CONSTITUTIONAL LAW—FIFTH AMENDMENT TAKINGS CLAUSE—MONETARY COMPENSATION FOR TEMPORARY REGULATORY TAKING IS REQUIRED FOR THE PERIOD DURING WHICH THE REGULATION IS EFFECTIVE—*First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

The fifth amendment to the United States Constitution provides that private property shall not "be taken for public use without just compensation."[1] In light of this constitutional mandate, government agencies have routinely paid monetary compensation to property owners for land which has been formally condemned for public use.[2] Nevertheless, the question of what remedies are sufficient to provide just compensation has not been without controversy.[3] One aspect of this controversy has been the question of what remedies should be available to property owners subject to regulatory takings—the takings effectuated through governmental land use regulations so restrictive as to deprive a landowner of all economically viable use of his land.[4] In litigating this issue, state and local governments generally argue that an aggrieved property owner's relief should be limited to the invalidation of the regulation.[5] Property owners, on the

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[1] U.S. CONST. amend. V.

[2] *See* F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE, 51 (1973) [hereinafter BOSSELMAN].

[3] Costonis, *"Fair" Compensation and the Accommodation Power*, in REGULATION V. COMPENSATION IN LAND USE CONTROL: A RECOMMENDED ACCOMMODATION, A CRITIQUE, AND AN INTERPRETATION 21-24 (1977).

[4] *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). The Supreme Court recognized that "the natural tendency of human nature is to extend the [police power] more and more until at last private property disappears" and held that a government land use regulation which "goes too far" may constitute a taking within the meaning of the fifth amendment. *Id.* Thus, in addressing the question of whether a taking has occurred, courts have considered both physical occupation of property by a governmental agency, and regulatory measures enacted by the agency. *See* Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491, 495, 499 (1981). Typically, courts have categorized physical occupation as a greater intrusion on property rights than regulatory action and have been more inclined to find that a taking has occurred when physical occupation was involved. *See* BOSSELMAN, *supra* note 2, at 106.

[5] *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 627 (1981) (City of San Diego relying on California Supreme Court's decision in Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), limiting remedy for regulatory taking to invalidation or declaratory relief); Agins v. City of Tiburon, 24 Cal. 3d 266, 273, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375-76 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980) (California court held invalidation to be sole remedy available to a landowner for a regulatory taking).

other hand, contend that they are entitled to monetary compensation for the value of the lost use of their land during the period in which the regulation was in effect.[6]

Until recently, the United States Supreme Court had declined to consider the remedies involved concerning a regulatory taking.[7] In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[8] the Court finally addressed this matter.[9] The Court held that under proper circumstances the fifth amendment requires that property owners receive monetary relief for the period of time during which a regulatory taking was in effect.[10]

In 1957, the First English Evangelical Lutheran Church of Glendale (Church) purchased land in the Angeles National Forest along the banks of Mill Creek.[11] Although located along "the natural drainage channel for a watershed area owned by the National Forest Service,"[12] the Church used the property called "Lutherglen," as a retreat and recreational facility.[13] The Church operated Lutherglen until February 1978, when run-off from a heavy storm overflowed the banks of Mill Creek flooding and destroying Lutherglen.[14] In January 1979, in response to the severe flooding problem, the County of Los Angeles (County)

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[6] *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 626; Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980); (landowners contend that they are entitled to a remedy in damages).

[7] *See* MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986) (Supreme Court failed to reach the issue of remedies due to its finding that no final determination regarding the taking claim had been reached and therefore the case was not ripe for review); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-87 (1985) (Supreme Court held that remedies claimed were premature because of the failure to obtain a final decision regarding the application of the zoning ordinance); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (Supreme Court declined to determine the remedies issue because a final judgment was not rendered by the lower court); Agins v. City of Tiburon, 447 U.S. 255, 263 (1980) (Supreme Court declined to address the remedies issue based on its finding that a taking had not occurred and that the question regarding compensation for regulatory takings was moot).

[8] 482 U.S. 304 (1987).

[9] *Id.* at 312.

[10] *Id.* at 321.

[11] *Id.* at 307.

[12] *Id.* A drainage channel or watershed is the land area which contributes surface runoff to rivers and streams. *See* ABA, MATERIALS ON FLOODPLAINS AND WETLANDS: LEGAL CONSTRAINTS AND OPTIONS, §§ 2-1 to 2-5 (R. Robbins & D. Lagerroos eds. 1981) [hereinafter FLOODPLAINS & WETLANDS].

[13] *First English*, 482 U.S. at 307.

[14] *Id.* The Church contended that the flood and resultant damage to Lutherglen was the result of a forest fire in July of 1977 which "denuded the hills upstream

adopted an ordinance prohibiting all construction and reconstruction within a designated flood plain area.[15] The area affected by the ordinance included a portion of the Church's property where Lutherglen previously had been located.[16]

The Church subsequently filed suit against the County and the Los Angeles County Flood Control District in the Superior Court of California, alleging, among other things, that the ordinance denied the Church of all use of Lutherglen.[17] The Church sought monetary damages based on a claim of inverse condemnation.[18] Following California precedent, the trial court held

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from Lutherglen, destroying approximately 3,860 acres of the watershed area and create[d] a serious flood hazard." *Id.*

[15] *Id.* at 307-08. Interim Ordinance No. 11,855 was adopted by the County of Los Angeles (County) in January 1979. *Id.* at 307. The ordinance was "an interim ordinance temporarily prohibiting the construction, reconstruction, placement or enlargement of any building or structure within any portion of the interim flood protection area delineated within Mill Creek." *Id.* at 326-27 n.6 (Stevens, J., dissenting). The County contended the ordinance was necessary to preserve and maintain the public health and safety. *Id.* at 307.

This power to protect and enhance the public health, safety and general welfare has been interpreted as being reserved to state governments, for the benefit of their citizens, through the tenth amendment of the United States Constitution. FLOODPLAINS & WETLANDS, *supra* note 12, at § 6-1. Under this power, states retain jurisdiction to regulate floodplain areas. *See id.* The severe threats that flooding presents to the health, safety and general welfare of the public justifies local governmental regulation of floodplain areas through the exercise of their police powers. *See id.* §§ 6-1 to 6-2; Mandelker, *supra* note 4, at 501-02; *see also* Agins v. City of Tiburon, 477 U.S. 255, 261 (1980); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 125 (1978) (both cases upholding the right of local authorities to regulate land use to protect the public welfare).

[16] *First English*, 482 U.S. at 307.

