited to what the new regulations allowed, the Agin's sued the City.[78] They sought compensation for destruction of the value of their property by the regulations and invalidation of the regulations as violative of the just compensation clause of the fifth amendment.[79]

The California trial court dismissed both claims.[80] On appeal, the California Supreme Court held that compensation was not an available remedy for the effect of a land use regulation.[81] It stated that where a regulation substantially limits the use of property, the landowner "may challenge both the constitutionality of the ordinance and the manner in which it is applied to his property by seeking . . . declaratory relief or mandamus, [but] he may not recover damages on the theory of inverse condemnation."[82] The state high court also found declaratory relief unwarranted, holding that the regulations were not facially unconstitutional because they did not deprive plaintiffs of

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491; Payne, *California Downzoning Controversy to Reach the U.S. Supreme Court*, 9 REAL EST. L.J. 48 (1980); Rose & Kanner, *When Are Environmental Restrictions On Land Use Compensable?*, 9 REAL EST. L.J. 233 (1981); Sallet, *The Problem of Municipal Liability for Zoning and Land-Use Regulation*, 31 CATH. U.L. REV. 465 (1982); Shedd, *Inverse Condemnation: Will the Supreme Court Allow It?*, 9 REAL EST. L.J. 336 (1981); Note, *Agins v. City of Tiburon*, 68 CALIF. L. REV. 822 (1980); Note, *Municipal Open-Space Ordinance Not a "Taking" of Property*, 13 CONN. L. REV. 167 (1980); Note, *Agins v. City of Tiburon: A Balancing Framework For "Takings" Challenges of Zoning Ordinances*, 1981 DET. C.L. REV. 179; Note, *Agins v. City of Tiburon*, 11 ENVTL. L. 755 (1981); Note, *Open-Space Zoning and the Taking-Clause: A Two-Part Test*, 46 MO. L. REV. 868 (1981); Note, *Supreme Court Fails to Reach Inverse Condemnation Issue*, 21 NAT. RESOURCES J. 169 (1981); Note, *Agins v. City of Tiburon: An Aggrieved Party-Loss of Inverse Condemnation Actions in Zoning Ordinance Disputes*, 7 PEPPERDINE L. REV. 457 (1980); Note, *Agins v. City of Tiburon: Open Space Zoning Prevails: Failure to Submit Master Plan Prevents a Cognizable Decrease in Property Value*, 8 PEPPERDINE L. REV. 839 (1981); Note, *Filling In the Pennsylvania Coal Mine: Agins v. City of Tiburon and Supreme Court Approval of Space Zoning*, 1981 WIS. L. REV. 790. For a discussion of *Agins I*, see generally Note, *Agins v. City of Tiburon: The Case of the Frustrated Landowner*, 13 LOY. L.A.L. REV. 157 (1979).

76. *Agins II*, 447 U.S. 255, 257-58 (1980).

77. *Agins I*, 24 Cal. 3d 266, 270-71, 598 P.2d 25, 27, 157 Cal. Rptr. 372, 374 (1979). The city also sought to acquire the Agins's land via eminent domain, but later abandoned those proceedings. *Id.* at 271, 598 P.2d at 27, 157 Cal. Rptr. at 374.

78. *Id.*

79. *Id.*

80. *Id.* at 272, 598 P.2d at 27-28, 157 Cal. Rptr. at 374-75.

81. *Id.* at 273, 598 P.2d at 28, 157 Cal. Rptr. at 375.

82. *Id.* at 269-70, 598 P.2d at 28, 157 Cal. Rptr. at 373.

"substantially all reasonable use" of their property.[83]

The United States Supreme Court held that the issue of whether the regulation had effected a taking of plaintiffs' property was not ripe for judicial review. Since the regulation permitted some development and the landowners had not submitted a development plan limited to the level of development allowed, no plan had been rejected. The Court found that a concrete controversy was lacking as to whether the application of the regulation to the property worked a taking.[84] The Court also held that mere enactment of the regulation was not a taking on its face.[85] It reached this conclusion by finding that, prima facie, the regulation met a two-part test: it substantially advanced a legitimate state interest, and did not deny the owners' economically viable use of their land.[86]

Because the Court found no taking as the case was presented, it did not consider "whether a State may limit the remedies available to a person whose land has been taken without just compensation."[87] This result left standing the California State Supreme Court holding in *Agins I* that compensation is not available for the effect of a land use regulation.[88] The bases for the California decision on compensation are worth noting, since the Supreme Court addressed them when it finally faced the compensation issue in *First English.*

The California high court argued that a regulation that "goes too far"[89] is not only an *invalid* exercise of the police power, because it is unreasonable and arbitrary, but also an *invalid* exercise of the eminent domain power, because compensation is not provided.[90] Therefore, the high court asserted, compensation is not an available remedy for a regulation that goes too far, since allowing this would "transmute an *excessive* use of the police power into a *lawful* taking for which compensation in eminent domain must be paid."[91] The

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83. *Id.* at 277, 598 P.2d at 31, 157 Cal. Rptr. at 378.
84. *Agins II*, 447 U.S. 255, 260 (1980).
85. *Id.* at 260-62.
86. *Id.* at 260. The full test applied by the Court can be outlined as follows:
(1) the regulation substantially advanced a legitimate state interest, and
(2) the regulation did not deny the owner economically viable use of his land, since
(a) it benefitted the owner as well as the public, and this offset the diminution in value of the land, and
(b) it did not frustrate the owner's reasonable investment expectations, because 1) the best use of the land was not prohibited, and 2) no fundamental attribute of ownership was extinguished.
Id. at 261-63.
87. *Id.* at 263.
88. *Agins I*, 24 Cal. 3d 266, 269-70, 598 P.2d 25, 26, 157 Cal. Rptr. 372, 373 (1979).
89. *Id.* at 274, 598 P.2d at 29, 157 Cal. Rptr. at 376 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).
90. *Id.* at 272, 598 P.2d at 28, 157 Cal. Rptr. at 375 (citing with approval 1 NICHOLS, EMINENT DOMAIN § 1.42(1), at 116-21 (3d rev. ed. 1975)).
91. *Id.* at 273, 598 P.2d at 26, 157 Cal. Rptr. at 375 (emphasis added).

only remedies allowed for regulations that go too far are declaratory relief and mandamus.[92]

Two policy considerations were also cited as a basis for the California ruling that inverse condemnation is "an inappropriate and undesirable remedy" for a regulatory taking.[93] First:

> [C]ommunity planners must be permitted the flexibility which their work requires . . . . [I]f a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use . . . , the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land.[94]

Second, a compensation remedy

> would have a chilling effect upon the exercise of police regulatory powers at a local level because the expenditure of public funds would be, to some extent, within the power of the judiciary. "This threat of unanticipated financial liability will intimidate legislative bodies and will discourage the implementation of strict or innovative planning measures in favor of measures which are less stringent, more traditional, and fiscally safe."[95]

The dissent in *Agins I* argued that invalidation alone was so insufficient as to amount to a "non-remedy" for landowners.[96] It pointed out that where only invalidation is available, even property owners who win in court must lose the interim use of their land, often for years, and carry the burden of formidable legal costs.[97] Further, invalidation may not end the matter. As the dissent put it, "there is nothing to prevent the governmental agency from reenacting a modified ordinance compelling a second or even a third proceeding—a burden exceeding bare possibility in view of the majority's invitation to oppressive land use limitation."[98] As a consequence, the dissent predicted, many small landowners would be "economically unable to challenge even a confiscatory enactment," and be forced to "walk away from their properties."[99]

The dissent also noted the discriminatory effect often caused by un-

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92. *Id.* at 270, 272-73, 598 P.2d at 26, 28, 157 Cal. Rptr. at 373-75. In other words, according to the California Supreme Court, if the government takes your property legally, it has to pay you for it; but if it takes your property illegally, you get nothing — and the reason you get nothing is that the government's action was illegal, unreasonable, and arbitrary!

93. *Id.* at 275, 598 P.2d at 29-30, 157 Cal. Rptr. at 376.

94. *Id.* at 275, 598 P.2d at 30, 157 Cal. Rptr. at 377 (quoting Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 120, 514 P.2d 111, 117, 109 Cal. Rptr. 799, 805 (1973)).

95. *Id.* at 276, 598 P.2d at 30, 157 Cal. Rptr. at 377 (quoting Hall, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?*, 28 HASTINGS L.J. 1569, 1597 (1977)).

96. *Id.* at 283, 598 P.2d at 35, 157 Cal. Rptr. at 382 (Clark, J., dissenting).

97. *Id.* (Clark, J., dissenting).

98. *Id.* (Clark, J., dissenting).

99. *Id.* (Clark, J., dissenting).

checked land use regulations.[100] When cities and agencies "price properties within their control out of reach to most people," only the wealthiest can afford land or construction.[101] "The environment which [such cities] seek[] to preserve will disproportionately benefit that wealthy landowner, whose home will be surrounded by open space, unobstructed view and unpolluted atmosphere."[102]

The dispute in *San Diego Gas & Electric Co. v. City of San Diego*[103]

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100. *Id.* at 283-84, 598 P.2d at 35, 157 Cal. Rptr. at 382 (Clark, J., dissenting). A number of scholars have noted that increased land use regulation often masks or fosters race and class discrimination. One treatise cites the "opportunity to zone out 'undesirables,' such as poor minorities, by zoning that increases the cost of land and housing" as a basic reason for the widespread adoption of zoning in the United States. D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 47, at 90-91 (1975). *See generally id.*, ch. 18, "Race, Poverty, and Planning and Development Control Law: Past Present, and Future." As Justice Mosk of the California Supreme Court observed, "No one has ever devised an ordinance to preserve an urban ghetto or crowded central city environment; it is always to protect the outer city, the suburb, the middle or upper class housing development." Mosk, *Finding A Direction For Our Environment*, BARRISTER, Spring, 1976, at 18. In his treatise on American land planning law, Williams cites a "built-in bias towards both fiscal zoning and exclusionary zoning" as a major shortcoming of the land use control system. 1 WILLIAMS, *supra* note 42, § 5.04.

The regulations that achieve this objective are often promoted as protecting the environment. One scholar observed that

> Suburban exclusionary zoning in recent years has moved toward keeping out not only the poor and minorities but often times moderate income whites as well by the increasingly effective method of clothing highly questionable land use practices in the respectable language of environmental protection. . . . Whenever our nation's environmental priorities of halting pollution and conserving critical assets and resources are transposed to the seemingly more mundane world of local zoning and subdivision control, the regrettable effect all too often is a distortion of environmental concern to the exclusion of legitimate land uses, such as lower priced housing. This lends a special urgency to the raising of taking issue as a constitutional matter.

Bauman, *supra* note 31, at 90.

101. *Agins I*, 24 Cal. 3d at 283, 598 P.2d at 35, 157 Cal. Rptr. at 382.

102. *Id.*

103. 450 U.S. 621 (1981). For a discussion of *San Diego Gas*, see generally Bauman, *supra* note 31, at 15; Blume & Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569 (1984); Ciamporcero, *"Fair" Is Fair: Valuing the Regulatory Taking*, 15 U.C. DAVIS L. REV. 741 (1982); Freilich, *supra* note 33, at 447; Glink, *New Developments in Land Use and Environmental Regulation*, 1984 PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 1; Gordon, *Compensable Regulatory Taking: A Tollbooth Rises on Regulation Road*, 12 REAL EST. L.J. 211 (1983); Kmiec, *Regulatory Takings: The Supreme Court Runs Out of Gas in San Diego*, 57 IND. L.J. 45 (1982); Noel, *Just Compensation: The Constitutionally Required Remedy for Regulatory Takings*, 55 U. CIN. L. REV. 1237 (1987); Payne, *The Supreme Court Tries Again On Regulatory Takings*, 10 REAL EST. L.J. 252 (1982); Sallet, *The Problem of Municipal Liability for Zoning and Land-Use Regulation*, 31 CATH. U.L. REV. 465 (1982); Stoebuck, *San Diego Gas: Problems, Pitfalls and a Better Way*, 25 WASH. U.J. URB. & CONTEMP. L. 3 (1983);

involved land in San Diego which the plaintiff utility had purchased as a possible nuclear power plant site while much of the property was zoned for industrial use.[104] The City then rezoned the property, reducing the industrial-use acreage and imposing an open-space plan on most of the land.[105] In a suit against the City, the utility alleged violation of the just compensation clause of the fifth amendment, and sought both compensation and prospective invalidation of the regulations.[106] A verdict awarding damages to the utility was affirmed by the California Court of Appeals.[107] The California Supreme Court, after granting the City's petition for a hearing, retransferred the case to the court of appeals for reconsideration in light of the intervening holding in *Agins I* that compensation was not available as a remedy for regulatory takings.[108] The court of appeals then applied the *Agins I* rule, and threw out the damage award.[109] After the state high court denied further review, the utility appealed to the United States Supreme Court.