[17] *Id.* at 308. A claim for loss of use is synonymous to a claim that a taking occurred. *See* Cunningham, *Inverse Condemnation as a Remedy for Regulatory Takings*, 8 HASTINGS CONST. L.Q. 517, 521-22 (1981). The Church's amended complaint additionally alleged that the County was liable for the destruction of Lutherglen due to the dangerous conditions resulting from the forest fire on the County's properties upstream of Lutherglen which contributed to the previous flooding. *First English*, 482 U.S. at 308. The Church also sought damages in tort for cloud seeding by the County during the storm that caused the floods which destroyed Lutherglen. *Id.*

[18] *First English*, 482 U.S. at 308. Inverse condemnation is the term used to describe a cause of action by a landowner against a government entity under which the landowner seeks to recover monetary compensation for the taking of property in instances where the government entity has failed to commence formal condemnation proceedings. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 637 n.2 (1981) (Brennan, J., dissenting).

> In the typical condemnation proceeding, the government brings a judicial or administrative action against the property owner to take "the fee simple or an interest in his property . . . . In an "inverse condemnation" action, the condemnation is "inverse" because it is the landowner, not the government entity, who institutes the proceeding.

that inverse condemnation was not an available remedy to a landowner seeking relief from a regulatory taking and granted the County's motion to strike the Church's claim for loss of the use of Lutherglen.[19] The California Court of Appeal affirmed,[20] and the California Supreme Court denied review.[21]

Granting certiorari,[22] the United States Supreme Court reversed the state court decision.[23] The Court held that where property has been taken without just compensation as a result of an excessive land use regulation, the landowner is entitled to compensation for the period the regulation was in effect.[24] The Court further held that monetary compensation was required even when the regulation was subsequently revoked.[25]

Challenges to land use regulations arise out of the inherent conflict among three basic rights: a landowner's traditional property rights, the government's power of eminent domain and the government's right, through its police powers, to regulate property use for the public welfare.[26] The fifth amendment to the United States Constitution reserves to the government the right

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Id. (citations omitted).

[19] *First English*, 482 U.S. at 309. The trial court relied on Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 477 U.S. 255 (1980). Under the *Agins* decision, a property owner's remedy for a regulatory taking was limited to invalidation rather than monetary compensation through inverse condemnation. *Id.* at 276-77, 598 P.2d at 31, 157 Cal. Rptr. at 378.

[20] *First English*, 482 U.S. at 309. The California Court of Appeal found itself obligated to follow *Agins* both because *Agins* demonstrated the most recent stand on the issue taken by the highest court of that state, and " 'because the United States Supreme Court ha[d] not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief . . . .' " *Id.*

[21] *Id.* at 309. In *Agins* the California Supreme Court set out a policy of denying monetary damages for regulatory takings. *See Agins*, 24 Cal. 3d at 275-77, 598 P.2d at 29-31, 157 Cal. Rptr. at 377-78.

[22] 478 U.S. 1003 (1986).

[23] *First English*, 482 U.S. at 322.

[24] *Id.* at 321-22.

[25] *First English*, 482 U.S. at 322. The Court stressed that its decision did not mean that every land use regulation enacted would require that compensation be paid, but rather, that compensation would be required only in instances in which a regulation is in fact deemed to constitute a taking. *Id.* Additionally, the Court's decision specifically excluded "normal delays in obtaining building permits, changes in zoning ordinances, variances and the like." *Id.* 107 S. Ct. at 2389.

[26] *See* 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, 712 (1982). The term property is "[i]n the strict legal sense, an aggregate of rights which are guaranteed and protected by the government. . . . More specifically, ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it." BLACK'S LAW DICTIONARY 1095 (5th ed. 1979). The right of eminent domain,

to appropriate private property for public use.[27] This right of eminent domain requires that just compensation be paid to the aggrieved property owner.[28] The government also has an implied right under the United States Constitution to regulate the use of private property in order to protect the health, safety and welfare of the community.[29] The right of the government to reg-

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or right of "taking," originated from the right of the government to seize land. BOSSELMAN, *supra* note 2, at 51.

There are three basic means by which the federal government can exercise its right of eminent domain. Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 3 (1984). The most traditional method is by the initiation of condemnation proceedings. *Id.* Condemnation proceedings involve the filing of a complaint by a government for a court determination of the value of the property to be taken. *Id.* at 3-4. After such value is determined, the governmental entity has the option of either purchasing the property at the determined price or dismissing the proceeding. *Id.* at 4. A second method by which the federal government can take private property is pursuant to 40 U.S.C. § 258a. *Kirby Forest*, 467 U.S. at 3. This statute empowers the federal government

> "at any time before judgment" in a condemnation suit, to file "a declaration of taking signed by the authority empowered by law to acquire the lands [in question], declaring that said lands are thereby taken for the use of the United States." The Government is obliged, at the time of the filing, to deposit in the court,. . . an amount of money equal to the estimated value of the land. Title and right to possession thereupon vest immediately in the United States. In subsequent judicial proceedings, the exact value of the land . . . is determined, and the owner is awarded the difference (if any) between the adjudicated value of the land and the amount already received by the owner, plus interest on that difference.

Id. at 4-5 (footnote and citation omitted). The third method by which the federal government may take private property is where "Congress . . . exercises the power of eminent domain directly. . . . [by] enact[ing] a statute appropriating the property immediately by 'legislative taking' and setting up a special procedure for ascertaining, after the appropriation, the compensation due to the owners." *Id.* at 5.

The government's right to regulate private property is derived from "certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated . . . relate to the safety, health, morals and general welfare of the public." Lochner v. New York, 198 U.S. 45, 53 (1905).

[27] *See* U.S. CONST. amend V. The fifth amendment provides in pertinent part that "[n]or shall private property be taken for public use without just compensation." *Id.* This clause, generally referred to as the "just compensation" clause, applies to the states through the fourteenth amendment. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 241 (1897).

[28] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[29] R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN, 107-10 (1985). While the United States Constitution makes no express reference to a right of police power, it has, by implication, been read into the Constitution. *Id.* at 107-08. "It would be a very odd construction of the Constitution that denied . . . governments the minimum capacity to maintain peace and good order when those are the central functions of government itself." *Id.* at 108.

ulate the use of private property, commonly referred to as the police power, while broad, is not without limits.[30] There is a point at which government regulation of private property becomes a "taking" within the meaning of the fifth amendment.[31]

The point at which a land use regulation becomes a taking is not set forth in the fifth amendment.[32] The United States Supreme Court has been unable to develop a clear formula for determining when a regulation goes so far as to constitute a taking.[33] The Court has held that within the context of the fifth amendment, the term "taken" includes governmental exercise of the right of eminent domain,[34] governmental action resulting in direct physical invasion of property[35] and governmental regulation of property which renders such property valueless or unusable.[36] Whether accomplished by physical invasion, condemnation, regulation or any other exercise of the police power, a taking is a governmental action which deprives the individual of property rights.[37]

In 1926, in *Village of Euclid v. Ambler Realty Co.*, the Court addressed a constitutional challenge to a comprehensive zoning or-

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[30] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). The Supreme Court noted:

> Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation must have its limits . . . .

Id.

[31] *Id.* at 415. As stated by Justice Holmes, "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." *Id.*

[32] *See* Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 RUTGERS L.J. 15, 50 (1983).

[33] *See id.* at 20. The Court has acknowledged the lack of a set formula for determining when a regulatory taking occurs. Each case is reviewed and decided on its own facts. *Id. See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 174-75 (1979); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[34] Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 9 (1983).

[35] *See* United States v. Causby, 328 U.S. 256, 265-66 (1946) (holding that continuous invasion of property by low-flying aircraft constituted a direct invasion of property and resulted in a taking); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall) 166, 181 (1871) (holding that erection of a dam that resulted in a flooding of landowner's property and destruction of its usefulness constituted a taking).

[36] *See* Armstrong v. United States, 364 U.S. 40, 48-49 (1960) (holding that destroying value of liens constituted a taking within the meaning of the fifth amendment); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) (holding that state statute which deprived owner of all economic value of property constituted a taking).

[37] *See* Bauman, *supra* note 32, at 50.

dinance.[38] The Court held that a determination of the validity of land use regulations requires a balancing of the government's right to protect the public health, safety and general welfare against the private citizens' property interests.[39] Despite the impact of land use regulations on private property values and their restrictions on property rights, the United States Supreme Court upheld governmental imposition of land use controls as a valid exercise of the police power.[40] The Court indicated, however, that a landowner could properly challenge the specific impacts of a zoning ordinance on a case-by-case basis.[41] Such a challenge would require the examining court to take into consideration the nature of the restrictions imposed along with the particular circumstances involved.[42] As a result of *Euclid*, early challenges to the validity of zoning regulations were largely based on landowner allegations that the ordinance under attack violated the due process guaranties of the fourteenth amendment.[43] By seeking to invalidate the offending regulation or to enjoin application of the regulation to the specific property involved, landowners did not pursue a compensation remedy under these early challenges.[44]

Notwithstanding the general validity of land use regulation,

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[38] 272 U.S. 365 (1926). The Village of Euclid, Ohio, enacted "a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, two-family houses, single family houses, etc., the lot area to be built upon the size and height of buildings." *Id.* at 379-80. A landowner sought an injunction restraining enforcement of the ordinance on the grounds that it violated the due process guarantees of the fourteenth amendment in that it reduced and destroyed the value of his land and prohibited the land's natural development.

[39] *Id.* at 387. Generally, the courts are reluctant to invalidate governmental regulations falling within the purview of the police power. *See, e.g.*, Penn Central Transp. Co. v. New York City, 438 U.S. 104, 125 (1978). Initially, the common law theory of nuisance was used to sanction governmental regulations enacted to prevent a public harm. *See* R. EPSTEIN, *supra* note 29, at 112-14. Generally, land use regulations have been upheld as a permissible governmental action when promoting "the health, safety, morals or general welfare" despite their infringement on real property rights. *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124-25 (1978).

[40] *See Euclid*, 272 U.S. at 397.

[41] *See id.*

[42] *See id.*

[43] Bauman, *supra* note 32, at 76.

[44] *See id. See also* Nectow v. City of Cambridge, 277 U.S. 183 (1928). The decision in *Nectow* was instrumental in establishing that land use regulations could be successfully challenged under the fourteenth amendment's due process provisions. *Id.* at 188-89. A successful challenge requires the plaintiff to show either that the regulations are arbitrary, capricious or unreasonable or that the restrictions imposed are not rationally related to the desired goal. *See id.* at 187-88.

the Supreme Court in *Pennsylvania Coal Co. v. Mahon*,[45] had made it clear that a land use regulation could also be challenged under the fifth amendment as a taking.[46] The Mahons were the owners of a home built on property once owned by the Pennsylvania Coal Company.[47] The company expressly had reserved the right to mine coal on land on which the home was built.[48] The Mahons sought to enjoin the coal company from exercising its mining rights based on a Pennsylvania statute regulating mining operations.[49] The Pennsylvania statute, known as the Kohler Act, prohibited the mining of coal if it would result in the collapse of any type of structure used for human habitation.[50] In an opinion by Justice Holmes, the Supreme Court invalidated the Kohler Act as an excessive use of the state's police power.[51] Using a balancing approach which placed the state's police and eminent domain powers at opposite ends of a scale, the Court held that "[t]he 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."[52] The Court observed that the "constitutional way" to remedy the inequity in a taking situation is to compensate the owner for the loss.[53]

Following *Euclid*,[54] case law evinces a plethora of state courts addressing the validity of land use regulations.[55] As challenges to the validity of land use controls in the state courts proved un-

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45 260 U.S. 393 (1922).

46 *See id.* at 415. Historically, physical takings cases were decided under a theory of eminent domain, while takings resulting from stringent regulation were deemed an unconstitutional exercise of the police power. *See supra* note 26 and accompanying text. It has been argued that although the police power and the government's power of eminent domain are at opposite ends of the spectrum of governmental power, often the two have proven to be difficult to distinguish. Bauman, *supra* note 32, at 53.

47 *Pennsylvania Coal*, 260 U.S. at 412.

48 *Id.*

49 *Id.* (citation omitted).

50 *Id.* at 412-13 (citation omitted).

51 *Id.* at 414.

52 *Id.* at 415.

53 *Id.* at 416.

54 BOSSELMAN, *supra* note 2, at 138. Because of the virtual retirement of the Supreme Court from land use cases after the 1920's, the Court's analysis in *Pennsylvania Coal* has set the only guidelines for the state courts to follow in subsequent land use regulation cases. *Id. See also* Nectow v. Cambridge, 277 U.S. 183 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). These cases set forth the last definitive stands taken by the Supreme Court on issues of zoning for a forty-six year period. Bauman, *supra* note 32, at 71.