The United States Supreme Court dismissed the case for want of jurisdiction due to the "absence of a final judgment."[110] The Court said it was well established that a state high court decision is not final if it holds that a taking occurred but that further proceedings are required to determine what compensation is due.[111] The state decision in *San Diego Gas* also was not final, the Court said, because it presented the reverse situation: the state courts had decided that compensation was not available, but would allow further proceedings to determine whether a taking had occurred for which invalidation was available as a remedy.[112]

In *Williamson County Regional Planning Commission v. Hamilton Bank*,[113] the Bank claimed that the Planning Commission had violated the just

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The White River Junction Manifesto, *supra* note 36, at 183; Note, *Land Use Regulation As a "Taking" of Property: Proposals For Reform*, 8 J. LEGIS. 278 (1981); Note, *A Regulation Gone Too Far?*, 2 N. ILL. U. L. REV. 143 (1981); Note, *Takings Law: Is Inverse Condemnation An Appropriate Remedy for Due Process Violations?*, 57 WASH. L. REV. 551 (1982).

104. *San Diego Gas*, 450 U.S. 621, 624 (1981).

105. *Id.* at 624-26.

106. *Id.* at 625-26.

107. *Id.* at 626-27.

108. *Id.* at 628.

109. *Id.* at 629-30.

110. *Id.* at 623, 630.

111. *Id.* at 632-33.

112. *Id.* One commentator suggests that the "non-result" in *San Diego Gas* may have happened because the majority Justices misunderstood the California procedural rules which affected the case. Bauman, *supra* note 31, at 72-73.

113. 473 U.S. 172 (1985). For a discussion of *Hamilton Bank*, see generally Bauman, *Hamilton Bank — The Supreme Court Says: Don't Make a Federal Case Out of Zoning Compensation*, 8 ZONING & PLAN. L. REP. 137 (1985); Berger, *supra* note 72, at 39; Sallet, *Regulatory "Takings" and Just Compensation: The Supreme Court's Search for a Solution Continues*, 18 URB. LAW. 635 (1986); Salsich, *Supreme Court Again Refuses to Resolve Land Use Taking Question*, 14 PROB. & PROP. 25 (1985); Smith, *The Hamilton Bank Decision: Regulatory Inverse Condemnation*

compensation clause of the fifth amendment in applying a number of zoning regulations to land the Bank owned and was developing as residential property.[114] A federal jury verdict awarding damages to the Bank, overturned by the trial judge on judgment notwithstanding the verdict, was reinstated by the Sixth Circuit.[115] That court held that a temporary denial of the use of property caused by a regulation could be a taking, and that damages were required to compensate such takings.[116] The Commission appealed that ruling to the United States Supreme Court.[117]

In its *Hamilton Bank* opinion, the Supreme Court announced that the Bank's claim was not ripe for judicial review.[118] In doing so, the Court put two new procedural barriers in the way of bringing a successful regulatory taking claim in federal court. The Court said that such a claim is not ripe for federal litigation until the landowner (1) obtains a final decision by the regulatory body regarding the application of regulation to the property, including a decision on waiver or variance applications, and (2) seeks compensation through state litigation if the state provides an adequate procedure for doing so.[119] According to the Court, the Bank's claim was not ripe because it had done neither of these things.[120]

The Court gave two reasons for imposing these procedural requirements. The first was that the Court regarded "the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations" as significant to determining whether a taking had occurred.[121] The Court held that these factors "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."[122] The second reason involved the abstention doctrine. The Court stated that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause [in federal court] until it has used the [state] procedure and been denied just com-

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Claims Encounter Some New Obstacles, 29 WASH. U.J. URB. & CONTEMP. L. 3 (1985); Sterk, *Government Liability for Unconstitutional Land Use Regulation*, 60 IND. L.J. 113 (1984); Note, *Ripeness for the Taking Clause: Finality and Exhaustion in Williamson County Regional Planning Commission v. Hamilton Bank*, 13 ECOLOGY L.Q. 625 (1986).

114. *Hamilton Bank*, 473 U.S. 172, 175 (1985).

115. *Id.* at 183-84.

116. *Id.* at 184.

117. *Id.* at 185.

118. *Id.* at 186.

119. *Id.* at 186-94. For a discussion of the exhaustion requirement in the context of land use regulations, see generally Morgan, *Exhaustion of Administrative Remedies as a Municipal Defense to Inverse Condemnation Actions*, 1985 INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN § 9.1.

120. *Hamilton Bank*, 473 U.S. at 186.

121. *Id.* at 191.

122. *Id.*

pensation."[123] This is so because "the State's action here is not 'complete' until the State fails to provide adequate compensation for the taking."[124]

The Court distinguished the finality requirement it imposed from both exhaustion of administrative remedies and legal proceedings seeking invalidation of the regulation.[125] Neither exhaustion nor a request for invalidation, it said, is a prerequisite to an inverse condemnation action.[126] Exhaustion involves procedures offering review of the regulatory body's decision, whereas the finality required for ripeness involves procedures that either establish the definitive position of the regulatory body as to application of the regulation to the property involved, or allow compensation to be sought for a taking.[127] While use of review procedures is not prerequisite to federal litigation, use of position-defining or compensation-seeking procedures is.[128]

The plaintiff in *MacDonald, Sommer & Frates v. Yolo County*[129] sued for compensation and declaratory relief after the county planning commission rejected a subdivision proposal concerning the plaintiff's land.[130] The suit claimed that the county intended to restrict the land to agricultural or open space use by denying approval for all development plans, and in effect preventing the "entire economic use" of the property.[131] It also alleged that any application for variances or other relief would be futile.[132] The California trial court dismissed the complaint, rejecting the compensation claim on the basis of the *Agins I* holding that compensation is not available for regulatory takings.[133] The state appellate and high courts affirmed the dismissal, and appeal to the Supreme Court followed.[134]

In its *MacDonald* opinion, the Supreme Court once again found the compensation issue not ripe for decision. It announced that "on further consideration of our jurisdiction to hear this appeal . . . we find ourselves unable to address the merits of [the compensation] question."[135]

The Court asserted that a regulatory taking claim has two components, the first being a showing that "the regulation has in substance 'taken' property—that is that the regulation 'goes too far.' "[136] With regard to this first component, the *MacDonald* Court essentially followed the holding of *Hamil-*

123. *Id.* at 195.
124. *Id.*
125. *Id.* at 192-93; *see also id.* at 194 n.13.
126. *Hamilton Bank*, 473 U.S. at 192-93.
127. *Id.* at 194 n.13.
128. *Id.*
129. 106 S. Ct. 2561 (1986).
130. *Id.* at 2563.
131. *Id.* at 2563-64.
132. *Id.* at 2564.
133. *Id.*
134. *Id.* at 2565.
135. *Id.* at 2566.
136. *Id.* (footnote omitted) (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

ton Bank. As the Court put it, a final determination by the regulatory authority of the "type and intensity of development legally permitted" on the property under the regulation is a prerequisite to assertion of a regulatory takings claim because "a court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."[137] Because such a final decision had not been obtained by the plaintiff in *MacDonald*, the Court was "in doubt regarding the antecedent question whether . . . property ha[d] been taken."[138]

The second component of a regulatory taking claim, according to the *MacDonald* majority, is a demonstration that "any proffered compensation is not just."[139] The Court mentioned transfer development rights and tax remissions as possible examples.[140] The discussion of this point was dictum, since no compensation had been proffered in the case, and the second component did not figure in the holding.[141] However, the Court did appear to suggest that such alternatives to monetary damages might satisfy the just compensation clause.

2. Brennan's Dissent in *San Diego Gas*

The most consequential feature of the Court's four abortive attempts at answering the compensation question was the regulatory takings theory enunciated in Justice Brennan's dissent in *San Diego Gas*.[142] After disposing of the majority's notion that the California courts had not decided whether a regulatory taking had occurred,[143] Brennan reached the taking issue for which cer-

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137. *Id.* This ripeness requirement is not, however, unlimited. The Court declared, "A property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this determination" of what use will be allowed under the regulation. *Id.* at 2567 n.7.

138. *Id.* at 2568-69. The Court commented that the landowner had alleged "only one intense type of residential development," and that the owner "could [still] seek an administrative application of the [regulations] which . . . would allow development to proceed." *Id.* at 2568 n.8. It also observed that "rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *Id.* at 2569 n.9.

139. *Id.* at 2566.

140. *Id.* at 2567. These forms of compensation had been discussed in dictum in Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 112-15, 112 n.13 (1978).

141. *MacDonald*, 106 S. Ct. at 2567-69.

142. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 636 (1981) (Brennan, J., dissenting).

143. "[T]he Court of Appeal held that the city's exercise of its police power, however arbitrary or excessive, could not *as a matter of federal constitutional law* constitute a 'taking' under the Fifth and Fourteenth Amendments, and therefore that there was no 'taking' without just compensation in the instant case." *San Diego Gas*, 450 U.S. at 639 (Brennan, J., dissenting) (emphasis in original). Brennan observed that the possibility of retrial on remand was based on the notion that the landowner might allege "overzealous use of the police power," a different constitutional theory. *Id.* at 643. Findings of fact relevant to that theory, Brennan noted, would "have no bearing

tiorari had been granted. Since the dissent had considerable effect on subsequent lower federal and state court opinions,[144] and was cited with approval in *First English*,[145] it is worth considering in some detail.

Brennan first addressed the issue of whether a valid police power regulation can ever effect a fifth amendment taking, an issue implicit in the basic question of whether a government entity must compensate when a regulation works a taking.[146] The California Supreme Court had ruled in *Agins I*[147] that a police power regulation could never constitute a taking within the meaning of the fifth amendment. Brennan found that this idea "flatly contradicts clear precedents of this Court."[148]

The principle running through these precedents, said Brennan, derived from *Pennsylvania Coal Co. v. Mahon*.[149] In *Mahon* the Court had declared, "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a 'taking.' "[150] Brennan noted the *Mahon* Court's acknowledgment that "government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[151] Nevertheless, Brennan maintained the *Mahon* Court "rejected the proposition that police power restrictions could never be recognized as a Fifth Amendment 'taking.' "[152]

Brennan rejected the interpretation of *Mahon*, advanced by advocates of increased regulation, that says the *Mahon* Court used the word "taking" metaphorically.[153] Under this view, the real challenge to the regulation in *Mahon*,

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on a Fifth Amendment 'taking' claim." *Id.* Brennan concluded that "[i]t is clear that the California Supreme Court has held that California courts in a challenge, as here, to a police power regulation, are barred from holding that a Fifth Amendment '*taking*' requiring just compensation has occurred." *Id.* at 642 (emphasis in original).

144. *See infra* notes 176-191 and accompanying text.

145. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2386, 2386 n.9, 2388 (1987).

146. *San Diego Gas*, 450 U.S. at 646-47 (Brennan, J., dissenting).

147. 24 Cal. 3d 266, 272-73, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979).

148. *San Diego Gas*, 450 U.S. at 647. Brennan cited *Agins II*, 447 U.S. 255 (1980); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), and other cases.

149. 260 U.S. 393 (1922).

150. *Id.* at 416.

151. *Id.* at 413.

152. *San Diego Gas*, 450 U.S. 621, 650 (1981). As Brennan observed, the *Mahon* court found that the regulation in that case effected a taking. *Id.*

153. *See, e.g.*, Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 198 (1985) ("Those who argue that excessive regulation should be considered a violation of the Due Process Clause rather than a 'taking' assert that *Pennsylvania Coal* used the word 'taking' not in the literal Fifth Amendment sense, but as a metaphor for actions having the same effect as a taking by eminent domain."). Obviously, if one wishes to rule out compensation for the effects of any and all police power regulations, one must advance some such device for distinguishing away *Mahon*,

and the basis of the ruling, was that the regulation was an invalid exercise of the police power under the fourteenth amendment due process clause. Brennan observed that "in addition to tampering with the express language of [*Mahon*], this view ignores the [property owner's] repeated claim before the Court that the [regulation] took its property without just compensation."[154]

Precedent also established, said Brennan, that regulatory takings are "essentially similar" to other takings.[155] As the Court had previously announced:

> It would be a very curious and unsatisfactory result, if in construing [the just compensation clause] . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can in effect subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use.[156]

Brennan observed that police power regulations "can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property."[157] Brennan labelled as irrelevant the theory that police power regulations do not effect takings because the government does not intend to take property through the regulation. As he put it, "[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does."[158]

According to Brennan, the test for when a police power regulation has "gone too far" and thus worked a taking, is whether "the effects [of the regulation] completely deprive the owner of *all or most* of his interest in the property."[159]

Brennan next addressed the question of whether compensation is the required remedy for a regulatory taking. He found a clear constitutional answer: "[O]nce a court establishes that there was a regulatory 'taking,' the Constitution demands that the government pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation."[160] In Brennan's view, this result is compelled by the express language and self-executing character of the fifth amendment.

> As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner

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the leading case concerning regulatory takings.

154. *San Diego Gas*, 450 U.S. 621, 649 n.14 (1981).

155. *Id.* at 651.

156. Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177-78 (1871) (emphasis in original).

157. *San Diego Gas*, 450 U.S. at 652.