55 *See* BOSSELMAN, *supra* note 2, at 138.

successful,[56] landowners began seeking compensation for economic losses resulting from regulatory takings under the theory of inverse condemnation.[57] Consequently, the states began to consider the types of remedies that should be available to a landowner whose property has been subject to a regulatory taking.[58] In the absence of a Supreme Court decision on point, state courts independently determined whether a landowner's remedy for a regulatory taking was limited to an invalidation of the regulation.[59] Consequently, over time, state court decisions addressing the remedies issue exhibited little uniformity.[60] At one end

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[56] *See, e.g.*, Modjeska Sign Studios, Inc. v. Berle, 43 N.Y.2d 468, 477-78, 373 N.E.2d 255, 260, 402 N.Y.S.2d 359, 365-66 (1977) (holding aesthetics to be a valid basis for the exercise of the police power); Just v. Marinett County, 56 Wis.2d 7, 17, 201 N.W.2d 761, 768 (1972) (upholding building restrictions on waterfront property limiting use of property consistent with its natural state).

[57] *See, e.g.*, MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 345-47 (1986); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 626 (1981); Agins v. City of Tiburon, 447 U.S. 255, 258 (1980).

As the types and extent of land use regulations expanded and greater financial losses were incurred by landowners unable to sell their property at pre-regulation market values, landowners increasingly turned to inverse condemnation proceedings for relief. Comment, *supra* note 26, at 715. In these instances landowners viewed mere invalidation as an inadequate remedy. *See id.* at 732. Landowners also sought relief on a theory of inverse condemnation because attempts at invalidation proved futile as nothing prevented "the regulating entity from subsequently imposing a modified or alternate restriction which achieve[d] the same result, plunging the property owner into another expensive and time-consuming round of litigation." *Id.* at 732-33. *See also* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 655-56 (1981) (Brennan, J., dissenting) (recognizing that where a substantial period of time has elapsed in connection with a landowner's attempt to have a regulation invalidated, mere invalidation is insufficient compensation).

[58] *See* Comment, *supra* note 26, at 716-19. There are two main arguments raised by advocates of limiting the remedy for a regulatory taking to invalidation. *See id.* at 724-32. First, they suggest limiting available remedies gives the regulating agency an opportunity to bring the regulation within constitutional constraints or, in the alternative, of continuing the regulation and paying compensation. *Id.* at 725. Second, they assert that unless governmental authorities are first offered the option to invalidate the offending regulation, a chilling effect on beneficial land use controls will result, causing governmental agencies to refrain from implementing innovative land use policies for fear of financial liability. *Id.* at 726-32.

There are three main arguments raised by proponents of a remedy in damages. *Id.* at 732-40. First, they suggest that invalidation is often an inadequate remedy for the temporary loss resulting from the regulation. *Id.* at 732. Second, they maintain that invalidation frequently results in an endless stream of litigation due to the ability of a municipality to enact subsequent land use regulations, slightly modified, but accomplishing the same result as the previously invalidated regulation. *Id.* Third, they assert that allowing damages for regulatory taking regulations will insure that planners exercise their best judgment in drafting regulations designed to strike a fair balance between regulation and the rights of property owners. *Id.* at 731-32.

[59] *See id.* at 716-18.

[60] *Id.* at 716. State courts have adopted a variety of positions on the issue of

of the spectrum, California limited the landowner's remedy in the case of a regulatory taking to invalidation.[61] At the other extreme, New Hampshire expressly rejected the California view, in favor of a monetary compensation remedy.[62] Aware of the lack of uniformity in state court decisions, landowners looked to the federal courts and challenged the ability of the state courts to limit the remedy for a regulatory taking to invalidation.[63]

The United States Supreme Court had its first opportunity to resolve the issue of whether a state may restrict the remedies available to a landowner affected by a regulatory taking in *Agins v. City of Tiburon*.[64] The City of Tiburon adopted an ordinance restricting the density of development in certain areas within the city limits.[65] As a result of the ordinance, the Agins' ability to develop their land was severely curtailed, as was their anticipated profit from the proposed development.[66] The Agins filed a claim against the city in the California Superior Court alleging that the ordinance constituted a taking of their property without compensation and sought damages on a theory of inverse condemnation.[67] While the California Supreme Court found that no taking had occurred based on the facts presented,[68] it noted that inverse condemnation was not an appropriate remedy for a regulatory taking.[69] The court asserted that a landowner challenging the validity of an ordinance was limited to recovery through declaratory relief or mandamus.[70] The United States Supreme Court

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whether invalidation is a sufficient remedy for a landowner affected by a regulatory taking. *See id.* at 717-18 nn. 48-51.

61 Agins v. City of Tiburon, 24 Cal. 3d 266, 276-77, 598 P.2d 25, 31, 157 Cal. Rptr. 372, 378 (1979), *aff'd on other grounds*, 447 U.S. 255, 263 (1980).

62 *See* Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981) (holding that a compensation remedy may be available when a landowner's property has been the subject of a regulatory taking).

63 *See* Comment, *supra* note 26, at 719.

64 447 U.S. 255 (1980).

65 *Agins*, 24 Cal. 3d at 271, 598 P.2d 27, 157 Cal. Rptr. at 374. The purpose of the ordinance was to prevent unnecessary urbanization of undeveloped land. *Agins*, 447 U.S. at 261 n.8.

66 *See Agins*, 24 Cal. 3d at 271-72, 598 P.2d at 27, 157 Cal. Rptr. at 374.

67 *Id.* at 272, 598 P.2d at 27, 157 Cal. Rptr. at 374.

68 *Id.* at 277, 598 P.2d at 31, 157 Cal. Rptr. at 378. The California court held that the ordinance was an exercise "of the city's police power to protect the residents of Tiburon from the ill effects of urbanization. Such governmental purposes long have been recognized as legitimate." *Agins*, 447 U.S. at 261 (footnote omitted).

69 *Agins*, 24 Cal. 3d at 275, 598 P.2d at 29, 157 Cal. Rptr. at 376.

70 *Id.* at 276-77, 598 P.2d at 31, 157 Cal. Rptr. at 378. The California Supreme Court stated that a zoning ordinance is unconstitutional only if it deprives the land-

granted certiorari,[71] and affirmed the California Supreme Court's decision that no taking had occurred but never reached the question of whether compensation was an available remedy for regulatory takings.[72]

In *San Diego Gas & Electric Co. v. City of San Diego*,[73] the United States Supreme Court once again refused to reach the issue of whether compensation was an appropriate remedy for a regulatory taking.[74] San Diego Gas & Electric Company had assembled a large tract of land for the construction of a nuclear power plant.[75] At the time of purchase, the tract was zoned predominantly for industrial or agricultural uses.[76] Subsequently, the city rezoned portions of the company's property from industrial to agricultural and open space uses.[77] Additionally, portions of the company's property zoned for open space use were designated for potential purchase by the city.[78] Unable to use the portions of its property zoned for open space, the company filed suit against the city in the California Superior Court alleging that its property had been taken and sought damages under the theory of inverse condemnation.[79] The superior court concluded that a taking had occurred and that the company was entitled to compensation.[80] The California Court of Appeal affirmed.[81] The California Supreme Court remanded the case to the appellate court in light of its *Agins* decision.[82] On remand, the appellate

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owner of "all reasonable use of his property." *Id.* at 277, 598 P.2d at 31, 157 Cal. Rptr. at 378.

71 444 U.S. 1011 (1980).

72 *Agins*, 447 U.S. at 263.

73 450 U.S. 621 (1981).

74 *Id.* at 623.

75 *Id.* at 624.

76 *Id.*

77 *Id.* at 624-25. "The city's plan defined 'open space' as 'any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes.' " *Id.* at 637 n.1 (Brennan, J., dissenting) (citation omitted).

78 *See id.* at 625.

79 *Id.* at 625-26. The company claimed that by adopting an open-space plan the city had denied it of all reasonable use of its property. *Id.* at 626.

80 *Id.* at 626-27.

81 *Id.* at 627.

82 *Id.* at 628. *Agins* and *San Diego Gas & Electric* were decided within the same year by the California courts. Decided first, *Agins* established the California position of refusing to grant a compensation remedy when challenging land use regulations. Agins v. City of Tiburon, 24 Cal. 3d 266, 275, 598 P.2d 25, 29, 157 Cal. Rptr. 372, 376 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980). *See* Mandelker, *supra* note 4, at 493-94.

court, following *Agins*, reversed the trial court.[83] The California Supreme Court declined further review.[84]

The United States Supreme Court granted certiorari,[85] but ultimately concluded that it lacked jurisdiction to decide the case because the California Court of Appeal had failed to enter a final judgment.[86] Because the case was decided on procedural grounds, the Court did not address the merits of the remedies issue.[87]

Notwithstanding the majority's failure to review the remedies issue, Justice Brennan addressed the issue directly in a dissenting opinion.[88] Justice Brennan noted that case precedent held that arbitrary or excessive use of the police power can constitute a fifth amendment taking, entitling the property owner to just compensation.[89] Justice Brennan based his analysis on the express language of the fifth amendment and on prior United States Supreme Court cases interpreting it.[90] He concluded that "once a court finds that a police power regulation has effected a 'taking,' the government entity must pay just compensation for

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[83] *San Diego Gas & Elec.*, 450 U.S. at 629.

[84] *Id.* at 630.

[85] San Diego Gas & Elec. Co. v. City of San Diego, 447 U.S. 919 (1980).

[86] *San Diego Gas & Elec. Co.*, 450 U.S. at 632-33. Under Title 28 U.S.C. § 1257 the jurisdiction of the United States Supreme Court is limited to the review of final judgments by a state court. *Id.* at 633. Although the California Court of Appeal had concluded that monetary compensation was not an available remedy for a regulatory taking, it had "not decided whether any other remedy [was] available because it ha[d] not decided whether any taking in fact ha[d] occurred." *Id.* Consequently, the court's decision was not final. *Id.*

[87] *Id.* at 623.

[88] *Id.* at 636-61 (Brennan, J., dissenting). Justices Stewart, Powell and Marshall joined in Justice Brennan's dissent. *Id.* at 636 (Brennan, J., dissenting). Justice Rehnquist, in a concurring opinion, indicated that had he not agreed that procedural defects prevented the Court from reaching the merits of the case, he would have joined in Justice Brennan's opinion. *Id.* at 633-34 (Rehnquist, J., concurring).

[89] *Id.* at 648-50 (Brennan, J., dissenting) (citing Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (recognizing that the police power is limited by the just compensation clause); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (holding excessive governmental regulation under the commerce clause to be a taking); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) (determining a balance to be struck between valid regulation and a taking); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (acknowledging that police power can be exercised in an unconstitutional manner); Andrus v. Allard, 444 U.S. 51, 68 (1979) (holding "prohibition of the sale of lawfully acquired property . . . does not effect a taking in violation of the [f]ifth amendment"); Pennsylvania Coal Co. v. Mahon, 269 U.S. 393 (1922) (holding a regulation that goes too far will be deemed to be a taking)).

[90] *Id.* at 654-55 (Brennan, J., dissenting) (citing United States v. Clarke, 445 U.S. 253 (1980); Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946); Jacobs v. United States, 290 U.S. 13 (1933)).

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."[91] In Justice Brennan's opinion, the fact that the government regulation was subject to amendment or repeal did not make the just compensation clause any less applicable.[92] The Justice concluded, however, that the just compensation clause does not give courts a right to compel initiation of a condemnation proceeding in instances where a taking is temporary and reversible.[93] In those instances, the government retains the right to rescind the offending regulation with any compensation due the landowner to be determined based upon standard methods used to calculate the value of the temporary use of the property.[94]

On two additional occasions, the Supreme Court granted certiorari to resolve the issue of whether landowners must be compensated when a governmental regulation has resulted in a temporary taking of their property.[95] In both instances procedural problems prevented the Court from addressing the issue.[96] In *Williamson County Regional Planning Commission v. Hamilton Bank*,[97] subsequent to the approval of a preliminary plat for the development of the landowner's property, but prior to completion of the development, the county revised its zoning ordinance.[98] The county applied the old ordinance requirements to the developer's tract for a period of two years.[99] Thereafter, the county applied the requirements of the new ordinance to the undeveloped portions of the developer's property and all subsequent proposals for further development were disapproved.[100]

Protesting the application of the new ordinance to its prop-

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[91] *Id.* at 658 (Brennan, J., dissenting).

[92] *Id.* 450 U.S. at 657 (Brennan, J., dissenting).

[93] *Id.* at 658 (Brennan, J., dissenting).

[94] *See id.* (citing Danforth v. United States, 308 U.S. 271, 284 (1939)).

[95] *See* MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 185 (1985).

[96] *See MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. at 348-49; *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. at 185.

[97] 473 U.S. 172 (1985).

[98] *Id.* at 177-78.

[99] *See id.* at 178.