158. *Id.* at 653 (quoting Hughes v. Washington, 389 U.S. 290, 298 (1967) (Stewart, J., concurring)).

159. *Id.* (emphasis added).

160. *Id.*

> has *already* suffered a constitutional violation, and "the self-executing character of the constitutional provision with respect to compensation," is triggered. This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a "taking," compensation *must* be awarded.[161]

Brennan maintained that invalidation alone "would fall far short" of the demands of the just compensation clause, which is designed to prevent the government from forcing "some individuals to bear burdens which, in all fairness, should be borne by the public as a whole."[162] Since police power regulations must be based on advancement of the public health, safety, morals or general welfare, the public "receives a benefit while the offending regulation is in effect."[163] If a valid police power regulation deprives a property owner of all or most of the use and enjoyment of his property and thus meets the test for a regulatory taking, fairness demands that "the public bear the cost of benefits received during the interim period between application of the regulation and the government entity's rescission of it."[164]

Brennan declared that "the fact that a regulatory 'taking' may be temporary, by virtue of the government's power to rescind or amend the regulation, does not make it any less of a constitutional 'taking.' "[165] He noted that the just compensation clause does not say that only permanent or irrevocable takings are to be compensated, and that the Court had long recognized that temporary takings are subject to the same constitutional analysis as permanent takings.[166]

Brennan stated that "the applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive, or judicial branches."[167] Therefore, he maintained, the California Supreme Court was wrong in deciding *Agins I* on the policy basis that just compensation is undesirable in regulatory takings cases.[168] Brennan took note of suggestions by land use planning commentators that the "threat of financial liability for unconstitutional police power regulations would help to produce a more rational basis of decisionmaking" through appli-

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161. *Id.* at 654 (quoting United States v. Clarke, 445 U.S. 253, 257 (1980), which quotes 6 J. SACKMAN, NICHOLS' LAW OF EMINENT DOMAIN § 25.41 (rev. 3d ed. 1980)) (emphasis in original).

162. *Id.* at 656.

163. *Id.*

164. *Id.* at 656-57.

165. *Id.* at 657.

166. *Id.*

167. *Id.* at 661.

168. *Agins I*, 24 Cal. 3d 266, 275, 598 P.2d 25, 29, 157 Cal. Rptr. 372, 376 (1979). The California Supreme Court had argued that compensation was undesirable because of the need for flexibility in land use planning, and the potential chilling financial effect of a compensation remedy on regulators. *See supra* notes 93-95 and accompanying text.

cation of cost-benefit analysis.[169] He commented that:

> [S]uch liability might also encourage municipalities to err on the constitutional side of police power regulations, and to develop internal rules and operating procedures to minimize overzealous regulatory attempts. After all, if a policeman must know the Constitution, then why not a planner? In any event, one may wonder as an empirical matter whether the threat of just compensation will greatly impede the efforts of planners.[170]

Justice Brennan's proposed regulatory takings doctrine can be summarized as follows. When government regulations deprive a landowner of all or most of the use and enjoyment of his property, the regulation has worked a fifth amendment taking.[171] When that occurs, a remedy in damages is compelled by the just compensation clause of the federal Constitution.[172] If the regulating entity chooses to rescind the regulation, the government must compensate only for the period during which the regulation temporarily "took" the property.[173]

The logic and fairness of Brennan's opinion compelled acknowledgment even by pro-regulation commentators. As one opponent of the compensation remedy observed:

> On a theoretical basis as well, Justice Brennan's position has greater analytical force than do the [regulators'] contentions . . . . The [pro-regulation] contention that physical invasion or the invocation of eminent domain proceedings are the sole methods of 'taking' is based on a distinction that is at odds with economic reality. Landowners whose properties are seized by the government may suffer no greater financial harm than landowners who are told, by means of open-space plans, that they may not develop their property in any manner. Yet the [regulators'] view of the fifth amendment would establish a constitutional distinction based precisely on that difference.[174]

That logic and fairness, coupled with the fact that there were, arguably, five votes on the Court for the Brennan opinion,[175] soon proved influential with the lower federal and state supreme courts. The predominant trend in regula-

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169. *San Diego Gas*, 450 U.S. 621, 661 n.26 (1981).
170. *Id.* (citations omitted).
171. *Id.* at 653.
172. *Id.*
173. *Id.* at 658.
174. Sallet, *The Problem of Municipal Liability for Zoning and Land-Use Regulation*, 31 CATH. U.L. REV. 465, 477 (1982). In spite of this recognition, Sallet argued that policy considerations, including financial risk to local governments and a chilling effect on land use regulation in general, should outweigh Brennan's arguments. *Id.* at 477-78.
175. The Brennan dissent had carried four votes, those of Justices Brennan, Stewart, Marshall and Powell. *San Diego Gas*, 450 U.S. at 636. The "fifth vote" was that of Justice Rehnquist. In his concurring opinion, Rehnquist observed that if he had been satisfied that a final decision had been made concerning application of the regulation to the property in the case, he "would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan." *Id.* at 633-34.

tory takings cases decided in those courts after *San Diego Gas* was to apply the Brennan doctrine.[176] The Fifth,[177] Sixth,[178] Seventh,[179] Eighth,[180] Ninth,[181] and Eleventh[182] Circuits, the United States Claims Court,[183] and the highest

176. *See* Bauman, *supra* note 31, at 47; Berger & Kanner, *supra* note 33, at 696; Freilich & Pal, *New Developments in Land Use and Environmental Regulation*, PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN § 1.02 (1985) ("It is significant to note that a growing number of federal and state appellate courts are endorsing Justice Brennan's dissent in *San Diego Gas & Electric Co. v. City of San Diego* and are recognizing that temporary regulatory interferences with property can be a compensable taking."); *see also* Morgan, *supra* note 119, § 9.01(1).

177. Hernandez v. City of Lafayette, 643 F.2d 1188, 1198-1200 (5th Cir. 1981) (fifth circuit "reassured" of correctness of its view that a damages remedy is required for regulatory takings under Brennan's *San Diego Gas* opinion), *cert. denied*, 455 U.S. 907 (1982).

178. United States v. Riverside Bayview Homes, Inc., 729 F.2d 391, 398 (6th Cir. 1984) (well established that regulation can effect taking; Brennan opinion cited for rationale), *rev'd on other grounds*, 474 U.S. 121 (1985); Hamilton Bank v. Williamson County Regional Planning Comm'n, 729 F.2d 402, 408-09 (6th Cir. 1984) (Brennan opinion represents view of majority of Supreme Court; sixth circuit agrees and holds compensation must be paid for regulatory taking), *rev'd on other grounds*, 473 U.S. 172 (1985).

179. Barbian v. Panagis, 694 F.2d 476, 482 nn.5-6 (7th Cir. 1982) (Brennan opinion is view of Supreme Court majority; regulatory taking therefore requires condemnation); Devines v. Maier, 665 F.2d 138, 141-45 (7th Cir. 1981) (well established that taking can result from police power to regulate property, and Brennan opinion to that effect is view of Supreme Court majority), *cert. denied*, 469 U.S. 836 (1984).

180. Nemmers v. City of Dubuque, 764 F.2d 502, 504, 505 & n.2 (8th Cir. 1985) (Brennan opinion represents Supreme Court majority view; several circuits have adopted it, and its view that compensation is required for temporary regulatory taking is persuasive).

181. Bank of Am. Nat'l Trust & Sav. Ass'n v. Summerland County Water Dist., 767 F.2d 544, 547 (9th Cir. 1985) (Brennan opinion represents Supreme Court majority view; *Agins I* therefore on "precedential precipice," but proper to invoke abstention doctrine to allow state to alter own law); Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141, 1148 (9th Cir.) (Supreme Court majority agrees with Brennan; damages therefore are recoverable for regulatory taking), *cert. denied*, 464 U.S. 847 (1983); *In re* Aircrash in Bali, Indonesia On April 22, 1974, 684 F.2d 1301, 1311 n.7 (9th Cir. 1982) (Brennan view represents Supreme Court majority and, notwithstanding *Agins I*, the ninth circuit assumes regulation can effect a taking for which compensation must be paid); *see also* Shamrock Dev. Co. v. City of Concord, 656 F.2d 1380 (9th Cir. 1981).

182. Fountain v. Metropolitan Atlanta Rapid Transit Auth., 678 F.2d 1038, 1043 (11th Cir. 1982) (Brennan opinion is authority for view that compensation is remedy for regulatory takings); *see also* Charles J. Arndt, Inc. v. City of Birmingham, 748 F.2d 1486 (11th Cir. 1984).

183. Florida Rock Indus. v. United States, 8 Cl. Ct. 160 (1985) (Brennan was "speaking for an apparent majority of the Court" in his *San Diego Gas* opinion, which is authority for view that regulation that goes too far exercises eminent domain), *aff'd in part, vacated in part*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 107 S. Ct. 926 (1987); Deltona Corp. v. United States, 657 F.2d 1184, 1190 & n.13 (Ct. Cl. 1981) (Brennan opinion cited for reasoning behind proposition that a regulation can effect a taking, which is "well established as a matter of law"; Rehnquist's general agreement

courts of Arizona,[184] Minnesota,[185] New Hampshire,[186] North Dakota,[187] Oregon,[188] Rhode Island,[189] and Wisconsin[190] followed Justice Brennan's analysis and accepted compensation as the proper remedy for regulatory takings.[191]

The Brennan theory of regulatory takings appeared to have become the majority rule. However, a split in authority remained, as the first Circuit[192] and the high courts of Florida[193] and North Carolina[194] rejected the Brennan

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with Brennan noted), *cert. denied*, 445 U.S. 1017 (1982); Jentgen v. United States, 657 F.2d 1210, 1212 & n.3 (Ct. Cl. 1981), *cert. denied*, 445 U.S. 1017 (1982) (same language as *Deltona* opinion).

184. Corrigan v. City of Scottsdale, 149 Ariz. 538, 720 P.2d 513, *cert. denied*, 107 S. Ct. 577 (1986).

185. Pratt v. State, 309 N.W.2d 767 (Minn. 1981).

186. Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981).

187. Rippley v. City of Lincoln, 330 N.W.2d 505 (N.D. 1983).

188. Suess Builders Co. v. City of Beaverton, 294 Or. 254, 656 P.2d 306 (1982).

189. Annicelli v. Town of S. Kingston, 463 A.2d 133 (R.I. 1983).

190. Zinn v. State, 112 Wis. 2d 417, 334 N.W.2d 67 (1983).

191. *Cf.* Pioneer Sand & Gravel v. Anchorage, 627 P.2d 651, 652-53 (Alaska 1981) (reserving judgment on inverse condemnation remedy, but allowing case to proceed to trial); Valley View Industrial Park v. City of Redmond, 107 Wash. 2d 621, 643-44, 733 P.2d 182, 195 (1987) (recognizing Brennan's opinion, but distinguishing the facts); Schwartz v. City of Flint, 426 Mich. 295, 315 & n.14, 395 N.W.2d 678, 686 & n.14 (1986) (recognizing the Brennan theory and noting states following it, but declining "at this time" to consider it since plaintiff had not sought damages); County of Kauai v. Pacific Standard Life Ins., 653 P.2d 766, 779 (Haw. 1982) (citing Brennan's opinion as authority for definition of regulatory taking), *appeal dismissed*, 460 U.S. 1077 (1984).

In his analysis of the historical stages of land use law in American courts, Williams describes the period of these recent cases as a fourth historical stage, which he labels "Sophisticated Judicial Review." 1 WILLIAMS, *supra* note 42, § 5.05. Bauman summarizes this stage as "characterized by careful judging of the rights and interests of government, landowners, existing neighbors and excluded residents, depending on the particular parties to a case. The sophisticated fourth stage replaces the third period's automatic presumption of governmental validity with a healthy judicial skepticism of government's motives and competence in devising and implementing various land use controls." Bauman, *supra* note 31, at 75. In Williams's view, the "appropriate approach to land use controls" which characterizes this fourth stage is a judicial attitude which is "basically sympathetic, yet cautious and skeptical," and one which involves "careful inquiry into the actual operation of the controls involved, within an overall context. This is the revival of creative judicial review . . . as an active force to protect really basic values . . . ." 1 WILLIAMS, *supra* note 42, § 5.05.

192. Citadel Corp. v. Puerto Rico Highway Auth., 695 F.2d 31, 33-34, 33 n.4 (1st Cir. 1982), *cert. denied*, 464 U.S. 815 (1983) (policy arguments make compensation inappropriate remedy for regulatory taking; Brennan position has four votes plus possible fifth vote from Rehnquist, but change of position on that basis would be "judicial tea leaf reading," and *San Diego Gas* is distinguishable as state rather than federal court case).

193. Dade County v. National Bulk Carriers, Inc., 450 So. 2d 213 (Fla. 1984). *But see* Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla.), *cert. denied*, 454 U.S. 1083 (1981).

194. Responsible Citizens in Opposition to the Flood Plain Ordinance v. City of Asheville, 308 N.C. 255, 302 S.E.2d 204 (1983).

analysis. A definitive statement by a majority of the Supreme Court was needed.[195]

C. *Land Use Regulation Issues Prior to* First English

When *First English* came before the Supreme Court, three major questions formed the center of dispute in land use regulation law. An outline of these questions will clarify the implications of the *First English* decision.

1. The Takings Question

The first of the three major questions in dispute was whether a police power regulation can effect a "taking" within the meaning of the fifth amendment. This question involved interpretation of "taken," the first of the two key terms in the just compensation clause.

The Supreme Court declined repeatedly to construct a general definition of regulatory takings, on the grounds that the parameters of a fifth amendment taking differ with the facts of each case.[196] Within the general rubric of

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195. The *de facto* majority-rule status of the Brennan doctrine was diminished by the fact that it had not been embodied in a majority opinion by the Supreme Court. Even the argument that Brennan's theory actually commanded five votes was clouded. Justice Stewart, who had voted with Brennan, had retired. The views of Justice O'Connor, who replaced Stewart, were largely unknown, although she had voted with the lack-of-ripeness majorities in *Hamilton Bank* and *MacDonald*. Williamson Regional Planning Comm. v. Hamilton Bank, 473 U.S. 172, 174 (1985); MacDonald, Sommer & Frates v. Yolo, 106 S. Ct. 2561, 2562 (1986). The picture was further complicated by the fact that Justice White, who voted with the majority in *San Diego Gas*, had dissented in *MacDonald* on the grounds that Justice Brennan had been correct in his *San Diego Gas* dissent. *MacDonald*, 106 S. Ct. at 2569, 2572-73 (White, J., dissenting). In addition, White's *MacDonald* dissent was joined by Justice Rehnquist, the putative fifth vote for the Brennan view in *San Diego Gas*. *MacDonald*, 106 S. Ct. at 2569, 2572-73 (White, J., dissenting). Although the net result seemed to be that five votes (Brennan, Marshall and Powell from *San Diego Gas*, plus White and Rehnquist from *MacDonald*) could be marshalled for the Brennan theory, a majority holding by the Court was still lacking. This view of the likely votes proved to be correct — the *First English* majority consisted of these five plus Justice Scalia, who joined the Court after *MacDonald* was decided and in effect replaced Chief Justice Burger. *First English*, 107 S. Ct. at 2381.

196. *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 998 (1984); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). Commentators have deprecated this approach as a judicial abdication. *See* Berger & Kanner, *supra* note 33, at 693, 695. They have also compared the approach to the Court's former "I know it when I see it" posture in obscenity cases. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); *see, e.g.*, Berger & Kanner, *supra* note 33, at 695; Bauman, *supra* note 31, at 3-4.

One problem with this approach is the resulting lack of legal predictability for either regulators and planners or landowners, with an attendant waste of the resources of both parties and courts. Another is a chilling effect on basic property rights.

> A supposed 'property' system in which the ostensible owner cannot tell what rights he "owns" until he tries to exercise them, and even then only after

the ad hoc approach, the Court established a few more precise definitional elements. Some of these defined a regulatory taking in the negative. The Court found that mere denial of the most profitable use which can be made of a property,[197] or of the property's highest and best use,[198] did not amount to a fifth amendment taking. Effective denial of all reasonable or economically viable use of the property, however, had usually been found to be a taking.[199] A "war emergency exception" also existed. Wartime regulations ordering mine closings[200] or regulating prices or profits[201] did not amount to takings. One positive, *per se* definition had been established. The Court had declared that a taking existed and the compensation requirement was triggered where even the smallest physical occupation or appropriation by the government was found.[202]

One survey of Supreme Court cases on regulatory takings reports that, in various contexts, the Court had developed and applied four common, often overlapping tests for the existence of a regulatory taking.[203] Three of these tests are frequently relevant in current cases.[204]

The Diminution of Value Test was established in the leading regulatory taking case, *Pennsylvania Coal Co. v. Mahon*.[205] This test examines the regulation's effect on the value of the landowner's property interests. It focuses on, but does not define, the point at which the regulation's effect becomes "so severe that it moves beyond the boundary of uncompensated police power ac-

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> ruinously costly (and often pointless) administrative proceedings with a multi-tier appellate process and, after that, litigation, is an illusion. Only the most wealthy (and the most determined) persons can even try to seek protection of their constitutional rights.

Berger & Kanner, *supra* note 33, at 693 n.34. Other commentators, however, find virtue in this ad hoc approach.

> The taking issue as we know it is only some twenty years old. With the quantum jump in land use controls . . . people have been forced to re-think previously set notions of private property, public control and land use regulation. That exercise necessarily takes time, and two decades is relatively little time to mesh changing conditions with constitutional principles.

Bauman, *supra* note 31, at 20-21. Those espousing this view predict that as the common law of regulatory takings develops, general standards will emerge. *Id.* at 30-31.

197. Andrus v. Allard, 444 U.S. 51, 66 (1979).

198. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962).

199. United States v. General Motors Corp., 323 U.S. 373, 378 (1945).

200. United States v. Central Eureka Mining Co., 357 U.S. 155 (1958).

201. Bowles v. Willingham, 321 U.S. 503 (1944).

202. Loretto v. Manhattan Teleprompter CATV Corp., 458 U.S. 419 (1982).

203. Bauman, *supra* note 31, at 21.

204. The first test discussed is the Physical Invasion Test, established in Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871) (flooding of land due to the negligent building of a dam by the government). This is "the least complicated of the taking tests," since it is like an actual exercise of eminent domain in that both produce a "*concrete* interruption of use of someone's private property." Bauman, *supra* note 31, at 22 (emphasis added). Given the nature of modern land use regulations, it is seldom of much relevance to the question of regulatory takings.

205. 260 U.S. 393 (1922). Bauman refers to the diminution of value test as the "most famous" of the four tests. Bauman, *supra* note 31, at 22.

tion and becomes a taking (i.e., a de facto exercise of the eminent domain power) which requires compensation."[206] As the *Mahon* Court put it, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[207] As to how far is "too far," scholars have noted that while the Diminution of Value Test "has been applied with varying results in different cases, all concur that the diminution must be substantial."[208]

The Nuisance Abatement Test derived from *Mugler v. Kansas*.[209] In *Mugler* the Court held that, given the public evils resulting from alcohol, a brewery could be regarded as a public nuisance, and therefore regulatory prohibition of it was not a compensable taking. This test focuses on "what the government means to accomplish rather than on the extent of harm inflicted upon an individual property owner."[210]

The Balancing Test originated in *Lawton v. Steele*,[211] and was restated in *Penn Central Transportation Co. v. City of New York*.[212] It balances "the interests of public good and private detriment . . . an all inclusive approach that emphasizes fairness to the parties involved . . . ."[213] The *Penn Central* Court considered three main factors under this test: "[1] the economic impact of the challenged regulation on the claimant, [2] the character of the government action and [3] whether an acquisition of resources by the public was sought."[214] The *Lawton* Court had looked at three similar factors: (1) whether the public interest required the interference with the property rights in question, (2) whether the means chosen were reasonably necessary to accomplish the purpose, and (3) whether the results were unduly oppressive of individuals.[215] In other words, the Balancing Test might be said to balance ends, means, and results.

Perhaps the greatest conceptual difficulty in the mix of regulatory taking arguments which confronted the *First English* Court was the proposition that compensable takings and valid regulations should be seen as mutually exclusive.[216] Those who asserted that a regulation cannot work a taking argued from *Mugler* and its progeny[217] that a regulation valid under the police power does not invoke the eminent domain power, and by definition does not amount to a taking.[218] The Supreme Court had repeatedly held that the question of

206. Berger & Kanner, *supra* note 33, at 692.
207. *Mahon*, 260 U.S. at 415.
208. Weidenbach, *supra* note 70, at 8.
209. 123 U.S. 623 (1887).
210. Bauman, *supra* note 31, at 22.
211. 152 U.S. 133 (1894).
212. 438 U.S. 104 (1978).
213. Bauman, *supra* note 31, at 23.
214. Bauman, *supra* note 31, at 23.
215. *See Lawton*, 152 U.S. at 137.
216. Bauman, *supra* note 31, at 32.
217. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Keystone Bituminous Coal Assoc. v. DeBenedictis, 107 S. Ct. 1232 (1987).
218. *See, e.g.*, Mandelker, *supra* note 32, at 491; Sallet, *The Problem of Munici-*

whether the objective of a regulation is a proper object of the police power is distinct and separate from the question of whether an otherwise valid regulation transgresses the just compensation clause.[219] In the two leading cases on zoning regulations, decided in the 1920's,[220] the Court had implicitly recognized that a valid regulation can amount to a taking. However, the argument persisted, and made an appearance in *First English*.[221]

2. The Compensation Question

The second question at the center of dispute was whether monetary damages are available as a remedy for a regulatory taking. This question involved interpretation of "just compensation," the second of the two key terms in the just compensation clause. When *First English* came before the Court, the lower federal and state high courts were split on this question, although the trend of decisions in the five years preceding *First English* had been to follow Justice Brennan's dissent in *San Diego Gas* in finding that compensation was the appropriate remedy for a regulatory taking.[222]

Implicit in the compensation question was a corollary issue: should policy considerations relating to land use regulation dictate that compensation not be found available as a remedy for regulatory takings? Some courts, notably the California Supreme Court in *Agins I*,[223] and many pro-regulation commenta-

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pal Liability for Zoning and Land-Use Regulation, 31 CATH. U.L. REV. 465, 465 (1982).

219. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 425 (1982) ("It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid."); Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979) ("There is no question but that Congress could assure the public a free right of access to [a marina] if it so chose. Whether a statute or regulation that went so far amounted to a 'taking,' however, is an entirely separate question."); *see also* United States v. Security Indus. Bank, 459 U.S. 70 (1982) (whether a particular exercise of Congress's bankruptcy power meets the rationality test is entirely separate from the question of whether the taking of property involved falls under the prohibition of the fifth amendment).

220. In Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the Court upheld zoning as a valid exercise of the police power. In Nectow v. City of Cambridge, 277 U.S. 183 (1928), the Court held that application of a zoning ordinance which rendered a parcel of land useless violated the Constitution. Together, these two cases reflect the approach taken in *Mahon*: the police power and the eminent domain power both lie on the same continuum, and a regulation which takes all or most of the use of a piece of land may be valid under the police power but nevertheless violate the fifth amendment.

Commentators have interpreted Justice Brennan's *San Diego Gas* dissent as embodying this continuum concept. *See, e.g.*, *The White River Junction Manifesto*, *supra* note 36, at 221 ("Under the Brennan approach, taking analysis requires viewing regulation as a continuum of governmental actions that ultimately crosses an invisible line that divides compensable from non-compensable actions."); *see also* Bauman, *supra* note 31, at 83.

221. *See infra* notes 258-68 and accompanying text.

222. *See supra* notes 176-94 and accompanying text.

223. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).

tors,[224] had advanced two policy arguments as grounds for barring a compensation remedy. They posited that a compensation remedy would (1) create enormous financial risk for regulatory bodies, and (2) "have a chilling effect" on land use regulation, and that this made compensation "an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged."[225]

3. The Timing Question

The third question at the heart of the takings dispute confronting the *First English* court was this: Assuming that a regulation can work a taking, *when* does it do so? This question involved determination of when a regulatory taking begins, and of the effect caused when a such a taking ends. Put differently, the question was whether the temporary effect of a regulation can constitute a taking.[226]

The question of when a regulatory taking begins—that is, of the point from which compensation must be paid—was unsettled when the Court took up *First English*. Some commentators argued that the *Agins I* decision by the California high court,[227] left intact by the Supreme Court decision in *Agins II*,[228] implied that a regulatory taking begins only when a court rules that a taking has occurred.[229] They saw support for this view in *Danforth v. United States*,[230] in which the Supreme Court had observed that "mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership.' They cannot be considered as a 'taking' in the constitutional sense."[231] Justice Brennan's influential dissent in *San Diego Gas*, however, argued that the beginning point was "the date the regulation first effected the 'taking.' "[232] Brennan noted that "[a]s soon as private

224. *See, e.g.*, Girard, *Constitutional "Takings Clauses" and the Regulation of Private Land Use*, 34 LAND USE L. & ZONING DIG., Oct. 1982, at 4, Nov. 1982, at 4; Sallet, *The Problem of Municipal Liability for Zoning and Land-Use Regulation*, 31 CATH. U.L. REV. 465, 465 (1982); *The White River Junction Manifesto*, *supra* note 36, at 193.

225. *Agins I*, 24 Cal. 3d at 275-76, 598 P.2d at 29-30, 157 Cal. Rptr. at 376-77.

226. Freilich, *supra* note 33, at 95 ("As much emphasis needs to be placed on *when* a property interest is invaded and destroyed so as to trigger constitutional relief, [a question which] rais[es] the significant issues of the time of the 'taking,' exhaustion of administrative remedies . . . and whether a [temporary] deprivation . . . is a constitutional violation.").

227. *Agins I*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372.

228. 477 U.S. 255 (1980).