[100] *Id.* at 179-82. The developers preliminary plat was based on a cluster zone development with a total of 736 residential units. *Id.* at 177. Under the revised cluster density regulations, development would be limited to a total of 548 units. *Id.* at 179. In addition, eight other violations of the new ordinance were also cited in the planning commission's rejection of the developer's revised preliminary plat. *See id.* at 188.

erty, the developer filed suit in the district court of Tennessee against the county's Planning Commission under section 1983 of the Civil Rights Act.[101] The developer's complaint alleged that application of the new ordinance to the undeveloped portions of its property constituted a taking without just compensation.[102] The jury found that a temporary taking had occurred and awarded the developer $350,000.00 in damages.[103] Notwithstanding the jury's findings, the district court held that a taking had not occurred and vacated the jury award.[104] Nevertheless, the court also granted the developer injunctive relief.[105] The Sixth Circuit Court of Appeals, applying the reasoning of Justice Brennan's dissent in *San Diego Gas & Electric*, reinstated the jury award, holding that where a taking has occurred, just compensation must be paid.[106] In a dissenting opinion, Judge Wellford, however, argued that by finding a compensatory taking the majority had incorrectly relied on case law which was not on point.[107] The judge reasoned that cases in which the government took physical possession of a landowner's property for a temporary period were distinguishable from cases where land use controls imposed a temporary restriction on the landowner's right to develop his property.[108] The United States Supreme Court granted certiorari to decide the compensation issue, and again ruled that the compensation issue was not ripe for review.[109]

In *MacDonald, Sommer & Frates v. County of Yolo*,[110] a developer filed suit in the California Superior Court for inverse condemna-

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[101] *Id.* at 182. Under section 1983, a private monetary action is available to private individuals for infringement of their federally protected rights. *See* 42 U.S.C. § 1983 (1984). This remedy has been held to encompass private actions against municipalities "for violations of 'any rights, privileges, or immunities secured by the Constitution and laws.' " Mandelker, *supra* note 4, at 506 (citation omitted). Because section 1983 also allows injunctive remedies, the question of whether monetary damages will be awarded is an open issue. *See id.* at 510-12.

[102] *Williamson County*, 473 U.S. at 182.

[103] *Id.* at 183.

[104] *Id.*

[105] *Id.*

[106] Hamilton Bank v. Williamson County Regional Planning Comm'n, 729 F.2d 402, 409 (6th Cir. 1984). The court of appeals found that the evidence was sufficient to support the jury's finding that a taking had occurred. *Id.* at 409.

[107] *Id.* at 412 (Wellford, J., dissenting).

[108] *Id.*

[109] *Williamson County*, 473 U.S. at 185. The Court found the developer's claims to be premature in that the developer did not first seek to obtain zoning variances in order to develop the property. *Id.* at 188. Consequently, the appellant had not exhausted his state remedies before seeking federal judicial intervention. *See id.* at 190-91.

[110] 477 U.S. 340 (1986).

tion after approval of its application for development was denied.[111] In its complaint, the developer alleged that the county was restricting its property to open-space use by refusing to approve its proposed plans for development.[112] The California Superior Court held "that, irrespective of the insufficiency of [the developer's] factual allegations, monetary damages for inverse condemnation are foreclosed by the California Supreme Court's decision in *Agins v. City of Tiburon*."[113] The United States Supreme Court again failed to rule on the remedies issue by holding that the decision on appeal was not ripe for review.[114] Only in Justice Byron White's dissent were the merits of the issue addressed.[115] Justice White concluded that if a taking has occurred, even if only temporarily, just compensation must be paid.[116]

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,[117] marked the fifth attempt by the United States Supreme Court this decade to address the remedies involved in a regulatory taking.[118] In *First English* the Supreme Court finally considered the question of whether the fifth amendment requires a compensation remedy for temporary regulatory takings.[119] The Court ruled that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[120]

Chief Justice Rehnquist, writing for the majority, noted that there were no concerns with the ripeness of the Church's claim which would prevent the remedies issue from being considered by the Court.[121] Recognizing the remedies issue as being

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111 *See id.* at 342-43.

112 *Id.* at 344.

113 *Id.* at 345-46.

114 *Id.* at 351-53. Once again, the Court concluded that appellants had not exhausted available state remedies before seeking judicial intervention. *Id.*

115 *Id.* at 353-64 (White, J., dissenting). Chief Justice Burger, Justice Powell and Justice Rehnquist joined with Justice White in the dissent. *Id.* at 353.

116 *Id.* at 362-63 (White, J., dissenting).

117 482 U.S. 304 (1987).

118 *Id.* at 310-11.

119 *Id.* at 313.

120 *Id.* at 321.

121 *Id.* at 310-11. The Court referred to the fact that on four prior occasions it was unable to address the issue of remedies due to concerns of finality. *Id.* at 310. It found this case distinguishable from the prior cases because of the position of the California courts that damages are an unavailable remedy in connection with a reg-

"squarely presented,"[122] the Chief Justice addressed "the question of whether the just compensation clause requires the government to pay for 'temporary' regulatory takings."[123] The Court's analysis focused on the purpose of the just compensation clause and the manner in which it has been applied.[124] The Court asserted that the Constitution guarantees property owners a right to just compensation in instances where the government's interference with their property interests constitutes a taking.[125] The Court recognized that an affected landowner has two methods of securing just compensation.[126] First a landowner may commence an action in inverse condemnation.[127] Second, a landowner may secure just compensation through governmental exercise of its eminent domain power.[128] In addition, governmental regulation, when it "goes too far" can trigger application of the just compensation clause.[129]

The Court then addressed the issue of whether a government's imposition of a regulation later abandoned after being found to constitute an unconstitutional taking, requires that monetary compensation be paid to an affected landowner for the period during which the regulation was in effect.[130] The Court examined its prior decisions dealing with governmental takings for limited periods of time,[131] and found that such temporary takings were indistinguishable from permanent takings in all re-

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ulatory taking. *Id.* at 312. This position caused the United States Supreme Court to find that the constitutional question was properly before it. *Id.*

[122] *Id.* at 312.

[123] *Id.* at 313. The Court uses the phrase "temporary regulatory taking" in reference to "those regulatory takings which are ultimately invalidated by the courts". *Id.* at 310.

[124] *See id.* at 314-16.

[125] *Id.* at 315 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[126] *See id.* at 315-16.

[127] *Id.* at 315. *See supra* note 18 for an explanation of inverse condemnation.