229. This follows from the California high court's ruling that only prospective relief — declaratory relief or mandamus — is available to remedy the effect of a regulation. *Agins I*, 24 Cal. 3d at 269-70, 598 P.2d at 26, 157 Cal. Rptr. at 373; *see also* Sallet, *Regulatory "Takings" and Just Compensation: The Supreme Court's Search for a Solution Continues*, *supra* note 33, at 641-42.

230. 308 U.S. 271 (1939).

231. *Id.* at 285.

232. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 653 (1981)

property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation," which triggers the self-executing compensation provision of the just compensation clause.[233]

The effect caused when a regulatory taking ends, and thus becomes temporary, was also unsettled. Brennan's dissent posited that a regulatory taking required compensation even if the regulation's effect was temporary due to governmental amendment or rescission.[234] He noted that compensation for temporary physical takings had long been the rule,[235] and that physical and regulatory takings were essentially similar.[236]

The California Supreme Court, on the other hand, argued that government should be given a chance to rescind or amend in order to avoid negative financial consequences and discouragement of regulation.[237] It held in *Agins I*[238] that invalidation, not compensation, was the appropriate remedy for the period between the regulation's effective date and the date of judicial review.[239]

These three fundamental and unsettled questions—the takings question, the compensation question, and the timing question—faced the Court when it took up *First English Evangelical Lutheran Church v. County of Los Angeles.*

III. THE *First English* DECISION

The primary significance of the procedural posture in which *First English* reached the Supreme Court lies in the fact that the compensation question to which the Court granted certiorari was divorced from the facts of the case. The question was presented by procedural motions granted on the basis of the *Agins I* holding that compensation is not an available remedy for a temporary regulatory taking. The Supreme Court found that "the disposition of the case on these grounds isolates the remedial question for our consideration."[240] The lower court rulings did not depend on a rejection of the church's allegation that the regulation deprived it of all use of the property, or on a holding that the type of regulation involved can never constitute a Fifth Amendment taking.[241] The Court observed that the case did not require it to decide whether

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(Brennan, J., dissenting).

233. *Id.* at 654 (Brennan, J., dissenting).

234. *Id.* at 657.

235. *Id.*

236. *Id.* at 651.

237. *Agins I*, 24 Cal. 3d 266, 275, 598 P.2d 25, 29-30, 157 Cal. Rptr. 372, 376 (1979).

238. *Id.*

239. *Agins I*, 24 Cal. 3d at 276-77, 598 P.2d at 31, 157 Cal. Rptr. at 378.

240. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2384 (1987).

241. *Id.*

the regulation "actually denied appellant all use of its property,"[242] or whether the regulation did not effect a taking because its police power objective was safety.[243] The question presented was the one the Court had struggled for seven years to reach: "whether the Just Compensation Clause requires the government to pay for 'temporary' regulatory takings."[244]

A. *The Takings Question*

First English gave the least definite of its answers to the question of whether a valid police power regulation can effect a "taking" within the meaning of the fifth amendment. Pro-regulation commentators are already arguing that *First English* does not answer this question at all.[245] The ambiguity of Chief Justice Rehnquist's opinion on this point, which compares unfavorably with the forthright approach of Justice Brennan in *San Diego Gas*, appears to have made further litigation on the takings question inevitable.[246]

First English did reaffirm the validity of the basic doctrine of regulatory takings, established in *Pennsylvania Coal Co. v. Mahon*, that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[247] It was because *Agins I* "truncated" the efficacy of the *Mahon* rule—that is, because it held that deprivation of property rights by regulations was not protected as a just compensation clause taking—that the *First English* Court held *Agins I* to be constitutionally fallacious.[248] The Court also declared that the just compensation clause

> does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of *otherwise proper interference amounting to a taking.*[249]

In other words, the Court recognized that the just compensation clause does not describe the outer limits of validity for police power regulations. Rather, it exists to secure compensation when a valid regulatory interference with property rights has an effect so severe as to amount to a taking.

The Court also indicated that a valid police power regulation can take when it noted the options available to the government once a court has found

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242. *Id.*
243. *Id.* at 2385.
244. *Id.*
245. *See, e.g.*, Callies, *supra* note 54, at 53.
246. *See supra* notes 146-59 and accompanying text (discussion of Brennan's opinion); *see infra* notes 260-71 and accompanying text (discussion of Rehnquist's opinion).
247. 107 S. Ct. at 2386 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).
248. *Id.* at 2387.
249. *Id.* at 2385-86 (citations omitted) (first emphasis in original; second emphasis added).

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that a regulatory taking has occurred.[250] The *First English* opinion distinguished "amendment of the regulation" and "withdrawal of the *invalidated* regulation."[251] It thus recognized that a regulation which works a taking can be either valid or invalid as an exercise of the police power.

Justice Brennan's *San Diego Gas* opinion[252] had explicitly found that a valid police power regulation can also work a compensable taking.[253] For Brennan, this conclusion was compelled by logic as well as by clear Supreme Court precedent.[254] The majority of federal appellate courts and state supreme courts had subsequently followed the Brennan doctrine.[255]

Unfortunately, the Rehnquist opinion in *First English* not only failed to acknowledge the trend which had developed in the lower courts, and failed to address the police power question head on as Justice Brennan had done,[256] but also appeared to back off from the Brennan position in two respects.

Because of the procedural posture of the case, the lower courts had assumed the truth of the church's allegation that the regulation deprived it of all use of Lutherglen.[257] Chief Justice Rehnquist announced that the Court accordingly had

> no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as part of the State's authority to enact safety regulations.[258]

Given the procedural posture under which *First English* reached the Court, the majority may well have felt compelled to leave direct resolution of the police power question for another day. However, Rehnquist's failure to at least address the subject seems remarkable in light of the fact that he had agreed with the merits of Brennan's *San Diego Gas* opinion,[259] and the fact that he cited that opinion three times in *First English*.[260] Brennan's opinion was founded on the idea that the *Mahon* court conclusively "rejected the proposition that police power restrictions could never be recognized as Fifth Amendment 'taking[s].' "[261] Furthermore, the Chief Justice failed to mention that the first case he cited as authority for the proposition that a safety regula-

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250. *Id.* at 2389.
251. *Id.* (emphasis added).
252. *See supra* notes 142-73 and accompanying text.
253. *See supra* notes 146-59 and accompanying text.
254. *Id.*
255. *See supra* notes 176-94 and accompanying text.
256. *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 647-53 (1981).
257. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2384-85 (1987).
258. *Id.*
259. *San Diego Gas*, 450 U.S. at 621, 633.
260. 107 S. Ct. at 2386 & n.9, 2388.
261. *San Diego Gas*, 450 U.S. at 650 (Brennan, J., dissenting).

tion might be insulated from causing a taking, *Goldblatt v. Hempstead*,[262] also recognized as incorrect the view that "governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation."[263] The manner in which Rehnquist phrased the decision not to reach this issue, coupled with his citation of *Mugler*[264] but not *Mahon*[265] in this connection,[266] is already leading regulation advocates to argue that compensation is never required for the effect of a valid police power regulation.[267] It seems unfortunate that this portion of the opinion should have been written in a way that can lend itself to undercutting of the basic thrust of the opinion as a whole.[268]

The second respect in which Chief Justice Rehnquist appeared to back off from the Brennan position on the police power takings question is even more unfortunate. As Justice Brennan defined it, a regulatory taking occurs "where the effects completely deprive the owner of *all or most* of his interest in the property."[269] In *First English*, Chief Justice Rehnquist phrased the Court's holding as follows: "We merely hold that where the government's activities have already worked a taking of *all* use of property . . . . Here we must assume that the Los Angeles County ordinances have denied appellant *all* use of its property for a considerable period of years . . . ."[270] It takes no great imagination to foresee the use to which lawyers representing regulators will put this

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262. 369 U.S. 590 (1962).

263. *Id.* at 594.

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

265. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

266. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2385 (1987). For a persuasive demonstration that the principles of *Mugler* and *Mahon* are not really contradictory, and that the police and eminent domain powers are correctly viewed as occupying the same continuum of government power on which they can and do overlap, see Bauman, *supra* note 31, at 49-53.

267. *See, e.g.*, Weidenbach, *supra* note 70, at 6. Chief Justice Rehnquist did limit his remark to the question of whether a *safety* regulation could be "insulated" from working a taking. *First English*, 107 S. Ct. at 2385. Whether future decisions will differentiate safety regulations, which do not "take," from other police power regulations, which may, remains to be seen. For a recent suggestion that the Court may be moving toward a distinction between "harm prevention" regulations, which do not take, and "amenity preservation" regulations, which might take, see R. Freilich, Planning and Zoning Case Law Overview with Emphasis on Recent Supreme Court Decisions: Nollan v. California Coastal Commission and Evangelical Church of Glendale v. County of Los Angeles, The 'Regulatory Taking' Cases, Presentation to University of Missouri-Columbia Continuing Legal Education Seminar, Kansas City, Missouri (Sept. 25, 1987) (written outline available in Office of CLE, University of Missouri-Columbia School of Law).

268. If no valid police power regulation can also "take," the *First English* rule that compensation is required for regulatory takings will be of largely precatory effect, provided that validity continues to be measured by a deferential, rational-basis standard.

269. First English Evangelical Lutheran Church v. County of Los Angeles, 450 U.S. 621, 653 (1981) (emphasis added).

270. *First English*, 107 S. Ct. 2378, 2389 (1987) (emphasis added).

omission of the words "or most." In this respect, *First English* could in fact unsettle an aspect of the takings question which was well on the way to being settled by lower federal and state supreme court decisions using the Brennan formula.[271]

Given the level of controversy over the takings question, the consequential nature of the issues, and the need for definitive guidance from the Supreme Court, it is hard to avoid the conclusion that, at least as regards this aspect of the opinion, the Court would have done better to adopt Justice Brennan's *San Diego Gas* opinion verbatim, rather than at second-hand.

B. *The Compensation Question*

To the question of whether monetary damages are available as a remedy for a regulatory taking, the *First English* Court gave a definitive, categorical, and unequivocal answer. It held that compensation is the constitutionally required remedy for all regulatory takings.[272]

In affirming that compensation is the constitutionally required remedy for regulatory takings, the Court directly addressed the contrary view expressed in *Agins I* and argued by pro-regulatory commentators, and found that view to be constitutionally erroneous. *Agins I* had declared that a compensation remedy is not available for temporary regulatory takings, and therefore landowners may seek only invalidation of a regulation. Having finally reached the question of the correctness of the *Agins I* rule after four abortive attempts, the Court declared that "the California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment."[273] *Agins I* is therefore necessarily overruled, and the view it espoused is no longer tenable.

The Court declared that the express language of the fifth amendment in the just compensation clause requires compensation for temporary regulatory takings.[274] Since the purpose of the clause is "to secure *compensation* in the

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271. *See supra* notes 174-94 and accompanying text.

272. *First English*, 107 S. Ct. at 2389. It is worth noting in this regard that the majority opinion in *First English* was written by the Chief Justice, and that the six-member majority included Justices commonly considered to be liberals (Brennan, Marshall), conservatives (Rehnquist, Scalia), and moderates (Powell, White). *Id.* at 2381.

The result in *First English* had been predicted by some commentators. *See, e.g.*, Deutsch, *supra* note 28, § 1.02(1)(b); Bauman, *A True Landmark Decision*, 39 LAND USE & ZONING DIG. No. 8, at 3 (Aug. 1987). According to Bauman, the makeup of the majority was predictable given a careful reading of the opinions in *Hamilton Bank*, *MacDonald* and *Keystone Bituminous*, coupled with close attention to the shifts in voting in those cases — the key was convincing Brennan and White to vote together. Bauman, *supra*, at 3. This holding obviously means that when *First English* reaches the California Court of Appeal on remand, the allegation that the regulation took all use of Lutherglen must be reinstated.

273. *First English*, 107 S. Ct. at 2383.

274. *Id.* at 2385.

event of otherwise proper interference amounting to a taking,"[275] it follows that "government action that works a taking of property rights *necessarily* implicates the 'constitutional obligation to pay just compensation.' "[276]

Furthermore, a property owner affected by a regulatory taking has the right to bring an inverse condemnation action and thus seek the compensation remedy. *First English* reaffirmed the established doctrine that the just compensation clause is self-executing. As the Court put it, "We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation. . . .' In the event of a taking, the compensation remedy is required by the Constitution."[277]

The Court concluded that invalidation alone is not a constitutionally sufficient remedy for a regulatory taking.[278] This is true even where invalidation converts the regulatory taking into a temporary one. The Constitution requires compensation for all takings, permanent or temporary.[279] The Court noted that many of its earlier cases had required compensation for temporary physical appropriation or use of property by the government.[280] In the Court's view, these cases established the principle that " 'temporary' takings which, *as here*, [*i.e.*, temporary *regulatory* takings] deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[281] Therefore, the Court asserted, "invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause."[282]

The *First English* majority observed that when a court finds that a regulation has worked a taking, the government has the option of "amendment of the regulation, withdrawal of the invalidated regulation, or the exercise of eminent domain."[283] Thus, the property owner may not demand that the government keep what the regulation has taken and pay the compensation due for a permanent taking, merely because a regulation has already affected a taking of his property.[284] However, the Court said, where the regulation has "already worked a taking of all use of property, no subsequent action by the govern-

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275. *Id.* at 2386 (emphasis in original).

276. *Id.* at 2386 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)) (emphasis added).

277. *Id.* (citations omitted).

278. *Id.* at 2388.

279. *Id.*

280. *Id.* at 2387-88.

281. *Id.* at 2388 (emphasis added). This principle was enunciated, the *First English* opinion noted, in Justice Brennan's dissent in *San Diego Gas.*

282. *Id.* The period of time between the date the regulation in *First English* went into effect and the date of the final state court disposition of the regulatory taking claim, which is the period referred to by the Court, was six years and seven months. *Id.*

283. *Id.* at 2389.

284. *Id.*

ment [i.e., not even amendment of a still-valid regulation or withdrawal of an invalidated regulation] can relieve it of the duty to provide compensation for the period during which the taking was effective."[285] This is consistent, the Court noted, with the established rule that compensation is required for temporary physical takings by the government.[286]

C. *The Timing Question*

The *First English* opinion also provided an answer to the question of *when* a regulation works a taking. This question involves determination of when a regulatory taking begins, and of the effect caused when such a taking ends.[287] The *First English* Court definitively settled questions concerning the impact of the end of a regulatory taking when it held that "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[288] However, it addressed the determination of when a regulatory taking begins in a somewhat indirect and ambiguous fashion.[289] This issue is probably not entirely settled; the ambiguity of the answer may lead to further litigation.

The *First English* rule is that compensation must be paid for the period of time during which a regulatory taking exists prior to abandonment of the regulation by the government.[290] While this rule does not of itself settle exactly when such a period begins, *First English* does establish, at least by implication, some criteria by which the beginning point can be determined.

The government defendants in *First English* had argued that no taking existed before a court invalidated the regulation; that is, before a court declared that a taking existed.[291] They based their argument on the Court's earlier decisions in *Danforth v. United States*[292] and *Agins II*,[293] which had said that fluctuations in property value resulting from adoption of regulations were "incidents of ownership" rather than regulatory takings.[294] The *First English* Court, however, plainly took the view that regulations do not necessarily begin to deny use of property only when a court rules that they have that effect. As the Court observed, "It would require a considerable extension of these decisions [*Danforth* and *Agins II*] to say that no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid."[295] The Court found that, on the contrary, "the interference that effects a taking

285. *Id.*
286. *Id.* at 2387.
287. *See supra* notes 226-39 and accompanying text.
288. *First English*, 107 S. Ct. at 2389.
289. *See infra* notes 290-312 and accompanying text.
290. *First English*, 107 S. Ct. at 2387-89.
291. *Id.* at 2388.
292. 308 U.S. 271 (1939).
293. 447 U.S. 255 (1980).
294. *Danforth*, 308 U.S. at 285; *Agins II*, 447 U.S. at 263 n.9.
295. *First English*, 107 S. Ct. at 2389.

might begin much earlier, and compensation is measured from that time."[296] *Danforth* and *Agins II*, the Court said, "merely stand for the unexceptional proposition that the valuation of property which has been taken must be calculated as of the time of the taking, and that depreciation in value of the property by reason of preliminary activity is not chargeable to the government."[297]

Although the *First English* Court did not explicitly define the distinction between preliminary activity and the beginning of a regulatory taking, it implied that one major element in the distinction is time. It did so by discussing temporal matters as affecting the determination of a taking.

The Court distinguished the factual situation in *First English* from "*normal delays* in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us."[298] Even after *First English*, therefore, it remains true that where a regulation affects a property owner's interests only during the "normal delay" involved in seeking a permit, amendment, or variance, a taking does not begin. Compensation for depreciation in the property's value caused by such delays "is not chargeable to the government."[299]

However, in *First English* the plaintiff had been deprived of use of its

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296. *Id.* at 2389 n.10. The Court indicated that this directive is distinct from the ripeness requirement that makes a denial of compensation by the government a prerequisite to legal action. *Id.* While ripeness requires finality, including denial of applications for variances, etc., *Hamilton Bank* "did not establish that compensation is unavailable for government activity occurring before compensation is actually denied. Though, as a matter of law, an illegitimate taking might not occur until the government refuses to pay, the interference that effects a taking might begin much earlier, and compensation is measured from that time." *Id.*

When analyzed, footnote 10 appears to mean the following: A regulatory taking begins when the interference by the regulation with the owner's property rights begins. If matters are not resolved prior to judicial determination that the regulation worked a taking, the calculation of what compensation is due dates from the beginning of the interference. However, that judicial determination cannot take place until after the property owner has used available compensation-providing procedures short of an inverse condemnation claim in court. Use of such procedures, if available, is required by the doctrine of ripeness for judicial review, one purpose of which is to prevent waste of judicial resources. This was the requirement discussed in Williamson Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 & n.13 (1985), the source cited by Justice Rehnquist in footnote 10. It appears to be what was meant by the statement that "an illegitimate taking might not occur until the government refuses to pay," 107 S. Ct. at 2389 n.10, which might have been better worded as "an illegitimate taking may not be judicially determinable prior to government refusal to pay."

Some commentators had predicted that the ripeness and exhaustion requirements set out in *Hamilton Bank* and *MacDonald* would lead the Court to set the beginning point for regulatory takings at the time a final decision is rendered, rather than the time when the regulation is enacted. *See, e.g.*, Deutsch, *supra* note 21, § 1.02(1)(b). This prediction proved to be incorrect.

297. *First English*, 107 S. Ct. at 2388.

298. *Id.* at 2389 (emphasis added).

299. *Id.* at 2388.

property for six and one-half years.[300] Earlier temporary taking cases involving leasehold interests had required compensation for shorter periods.[301] The Court referred repeatedly to this "considerable period of years,"[302] and held that invalidation without compensation for "this period of time" would be constitutionally insufficient.[303] The implication that duration is a factor in finding a regulatory taking is plain. It should be remembered, however, that the *First English* Court cited *Agins II* as an example of preliminary activity which was not a taking; and the comparable period of time involved in that case was also approximately six years.[304] Simple numerical calculation, it seems, does not provide a mechanical answer to the timing question.

The *First English* Court also implied that a second major element in the distinction between preliminary activity and the beginning of a regulatory taking is fairness. The Court began its entire discussion of the timing question by reasserting the established doctrine that "the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[305]

Given (1) the emphasis in *Hamilton Bank* on requiring a landowner to seek variances or changes in the regulation in order to produce the "final" government decision on how the regulation applies to the property which is prerequisite to suit,[306] (2) the discussion in *First English* concerning "normal delays" and "fairness,"[307] and (3) the assertion in *First English* that a regulatory taking may occur as early as the effective date of the regulation,[308] it appears that the *First English* answer to the timing question is threefold. One, a regulatory taking begins when the challenged regulation begins to affect the property.[309] Two, this occurs when, without unfair delay,[310] the regulating body makes a final decision as to the regulation's particular effect on the property, including disposition of requests for variances. It does not occur only

300. *Id.* ("[T]he interim ordinance was adopted . . . in January 1979, and became effective immediately. Applicant filed suit within a month . . . and yet when the Supreme Court of California denied a hearing in the case on October 17, 1985, the merits of appellant's claim had yet to be determined." *Id.*).

301. *Id.*

302. *Id.* at 2389.

303. *Id.*

304. The ordinance in question in *Agins I* and *Agins II* was adopted in June, 1973, and the California Supreme Court ruled in March, 1979. *Agins I*, 25 Cal. 3d 266, 271, 598 P.2d 25, 27, 157 Cal. Rptr. 372, 374 (1979). The Supreme Court ruled in June, 1980. *Agins II*, 447 U.S. 255, 255 (1980).

305. *First English*, 107 S. Ct. at 2388 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

306. *Id.* at 2389 n.10.

307. *Id.* at 2388-89.

308. *Id.* at 2389 n.10.

309. *Id.*

310. MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561, 2567 n.7 (1986).

when a court rules that the regulation worked a taking.[311] Three, what constitutes "normal delay" versus what is "unfair" is a question of fact, which must be determined separately in each case.[312]

IV. THE IMPACT OF *First English* ON LAND USE REGULATION

Assessment of the Court's decision in *First English* must include consideration of its potential impact on land use regulation law. Both the majority and dissenting opinions addressed this issue.[313] The dissent predicted that the Court's ruling would have dire consequences for land use regulation.[314] The majority acknowledged that the decision might have a material impact on land use planning and regulation,[315] but concluded that such potential consequences were outweighed by two fundamental principles: fairness,[316] and protection of constitutional rights.[317]

A. *Predicted Consequences*

The dissent[318] and some initial reports of the case[319] predicted three ma-

311. *Id.* at 2566.

312. Justice Brennan's dissent in *San Diego Gas* also asserted that compensation is to be measured from the effective date of a regulation. 450 U.S. 621, 653 (1981) (Brennan, J., dissenting). It can be argued that the *First English* majority opinion tacitly incorporates the Brennan opinion. The incorporation argument derives from the fact that the majority opinion in *First English* refers to Justice Brennan's *San Diego Gas* dissent with approval three times — at 107 S. Ct. 2382, 2386 and 2388 — as well as from the fact that Chief Justice Rehnquist's concurrence in *San Diego Gas* indicated his fundamental agreement with the substance of Justice Brennan's opinion regarding the merits. *See* 450 U.S. at 633-34 (Rehnquist, J., concurring). The thesis would also find support in the widespread lower court adoption of the Brennan dissent position. *See supra* notes 150-65 and accompanying text.

313. *First English*, 107 S. Ct. at 2389-90.

314. *Id.* at 2389-90, 2399-2400 (Stevens, J., dissenting).

315. *Id.* at 2389.

316. *Id.* at 2388.

317. *Id.* at 2389.

318. Justice Stevens wrote the single dissenting opinion in *First English*. He made four major points and three predictions. Justices Blackmun and O'Conner joined in two parts of the Stevens opinion. *See id.* (Stevens, J., dissenting). Stevens' other arguments swayed no vote but his own. *Id.* (Stevens, J., dissenting). Since the vote in *First English* was 6-3, all of the positions taken by the dissent have been rejected by a substantial majority of the Court, and some have been rebuffed by an overwhelming majority.

Stevens, Blackmun, and O'Connor would have "summarily rejected on its merits" the church's claim that the regulation was a taking of Lutherglen, 107 S. Ct. at 2393, because they believed that a safety ordinance "cannot constitute a taking." *Id.* at 2391-92 (Stevens, J., dissenting). Stevens cited the *Mugler* line of cases for the premise that a regulation which is a valid exercise of the police power cannot require compensation, at least when its objective relates to health and safety, since it falls within the noxious use area. *Id.* (Stevens, J., dissenting). *See generally supra* notes 219-20 and accompanying text. He cited Plater, *The Takings Issue in a Natural Setting: Floodlines and*

the Police Power, 52 TEX. L. REV. 201 (1974), as placing flood plain regulations within this area. Plater, however, cites a number of cases holding otherwise. *See id.* at 227. The view of the majority Justices was that the Court need not decide "whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations." *First English*, 107 S. Ct. at 2384-85.

Stevens was also joined by Blackmun and O'Connor in arguing that the Court should have found the church's claim unripe for judicial review because it had not sought invalidation of the regulation. *Id.* at 2396-98 (Stevens, J., dissenting). In Stevens' view, the California courts had not declared that damages were never available for the portion of a regulatory taking which preceded a judicial ruling. *Id.* Rather, he argued, they had stricken the damages claim in *First English* because it was not coupled with a request for declaratory relief in the form of invalidation. Stevens contended that this could be a valid state procedural requirement. *Id.* This view of *Agins I* seems insupportable. The California Supreme Court had plainly declared that "although a landowner . . . may challenge both the constitutionality of the ordinance and the manner in which it is applied to his property by seeking to establish the invalidity of the ordinance either through the remedy of declaratory relief or mandamus, *he may not recover damages on the theory of inverse condemnation.*" *Agins I*, 24 Cal. 3d 266, 269-70, 598 P.2d 25, 26, 157 Cal. Rptr. 372, 373 (1979) (emphasis added).

Although no other Justice agreed, Stevens advanced the proposition that a regulation could only amount to a taking if its effect was nearly permanent. Stevens argued that the Diminution of Value Test, *see supra* notes 205-08 and accompanying text, should include not only "the extent to which the owner may not use the property," and "the amount of property encompassed by the restrictions," but also "the duration of the restrictions." *First English*, 107 S. Ct. at 2394 (Stevens, J., dissenting). For the temporary effect of a regulation to effect a taking, "the restriction on the use of the property would not only have to be a substantial one, but it would have to remain in effect for a significant percentage of the property's useful life." *Id.* (Stevens, J., dissenting). Since the useful life of land is virtually always longer than the useful life of landowners, it appears that such a rule effectively would end individual property rights. In support of his argument, Stevens made the assumption that "if the sovereign chooses not to retain the regulation, repeal will, in virtually all cases, mitigate the overall effect of the regulation so substantially that the slight diminution in value that the regulation caused while in effect cannot be classified as a taking of property." *Id.* at 2393. This assumption seems suspect on empirical grounds. *See supra* notes 52-53 and accompanying text.