[128] *First English*, 482 U.S. at 315.

[129] *Id.* at 316 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)). The Court cited Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177-78 (1872) for the general proposition that the failure of the government to formally condemn property should not operate to deny a property owner of just compensation where a taking has been affected in all but name. *First English*, 482 U.S. at 316-17.

[130] *First English*, 482 U.S. at 318.

[131] *Id.* (citing United States v. Dow, 357 U.S. 17 (1958); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945) (all holding that federal government's temporary interference with a landowner's use of property requires that compensation be paid)).

spects other than duration.[132] Accordingly, the Court concluded that once a taking has been established, compensation is required regardless of whether the taking was permanent or temporary.[133]

In reaching its decision, the Court rejected the government's contention that invalidation of the offending regulation was sufficient to remedy the injury suffered by a landowner as a result of a temporary regulatory taking.[134] The Court also rejected the County's argument that case precedent dictated that a compensable regulatory taking cannot occur until the ordinance challenged has been held invalid.[135] The Court found that the case law relied on by the County merely supported the theory that compensation due in connection with a taking should be calculated from the date on which the taking occurred.[136]

Having rejected the County's arguments, the Court determined that no subsequent action by a governmental authority will relieve it of its duty to compensate a landowner for losses attributable to the taking for the effective period of the regulation.[137] The Court, mindful that its decision might encourage landowners to assert taking claims for temporary delays in development incurred while seeking individual relief from land use regulations, limited the scope of its holding by expressly excluding such claims.[138] The Court suggested that its decision required only that compensation be paid in instances where a regulation had been in effect for a considerable period of time and had in fact effected a taking.[139]

Justice Stevens, joined in part by Justices Blackmun and

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132 *See id.*

133 *See id.* at 318-19.

134 *Id.* at 319. The Court analogized the six year period during which the County's ordinance was in effect to a six year leasehold interest in Lutherglen which required payment of just compensation. *See id.*

135 *Id.* at 320.

136 *Id.* The County relied on Danforth v. United States, 308 U.S. 271 (1939). *Id.* In *Danforth* the landowner sought interest on a disputed condemnation award, claiming that the actual taking had occurred before the condemnation proceedings were commenced. *See Danforth*, 308 U.S. at 283. The *Danforth* Court held that where condemnation proceedings were involved, a taking was not deemed to have occurred until the requisite amount due the landowner was determined and paid. *Id.* at 284.

137 *See First English*, 482 U.S. at 321.

138 *See id.* In his dissenting opinion, Justice Stevens opined that increased litigation would likely result from majority's holding. *Id.* at 2389-90 (Stevens, J., dissenting).

139 *See id.* at 322.

O'Connor, dissented.[140] The Justice argued that the Court erred in addressing the remedies issue.[141] Justice Stevens asserted that the Court should have ruled either that the Church's complaint was defective, in that it failed to allege that a taking had occurred, or that precedent dealing with this type of regulation required a finding that there had been no taking.[142]

Justice Stevens argued that the proper vehicle for relief in these cases is the due process clause of the fourteenth amendment and not the just compensation clause.[143] Justice Stevens reasoned that "it is the Due Process Clause . . . that protects the property owner from improperly motivated, unfairly conducted, or unnecessarily protracted governmental decisionmaking."[144] Moreover, the Justice noted that damages for any violations of the due process guarantees are available to an aggrieved landowner through section 1983.[145] Accordingly, Justice Stevens would limit the Court's review of the present case to a decision of the taking issue without ever reaching the remedies issue.[146]

The Supreme Court's decision in *First English* is supported by existing precedent enforcing the just compensation requirements of the fifth amendment.[147] Although previous decisions of the Court failed to decide the remedies issue,[148] the dissenting

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[140] *Id.* (Stevens, J., dissenting). Justice Stevens' dissenting opinion is divided into four parts. Justices Blackmun and O'Connor joined only in parts I and III. *Id.*

[141] *See id.* at 322 (Stevens, J., dissenting).

[142] *Id.* at 324-28 (Stevens, J., dissenting). Justice Stevens stated that regulation of flood-prone areas is within the valid exercise of the police power of the state and effected landowners are not entitled to compensation for pecuniary losses sustained as a result of such regulation. *Id.* at 325-27 (Stevens, J., dissenting).

[143] *Id.* at 339-40 (Stevens, J., dissenting). In Part III of his dissent, Justice Stevens asserted that jurisdictional problems should have precluded the Court from addressing the remedies issue. *See id.* at 333-39 (Stevens, J., dissenting). He focused on the failure of the Church "to exhaust [its] state remedies before confronting the question whether the net result of the state proceedings has amounted to a temporary taking of property without just compensation." *Id.* at 338 (Stevens, J., dissenting). According to Justice Stevens, the California state courts merely addressed the right of the state to convert a permanent taking into a temporary taking through invalidation. *Id.* at 336-37 (Stevens, J., dissenting). He contended that the California courts have not addressed the issue of whether damages are available for the period prior to invalidation during which the taking was in effect. *Id.* at 337.

[144] *Id.* at 339 (Stevens, J., dissenting).

[145] *Id. See supra* note 101 (discussing section 1983 remedy).

[146] *See id.* at 340-41.

[147] *See supra* notes 343-36 (for references to Court decisions upholding claims under the just compensation clause).

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

opinions in *San Diego Gas & Electric* and *MacDonald, Sommer & Frates*, collectively represented the views of a majority of the Court.[149] These opinions provided a clear indication of the stance the Court would adopt when finally deciding the remedies issue.[150] Thus it comes as no surprise that temporary governmental regulations which effect a taking of private property require that just compensation be paid.

In its analysis the Court properly recognized that the sole issue to be decided was whether a landowner, whose property has been taken via an unconstitutional land use regulation, has a right to make a claim for economic loss incurred as a result of such a taking.[151] The Court's holding ensures that landowners have their day in court. Significantly, the Court also expressly acknowledged that its decision was based on the assumption that a taking had in fact occurred.[152] By eliminating the question of whether a taking had occurred, the Court, with no difficulty, was able to observe that "it is the Constitution that dictates the remedy for interference with property rights amounting to a taking."[153] Additionally, the Court did not address the measure of compensation due a landowner whose property has been physically taken as compared to a landowner whose property has been regulatorily taken. The Court simply recognized that, in either situation, a method of calculating damages is readily available.[154] The landowner, in such situations, is entitled to "the value of the use of the land during this period."[155] By not addressing the distinctions between types of takings or the extent of the impacts on property owners necessary for a finding that a taking has oc-

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v. City of Tiburon, 447 U.S. 255 (1980) (in each case the Court failed to reach the remedies issue on procedural grounds).