Stevens was also alone in advancing the theory that "it is the Due Process Clause rather than [the Just Compensation Clause, as interpreted by *Pennsylvania Coal Co. v. Mahon*] that protects the property owner from improperly motivated, unfairly conducted, or unnecessarily protracted governmental decisionmaking" in the context of regulations. 107 S. Ct. at 2399 (Stevens, J., dissenting). Stevens candidly stated his belief that even this protection should rarely be available. "I am convinced that the public interest in having important governmental decisions made in an orderly, fully informed way amply justifies the temporary burden on the citizen that is the inevitable by-product of democratic government." *Id.* "We must presume that regulatory bodies . . . generally make a good-faith effort to advance the public interest when they are performing their official duties . . . ." *Id.* (quoting Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 205 (1985) (Stevens, J., concurring)). This latter presumption is contradicted by even the most openly pro-regulation scholars. *See supra* notes 46-47 and accompanying text.

Stevens' predictions (paraphrased freely) were that the sky would fall if compensation became available for regulatory takings. His opinion began by forecasting that the

jor consequences of the decision: a flood of litigation,[320] a potentially ruinous financial impact on government regulatory bodies,[321] and a chilling effect on land use planning and regulation.[322] These predictions overstate the likely results of *First English*.[323]

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majority opinion was certain to "generate a great deal of litigation," and that "the mere duty to defend the actions that today's decision will spawn will undoubtedly have a significant adverse impact on the land-use regulatory process." 107 S. Ct. at 2389-90 (Stevens, J., dissenting). It ended with similar prophecies: "Cautious local officials and land-use planners may avoid taking any action that might later be challenged and thus give rise to a damage action. Much important regulation will never be enacted, even perhaps in the health and safety area." *Id.* at 2399-2400. These predictions seem unlikely. *See infra* notes 325-55 and accompanying text.

319. *See supra* notes 26-27 and accompanying text.

320. *First English*, 107 S. Ct. at 2389-90 (Stevens, J., dissenting).

321. *See supra* notes 26-27 and accompanying text.

322. 107 S. Ct. at 2399-400 (Stevens, J., dissenting).

323. One other potential consequence, or non-consequence, of the *First English* decision also deserves mention. It is possible that First English Evangelical Lutheran Church of Glendale may not benefit from the *First English* rule, since the church may not receive compensation for the effect on Lutherglen of the ban on building in the floodplain. As discussed *supra* at notes 241-45, 258-68 and accompanying text, the Court did not decide either (1) whether the regulation "took" Lutherglen by depriving the church of all use of the property, or (2) whether "the denial of all use was insulated as a part of the State's authority to enact safety regulations." 107 S. Ct. at 2384-85. Those questions, the Court said, remain open on remand. *Id.* Pro-regulation commentators are already arguing that the rule is unlikely to apply because of the safety rationale for the regulation. Weidenbach, *supra* note 70, at 8.

The question of whether floodplain regulations can work a compensable taking is not clearly settled. Cases which have considered the issue are collected in Annotation, *Local Use Zoning Of Wetlands Or Flood Plain As Taking Without Compensation*, 19 A.L.R. 4TH 756 (1983 & Supp. 1987). In the first flood plain zoning case, Dooley v. Town Plan & Zoning Commission, 151 Conn. 304, 197 A.2d 770 (1964), the Connecticut high court declared the regulation unconstitutional as applied. *Id.* at 311-12, 197 A.2d at 773-74. More recent cases have been more receptive to flood plain zoning, but have noted in upholding regulations that the landowners involved were not deprived of all beneficial use of their property. *See* Hope, *Various Aspects of Flood Plain Zoning*, 55 N.D.L. REV. 429, 432-34, 438 (1979); *see also* Plater, *The Takings Issue in a Natural Setting: Floodlines and the Police Power*, 52 TEX. L. REV. 201, 227 (1974).

All of the cases cited by the Annotation predate *First English*. The rule on compensation for regulatory takings will now be different for states such as California, which previously banned compensation for regulatory takings. *See Agins I*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979). California courts have previously held that flood plain regulations did not constitute governmental takings, but have noted in doing so that the regulations allowed some beneficial use of the property. *See* Helix Land Co. v. San Diego, 82 Cal. App. 3d 932, 147 Cal. Rptr. 683 (1978); Turner v. County of Del Norte, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972). In *First English*, it may turn out to be important that the county claimed that some development could be allowed on the church's property, since the county has a list of allowed floodplain uses. Deutsch, *supra* note 21, § 1.02(1)(b).

Scholars have argued that some regulations banning development in a flood plain may be unjustified by the police power due to lack of a legitimate public purpose. This is so, it is argued, because flood protection works and flood relief are a normal obliga-

Several aspects of regulatory takings law, embodied in precedents left un-

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tion of government, which governmental bodies should not be able to avoid merely by banning development which might be flooded. *See* Dunham, *Flood Control Via the Police Power*, 107 U. PA. L. REV. 1098, 1125-27 (1959).

The issue of whether a safety regulation can ever work a compensable taking is likely to be hotly contested in the remand proceedings. It is by no means unimaginable that the case could again reach the Supreme Court. If it does so, it may be affected by what some commentators see as a developing Supreme Court trend toward a stiffer level of judicial scrutiny of legislative actions in the land use regulation area.

> [U]nder the guise of equal protection, the Court is taking a closer look at economic and social legislation, including land-use regulation. Generally, the Supreme Court has in modern times eschewed second guessing state and local legislators, holding that absent some basis for strict scrutiny, their actions pass the equal protection test if they have a "rational basis." In practice, this has meant it is virtually impossible to overturn a state or local enactment on the ground that it lacks a rational basis. . . .
>
> Starting in the early 1980s, however, the Court began to reassert its oversight of social and economic legislation that seemed beyond challenge only a few years earlier. Suddenly new life [has been] breathed into the rationality test . . . .

Duerksen & Bean, *Land and the Law 1986: The Perils of Prognostication*, 18 URB. LAW. 947, 953-54 (1986). For a summary of this trend, see Bosselman, *Overview of Recent Decisions*, ALI-ABA INSTITUTE, Aug. 13, 1985.

The argument that the rational-basis hurdle has been raised in the land use context was markedly strengthened by the Court's decision in *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987), handed down less than a month after *First English*. In *Nollan*, the Court found that an exaction by the government of an easement for public passage along a private stretch of ocean beach, in return for permission to build a larger house, was not rationally related to the stated government objective of preserving the public view of the beach from further inland. *Id.* at 3148.

The *Nollan* Court said that a regulation "does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" 107 S. Ct. at 3146 (quoting *Agins II*, 447 U.S. 255, 260 (1980)) (citations omitted). Significantly, the Court said it was *not* established that these standards were "the same as those applied to due process or equal-protection claims." *Id.* at 3147 n.3. On the contrary, the Court asserted, in the takings field the standards are different. "We have required that the regulation must '*substantially* advance' the '*legitimate* state interest' sought to be achieved." *Id.* (quoting *Agins II*, 447 U.S. 255, 260 (1980)) (emphasis added). The standard is not, the Court stated, whether "the State '*could rationally have decided*' the measure adopted might achieve the State's objective." *Id.* (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981)) (emphasis in original).

> [O]ur cases describe the condition for abridgement of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate State interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.

Id. at 3150 (emphasis in original).

If the Court is in fact applying a heightened level of scrutiny in land use regulation cases, as *Nollan* seems to indicate, the significance of *First English* is likely to be increased. The combination of heightened scrutiny and availability of a compensation

changed by *First English*, suggest that an inundation of the courts by inverse condemnation claims in temporary regulatory taking cases may be unlikely. First, the finality requirement which the Supreme Court has made part of the definition of ripeness for judicial review in regulatory takings cases still constitutes a major hurdle for inverse condemnation claims to overcome.

In *Hamilton Bank*[324] and *MacDonald*[325] the Court made it clear that a property owner must obtain a final decision by the regulating agency concerning the application of the regulation to the property before a regulatory takings case is ripe for judicial review. Obtaining this final decision requires submission of at least some revised development plans, and application for variances or other changes in the regulation.[326] As commentators on *Hamilton Bank* had already observed, this finality requirement plainly "takes some of the potential sting out of damage actions being used as a weapon to coerce recalcitrant local governments."[327] While the finality requirement has been criticized by some scholars,[328] the cases which establish it were not overruled by *First English*.

Under *First English*, the regulatory body will have to keep in mind that compensation might be calculated from the date the regulation affected the property if a court finds that the regulation worked a taking.[329] However, because the property owner must meet the finality requirement before he can sue, the government will have an opportunity to avoid financial liability through the choices it makes in the process of considering amended development plans, variance applications, etc. It need not fear that by merely enacting a regulation it has touched a financial "tar baby" it cannot shake off. The fact that a landowner might ultimately win compensation for a regulatory taking in court may create a more even balance of power in negotiations between owner

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remedy could prove more potent than a compensation remedy alone. Indeed, pugilistic analogies to a "one-two punch" seem likely to grace future scholarship on the question. The level of scrutiny eventually applied also may affect the issue of whether the regulation in *First English* is shielded from working a taking by its police power rationale as a safety measure.

324. Williamson Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

325. MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986).

326. *Hamilton Bank*, 473 U.S. at 188-93; *MacDonald*, 106 S. Ct. at 2567-68.

327. Duerksen & Bean, *Land and the Law 1986: The Perils of Prognostication*, 18 URB. LAW. 947, 948 (1986); *see also* Morgan, *supra* note 119, at ch. 9.

328. *See, e.g.*, Deutsch, *supra* note 21, § 1.02(1)(b) ("The Court is attempting to apply concepts of finality that make sense only in a formal administrative decisionmaking process. However, local land use decisionmaking rarely matches that formal model. . . . Usually . . . the developer and the local government are involved in a bargaining process which ultimately leads to permission to develop some project, albeit modified, that is economically acceptable to the developer. Especially when a long-term development plan is proposed . . . there is a likelihood that the development will be modified over time.").

329. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2389 n.10 (1987).

and regulator. However, because owners must go through the process mandated by the finality requirement, and because subsequent litigation would have high financial and temporal costs, owners will normally prefer to obtain the relief they seek through negotiation. Thus, a major increase in litigation resulting from *First English* seems unlikely. It could even be argued that the ultimate threat of financial liability may produce more negotiation compromise by regulators, and thus actually cause some decrease in litigation.

Second, once the finality requirement is met, the abstention doctrine may suggest that a final outcome from state litigation is also prerequisite to federal litigation. *Hamilton Bank* pronounced the seeking of compensation through available state procedures to be a further precondition of ripeness for federal judicial review, and thus appears to establish such a requirement.[330] The significance of this prerequisite has been heightened by *First English*. Whereas formerly only some states provided a compensation remedy, now all must do so, because the Supreme Court declared such a remedy to be constitutionally required.[331] If all landowners seeking access to federal court must first face the time and money costs of state litigation, any putative litigational deluge should be further deterred.

Third, in either state or federal litigation, the burden of proving a regulatory taking will still lie with the property owner, and the presumption of legislative validity with the government. This burden will in many cases remain difficult to meet. Judicial determination that a regulatory taking has occurred is still prerequisite to compensation, and recent decisions imply that if the regulation leaves the property owner with some valuable use of the property, a regulatory taking will not be found.[332] This prospect also seems likely to mitigate against a great increase in litigation.

Those predicting a negative financial impact on regulatory bodies do so to support what has been called the "risk to the fisc" argument.[333] They assert that the potential for government financial ruin supposedly inherent in a compensation remedy is so ominous that it constitutes a policy reason for a judicial finding that compensation is not available for regulatory takings.[334]

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330. Williamson Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194, 194 n.13, 195 (1985) ("[I]f a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it [sic] has used the procedure and been denied just compensation.").

Prior to *Hamilton Bank*, the federal courts were split on whether abstention was required in regulatory taking cases. *See* Berger & Kanner, *supra* note 33, at 694 nn.38-40 (citation of cases preferring or refusing abstention between 1967 and 1984).

331. *See supra* notes 372-86 and accompanying text.

332. *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 135 (1978) (where some economically viable use remained, regulation of air rights did not work a taking); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 653 (1981) (regulatory taking exists where the effects of the regulation "completely deprive the owner of all or most of his interest in the property").

333. Berger & Kanner, *supra* note 33, at 749.

334. *See Agins I*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).

One problem with the argument is that many of its proponents try to have things both ways, as they also argue that the damage done to individual property owners by regulatory takings is so minimal that the impact of a regulation cannot amount to a constitutionally prohibited taking. If regulating entities now face enormous and potentially ruinous judgments, individual property owners must have been suffering catastrophic losses and major deprivations of their constitutional rights prior to *First English*. If, on the other hand, the impact of regulations approaches the minimal, then regulating entities should face insignificant financial consequences when compelled to compensate those minimal damages.[335]

This prediction, often couched in apocalyptic terms,[336] probably belongs in the category of "crying Wolf." As some scholars have noted, such forecasts have proved false before.[337] For example, when state and local governments were trying to preserve the tort sovereign immunity doctrine, similar prophecies were made.[338] Yet general abandonment of the doctrine by state courts did not result in the predicted fiscal disaster.[339]

Another reason to greet the prediction of financial calamity with some skepticism is that the question of whether the compensation required for a regulatory taking must be monetary or whether it might take other forms appears undecided. In *MacDonald*,[340] the Court set out a two-prong test for takings claims, the second prong of which asks whether "any proffered compensation is not just,"[341] and cited *Penn Central Transportation Co. v. City of New York*[342] with approval in the course of discussing such "proffered" compensation.[343] Since the Court in *Penn Central* recognized the state's provision of transferred development rights as adequate compensation,[344] it appears that such compensation, at least in appropriate circumstances, might be found to satisfy the just compensation clause.[345] One commentator has observed that this could be "an enormous relief to communities that have been found to have carried out a regulatory taking," since such a community might be allowed to "avoid having to pay monetary compensation by putting together a package of

335. This contradiction in the "risk to the fisc" argument is pointed out in Berger & Kanner, *supra* note 33, at 743-45.

336. *See, e.g.*, *The White River Junction Manifesto*, *supra* note 36, at 240 ("Widespread adoption of [a compensation remedy] would be a disaster — quite possibly, a disaster of unimaginable proportions.").

337. *See, e.g.*, Comment, *Just Compensation*, *supra* note 33, at 726-27.

338. *Id.*

339. *Id.*; *see also* Berger, *The State's Police Power Is Not (Yet) the Power of a Police State: A Reply to Professor Girard*, LAND USE L. & ZONING DIG., May, 1983, at 4, 8.

340. MacDonald, Summer & Frates v. Yolo County, 106 S. Ct. 2561 (1986).

341. *Id.* at 2566.

342. 438 U.S. 104 (1978).

343. *MacDonald*, 106 S. Ct. at 2567 (dictum).

344. 438 U.S. at 112-15.

345. *See* Deutsch, *supra* note 21, § 1.02(1)(b).

benefits which, while sometimes less desirable from a planning viewpoint, may save the communit[y] from the bankruptcy some commentators have feared."[346]

The prediction that planning and regulation will be inhibited derives from the "risk to the fisc" argument noted above. In the words of the *First English* dissent, "Cautious local officials and land-use planners may avoid taking any action that might later be challenged and thus give rise to a damage action. Much important regulation will never be enacted, even perhaps in the health and safety area."[347]

As Justice Brennan noted in response to the same argument in *San Diego Gas*, "one may wonder as an empirical matter whether the threat of just compensation will greatly impede the efforts of planners."[348] Commentators have also noted a lack of empirical support for the prediction.[349] The Supreme Court has already discounted it in the context of municipal tort immunity. "[A]s an empirical matter, it is questionable whether the hazard of municipal loss will deter a public officer from the conscientious exercise of his duties; city officials routinely make decisions that either require a large expenditure of municipal funds or involve a substantial risk of depleting the public fisc."[350]

The injection of economic realism into the regulatory process should be welcomed rather than feared. The costs imposed by regulations cannot be avoided. As scholars have observed, the question is not whether these costs will be paid but rather who will pay them.[351] One commentator has noted that regulatory bodies lack an "incentive to seek the most efficient means to achieve public goals when they know they will not be forced to pay for even

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346. *Id.* For a general discussion of transferable development rights and their potential satisfaction of the compensation requirement, compare Costonis, *Fair Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975) with Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 799 (1976).

347. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2399-400 (1987) (Stevens, J., dissenting); *see also* Sallet, *Regulatory "Takings" and Just Compensation: The Supreme Court's Search for a Solution Continues*, *supra* note 33, at 636 ("The possibility that large monetary damages may be awarded to landowners for the period of time prior to a final judicial determination of the constitutionality of a land use regulation is likely to deter local governments from engaging in useful and constitutionally proper activities.").

348. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 661 n.26 (1981).

349. *See* Berger, *supra* note 339, at 8; Comment, *Just Compensation*, *supra* note 33, at 730.

350. Owen v. City of Independence, 445 U.S. 622, 656 (1980).

351. *See, e.g.*, Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1970); Michelman, *Property Utility and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 HARV. L. REV. 1165, 1181 (1967); *see also* Blume & Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569 (1984).

the most excessive regulations. A compensation remedy can be the catalyst which facilitates careful assessment of the actual social cost of a regulatory act . . . ."[352]

Furthermore, it is by no means established that less regulation would be an outcome to be deprecated. A growing number of reputable scholars in the field are suggesting that we would be better off, both environmentally and economically, without the current system of land use regulation.[353]

In any case, the Supreme Court has already declared that consideration of issues of constitutional rights and governmental liability is part of the duty of government officials. In the Court's words:

> More important, though, is the realization that consideration of the *municipality's* liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury.[354]

As Justice Brennan summed up this point in *San Diego Gas*, "After all, if a policeman must know the Constitution, then why not a planner?"[355]

B. *Fundamental Principles*

In the long run, the most lasting legacy of the *First English* decision may be the Court's insistence that land use regulation law must not ignore two paramount, fundamental principles. Its emphasis on fairness and protection of constitutional rights provides jurisprudential foundations on which future regulatory takings cases seem likely to build.

Clearly, the economic cost of restrictions on land use is inevitably paid by someone.[356] Just as clearly, the public good demands some reasonable restric-

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352. Comment, *Just Compensation, supra* note 33, at 731-32. As some commentators have observed, the argument that regulation will be inhibited by allowing a compensation remedy at bottom involves a distrust of democracy: those favoring regulation fear that if government were required to pay for the benefits obtained through land use regulations, local regulators would be unable to convince the voters to put up the money. *See* Berger & Kanner, *supra* note 33, at 747-48.

353. *See, e.g.*, Delogu, *supra* note 51, at 261; Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28 (1981); Pulliam, *Brandeis Brief for Decontrol of Land Use: A Plea for Constitutional Reform*, 13 SW. U.L. REV. 435 (1983).

354. Owen v. City of Independence, 445 U.S. 622, 656 (1980) (emphasis in original).

355. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 661 n.26 (1981).

356. The objective of land use regulations which prevent virtually all use of property, zoning for open space use only, for example, has too often been acquisition of a "free lunch" by in effect taking private property for public use without cost to the public. The Supreme Court observed long ago that property is held subject to a duty not to use it to create a nuisance which threatens public health or safety. Mugler v.

tions on land use. As the Supreme Court recognized long ago, the just compensation clause was designed to bar the government from forcing a limited number of citizens to bear the cost of public benefits which in fairness should be paid for by society.[357] The Court has stated that, even if a particular cost was not foreseen by the government, "it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights . . . have been violated."[358] The *First English* majority confirmed this concept when it affirmed that "[i]t is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' "[359]

The idea that property and liberty are intertwined is a fundamental concept of the Constitution. The language of the fifth amendment links property rights with some of the most cherished protections of individual liberty.[360] The

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Kansas, 123 U.S. 623 (1887). Pro-regulation commentators and courts have tried to extend this concept to cover the effect of all land-use regulations no matter how confiscatory. As California Supreme Court Justice Clark observed in dissent in *Agins I*, the holding in that case "effectively pronounces that henceforth in California title to real property will no longer be held in fee simple but rather in trust for whatever purposes and uses a governmental agency exercising legislative power elects, without compensation." *Agins I*, 24 Cal. 3d 266, 282, 598 P.2d 25, 34, 157 Cal. Rptr. 372, 381 (1979) (Clark, J., dissenting). Clark also noted that the plain objective of the regulation at issue in *Agins I* was to take property for public use. As he put it, "What greater diminution can there be than where, as here, [the government] has admitted that the ordinance complained of 'has completely destroyed the value of Plaintiff's property for any purpose or use whatsoever?' " *Id.* at 279, 598 P.2d at 32, 157 Cal. Rptr. at 379. As Justice Clark predicted, the United States Supreme Court rejected the *Agins I* view, after a long delay, in *First English*.

357. Armstrong v. United States, 364 U.S. 40, 49 (1960).

358. Owen v. City of Independence, 445 U.S. 622, 655 (1980).

359. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. at 2388 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

360. The fifth amendment states:

> No person shall be held to answer for a capital . . . crime, unless on a presentment or indictment . . . ; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONST. amend. V. As one treatise observes, "There can be little doubt that the framers believed that protection of property rights was an essential part of the American system." B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 7 (1977).

Recognition that this concept embraced regulatory takings was one of the most important and influential features of Justice Brennan's opinion in *San Diego Gas*. As a study of that opinion found, this recognition "transform[ed] two dimensional arguments setting property rights against government regulations into a three dimensional essay on official accountability in a liberal democracy, in which American courts' primary responsibility in all cases should be the protection of individual freedoms." Bauman, *supra* note 31, at 95. As two other commentators noted, this recognition has

Supreme Court has recognized that property rights are among the most important of the individual rights guaranteed by the Constitution, and declared that they are not somehow inferior to other civil rights supposedly more personal. In the words of Justice Stewart:

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.[361]

The *First English* Court affirmed that constitutional rights are paramount in the context of property as well as in other areas.[362] In doing so, it gave a definitive answer to the question of whether policy considerations should tip the scales against a compensation remedy for regulatory takings.[363] Such policy arguments, the *First English* Court said, are unavailing in light of the "command" of the just compensation clause.[364] *First English* thus joins *Immigration and Naturalization Service v. Chadha*[365] and *Bowsher v. Synar*[366] as a notable recent example of the Court's willingness to defend the Constitution even where policy and expediency may be inconvenienced, and where major pragmatic difficulties for the government may result.

In summing up its decision, the *First English* Court proclaimed the supremacy of the Constitution in the regulatory takings context. As the Court put it:

> We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right: many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the Just Compensation Clause is one of them.[367]

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sometimes been lacking among liberals. Brennan "took a hard look at the guarantees in the Bill of Rights and acknowledges — as some 'liberals' have had a difficult time doing — that property rights are protected by the Constitution in the same breath with rights of life and liberty, and all deserve judicial protection." Berger & Kanner, *Thoughts on "The White River Junction Manifesto": A Reply to the "Gang of Fives's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A.L. REV. 685, 719 (1986).

361. Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

362. *First English*, 107 S. Ct. at 2389.

363. *See supra* notes 223-25 and accompanying text.

364. *First English*, 107 S. Ct. at 2387.

365. 462 U.S. 919 (1983) (invalidation of the legislative veto).

366. 106 S. Ct. 3181 (1986) (role for Comptroller General in enforcement of Gramm-Rudman Act violated separation of powers).

367. *First English*, 107 S. Ct. at 2389. Wielding the Constitution to protect individual rights against excessive government encroachment is the noblest function of the Supreme Court. In that sense, *First English* may deserve a place among the Court's finest moments in recent years.

V. CONCLUSION

Prior to *First English*, each of the fundamental questions regarding regulatory takings lacked a definitive answer. No one could say for certain whether the effect of a land use regulation could amount to a "taking" of property, or if compensation was the remedy if such a taking occurred. No one could state conclusively when a compensable regulatory taking began, or whether the ending of such a taking precluded compensation. The resulting uncertainty was bad for both regulators and landowners.

The Court's ruling in *First English* has substantially reduced this uncertainty. Its holding has established that the Constitution requires compensation when a regulation takes property, even when such a taking is ended by rescission or amendment of the regulation. The opinion has also suggested the parameters of a test for pinpointing when a regulatory taking begins, and strongly implied that a regulation valid as regards the police power can nevertheless constitute a taking if it deprives the owner of the use of the property. Although the *First English* opinion has not eliminated all grounds for dispute on these latter questions, it has provided partial answers and suggested the shape of the conclusions likely to be reached in future cases.

The *First English* decision did not signal the tilt toward property owners painted in popular reports. Considerable procedural requirements must still be met before a landowner aggrieved by a regulation can bring an inverse condemnation action, and several safety nets still separate regulators from ultimate financial liability. What the decision did accomplish may be best described as a leveling of the playing field on which regulators and landowners contend. While compensation was unavailable when regulations took away the use of property, landowners were at a fundamental disadvantage in attempting to protect their constitutionally guaranteed property rights. Regulators faced no real penalty for trampling on those rights, and behaved accordingly. By establishing that the Constitution requires compensation for regulatory takings, the *First English* Court has ended the law's previous tilt toward regulators.

The *First English* ruling has also insured an ultimate protection for individual property rights against violation by the government through regulations. That revitalization of constitutional guarantees is the most fundamental meaning of the case. *First English* stands as a reminder that even ends which benefit society do not justify means forbidden by the Constitution as unfair to individuals. Its reaffirmation of the mutually dependent relationship between liberty and property which lies at the heart of the just compensation clause of the fifth amendment may in the end prove to be its most significant message.

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