149 In *San Diego Gas & Electric*, Justice Brennan's dissent was joined by Justices Stewart, Powell and Marshall. *San Diego Gas & Elec.*, 450 U.S. at 636 (Brennan, J., dissenting). Justice Rehnquist also agreed with Justice Brennan's analysis of the merits. *Id.* at 633-34 (Rehnquist, J., concurring). In *MacDonald, Sommer & Frates*, Justice White's dissent was joined in by Chief Justice Burger. *MacDonald, Sommer & Frates*, 477 U.S. at 353, 362 (White, J., dissenting).

150 *See* MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 361-64 (1986) (White, J., dissenting); *San Diego Gas & Elec. v. City of San Diego*, 450 U.S. 621, 636-661 (1981) (Brennan, J., dissenting) (dissenters advocate a compensation remedy be required in connection with a regulatory taking).

151 *First English*, 482 U.S. at 311-13.

152 *Id.* at 321.

153 *Id.* at 316 n.9.

154 *See id.* at 318-19.

155 *Id.* at 319.

curred, the Court adopted a narrow approach to the remedies issue.

The Court acted wisely in not addressing the issue of whether a taking had occurred. By not doing so, the Court was able to separate the remedies issue from the never ending debate of when a regulation has "gone too far." Additionally, by limiting its decision to a discussion of the remedies issue, the Court neither challenged the validity of zoning regulations nor threatened to convert statutes validly enacted by the states under the police power into fifth amendment takings.

Despite its limited application, the *First English* decision will not be without impact. Prior to *First English*, state courts and commentators gave voice to two major concerns related to the remedies issue. The first is whether the availability of a damages remedy will have a chilling effect on innovative zoning and land use planning efforts. The second is the fear that the liability imposed on municipalities from regulatory takings will result in financial disaster, thus curtailing the local government's ability to provide essential public services.[156]

The Court responded to these concerns by stating that it was "not unmindful of these considerations, but they must be evaluated in the light of the command of the Just Compensation Clause of the Fifth Amendment."[157] Given the deference shown to legislative policy by the courts, arguably the primary impact of the *First English* decision on municipalities and their ability to implement valid land use regulations will be to insure that municipal planning boards adhere to a careful and responsible regulatory program. Any fiscal threat to a municipality as a result of the availability of a damages remedy should be minimal[158] pro-

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[156] *See* Agins v. City of Tiburon, 24 Cal. 3d 266, 276, 598 P.2d 25, 31, 157 Cal. Rptr. 372-378 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980) (California Supreme Court based its decision on "the need for preserving freedom in planning and the inhibiting financial force which inheres in the inverse condemnation remedy"). *See also* Comment, *supra* note 26, at 726-31 (discussing the chilling effect resulting from allowing a damages remedy and the fears of fiscal problems resulting from allowing a damages remedy). *See generally* Cunningham, *supra* note 17; Mandelker, *supra* note 4 (each discussing Court's attempts to address remedies issue prior to *First English* and detailing separate theories Supreme Court may follow when addressing the merits).

[157] *First English*, 482 U.S. at 317.

[158] The difficulty involved in proving that a regulation constitutes a taking remains unchanged by the *First English* decision. *See id.* at 321. Past decisions of the various state and federal courts indicate that few land use regulations rise to the level of a taking. *See* Mandelker, *supra* note 4, at 500-02. Ironically, the facts in *First English* deal with challenges to a flood plain regulation. As Justice Stevens notes in

vided that good faith planning efforts are involved, and delay tactics by municipalities to stall landowner challenges to zoning regulations are avoided.[159]

While the Court's decision in *First English* does not represent a major change in the long standing policy set forth in *Pennsylvania Coal*, that a regulation which "goes too far" may amount to a fifth amendment taking, it does open a door for aggrieved landowners. The *First English* decision provides an unprecedented link between unconstitutional zoning and the prospect of a compensation remedy. Consequently, increased litigation is likely to result.[160] By providing landowners with a compensation remedy, the *First English* decision enhances the attractiveness of litigating the issue of whether a taking has occurred. In this respect the *First English* decision may prove to be problematical. Few claims for relief are based on standards as nebulous as those used to determined when a regulation "goes so far" as to constitute a taking. Indeed, the consequences of being frequently hailed into court to litigate the taking issue could well prove to be more harmful to the municipal budget than the threat of paying monetary compensation to aggrieved landowners.

Perhaps the major flaw in the Court's decision in *First English* is that it requires that compensation be paid for regulatory takings rather than merely prohibiting the states from limiting the remedies for regulatory takings to invalidation. While the *First English* Court recognized that denying a damages remedy to landowners who have incurred substantial financial losses as a result of a regulatory taking may fail to satisfy the requirements of the fifth amendment, it has also denied state courts the flexibility to apply an invalidation remedy where the landowner's financial loss has been minimal. Thus, one unfortunate result of the decision is that it may deprive state courts of the ability to develop remedies which will redress aggrieved landowner's losses while not unduly infringing on a municipality's ability to implement

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his dissent, "this Court's precedents demonstrate that the type of regulatory program at issue here cannot constitute a taking." *First English*, 482 U.S. at 325 (Stevens, J., dissenting). *See* BOSSELMAN, *supra* note 2, at 147-55 (discussing the constitutional validity of flood plain regulations).

159 Commentators have noted that landowner challenges to land use regulations can result in an endless stream of expensive litigation since "[t]here is nothing to prevent the regulating entity from subsequently imposing a modified or alternate restriction which achieves the same result." Comment, *supra* note 26, at 732.

160 *See First English*, 482 U.S. at 341 (Stevens, J., dissenting). In his closing remarks, Justice Stevens predicts that the Court's decision will ignite an explosion of litigation. *Id.*

beneficial land-use regulations.[161]

While the impact of the *First English* decision cannot be accurately predicted, the policy adopted by the Court will no doubt require reasonable adaptations to accommodate future problems. The *First English* Court, however, had little constitutional alternative but to recognize that where governmental land use regulations have effected a taking, a policy limiting the landowner to a remedy of invalidation of the offending regulation does not "meet the demands" of the just compensation clause."[162]

Sandra Lange Vieser

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[161] *See* Comment, *supra* note 26, 737-40 (discussing advantages of allowing courts flexibility when determining appropriate remedies).

[162] *First English*, 482 U.S. at 317.