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Damages for a Temporary Regulatory Taking: *First English Evangelical Lutheran Church v. County of Los Angeles*

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INTRODUCTION

The “taking”¹ issue arising from regulatory² land-use control has gained new prominence in the 1980s.³ Generally, the issue has been whether government land-use regulations can give rise to compensable “takings” within the meaning of the fifth amendment.⁴ *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*⁵ represents the sixth time⁶ in this decade

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1. The word “taking” is a colloquialism for eminent domain. For a detailed analysis of the taking issue, 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 (1983). “[A] taking is not simply synonymous with eminent domain. . . . A taking is that which takes, whether by condemnation, physical invasion, regulation or any other stringent exercise of state power.” *Id.* at 50. Mr. Bauman, Litigation Counsel, National Association of Home Builders, Washington, D.C., filed amicus curiae briefs on behalf of N.A.H.B. and in support of appellant in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378 (1987); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); and *Agins v. City of Tiburon*, 447 U.S. 225 (1980). Mr. Bauman was of Counsel on Supreme Court brief for appellant MacDonald, Sommer & Frates in *MacDonald, Sommer & Frates v. County of Yolo*, 106 S. Ct. 2561 (1986).

2. Taking claims are termed “regulatory takings” when a landowner alleges that government action so restricts the permissible use to which his land can be put that the land is deprived of all or substantially all of its value and has, in effect, been taken from the landowner. F. SCHNIDMAN, S. ABRAMS & J. DELANEY, *HANDLING THE LAND USE CASE* 519 (1984). In this article, the term regulatory taking is used as it has derived from case law and shall include any government act that deprives a landowner of all or substantially all of the value of the land subject to the governmental act thereby giving rise to protection under the taking clause of the fifth amendment.

3. “First, the taking issue is one of the most fundamental issues concerning individual rights and government power. Second, the Supreme Court keeps accepting taking cases and then avoiding the issue.” 1986 ZONING AND PLANNING LAW HANDBOOK 66 (B. Gailey ed. 1986).

4. The fifth amendment provides that private property shall not “be taken for public use without just compensation.” U.S. CONST. amend. V.

5. 107 S. Ct. 2378 (1987).

6. *Keystone Bituminous Coal Ass’n v. DeBenedicts*, 107 S. Ct. 1232 (1987); *MacDonald, Sommer & Frates*, 106 S. Ct. 2561; *Williamson County Reg. Plan Comm’n v. Hamilton Bank*, 473 U.S. 172 (1985); *San Diego Gas & Elec. Co.*, 450 U.S. 621; *Agins*, 447 U.S. 225.

the Supreme Court has granted review to determine whether a monetary remedy is available for regulatory takings. In the cases that preceded *First English*, the Court was unable to rule on the remedy issue because the pleadings left preliminary questions unanswered, or the judgment was not deemed final.⁷

Unlike earlier cases reviewed by the Court, *First English* has provided an answer to the remedy question. In *First English*, the Court, by a six to three vote,⁸ ruled that property owners must be compensated when land-use regulations deprive them, even temporarily, of all use of their property.⁹

This article examines the impact of the Supreme Court's decision in *First English* on government land-use regulations and property owners. First, it presents an overview of the regulatory taking issue, including recent Supreme Court responses. Second, it reviews the history of *First English*. Although some concepts and analyses are extracted from other decisions of the same term, this article concentrates on the remedy issue, both from a procedural and substantive perspective. Third, this article discusses the Court's reasoning in the majority and dissenting opinions of *First English*. Finally, this article analyses the Court's decision in relation to the future of land-use regulations, the exercise of the police power¹⁰ and how *First English* will affect litigation processes for municipal activities.¹¹

I. TAKING AND THE "POLICE POWER"

The property clauses of the fifth¹² and fourteenth¹³ amendments prohibit both the federal government and the individual states

7. See *supra* note 6. In *Agins*, the Court did not reach the question because it ruled that the challenged municipal activities did not constitute a taking. In *San Diego Gas*, the Court concluded that it did not have jurisdiction over the controversy. In *Williamson* and *MacDonald*, the Court held the claims to be premature as the antecedent question of whether the property was taken had not been decided.

8. Chief Justice Rehnquist delivered the opinion of the Court, and was joined by Justices Brennan, White, Marshall, Powell and Scalia. Justice Stevens filed a dissenting opinion joined in parts II, III and IV by Justices Blackmun and O'Connor. *First English*, 107 S. Ct. at 2381.

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

10. The police power is the broadest of governmental powers as it affects the peace, order, health, morals, convenience, comfort and safety of citizens. The police power establishes social order, protects life and health of persons, secures and safeguards the enjoyment and beneficial use of property. 6 E. MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 24.04 (3d ed. 1980).

11. In his dissent, Justice Stevens warned that the majority's decision will ignite a "litigation explosion." *First English*, 107 S. Ct. at 2400 (Stevens, J., dissenting).

12. See *supra* note 4. "No person shall . . . 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.

13. "No state shall . . . deprive any person of life, liberty, or property, without due

from depriving a person of property without due process of law. Additionally, government is prohibited from taking private property for public use without the payment of "just compensation."¹⁴ Courts have prohibited 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."¹⁵ In other words, since the general public benefits from regulation affecting property, the general public, through government, should bear the cost in favor of the affected property owners.¹⁶

A taking of private property for public use may be accomplished in one of three ways. First, a taking may be a direct physical invasion which typically occurs when government exercises its power of eminent domain.¹⁷ Second, a taking may be an indirect invasion which occurs when government exercises its police power in an unduly restrictive or improper manner.¹⁸ Third, an indirect taking may occur when, as a result of a public improvement project, damage to nearby property occurs.

While at first glance the distinction between the power of eminent domain and the police power may not be apparent, the power are separate and distinct. The power of eminent domain is a pre-existing federal and state power that authorizes the taking of private property for public use.¹⁹ The power is limited by the fifth amendment, so that property may only be taken upon the payment of just compensation.²⁰ Municipalities, however, have no in-

process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

14. See *supra* note 12.

15. *Armstrong v. United States*, 364 U.S. 40 (1960).

16. The restraints placed on government by the fifth and fourteenth amendments have been defined by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), as providing "an average reciprocity of advantage." The Court in *Penn. Cent. Transportation v. New York City*, 438 U.S. 104, 140 (1978), found that an average reciprocity of advantage was established when "[a]ll property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but for the common benefit of one another."

17. Eminent domain is the power of the government to take property for public use without the owner's consent upon making just compensation. 1 NICHOLS, ON EMINENT DOMAIN § 1.11 (3d ed. 1985). In California, see the eminent domain law, CAL. CIV. PROC. CODE §§ 1230.010-1273.010 (Deering 1981 & Supp. 1987).

18. "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." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). See *supra* note 2.

19. *Kohl v. United States*, 91 U.S. 367 (1875).

20. The Supreme Court originally construed the fifth amendment as applicable only to the federal government and not to the states. See *Withers v. Buckley*, 61 U.S. 84 (1857). The fifth amendment was held to be applicable to the states through the fourteenth amendment by the Supreme Court in *Chicago B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897). Since the Constitution of the United States did not expressly confer the power of eminent domain upon the federal government, the power to take property for federal

herent power to acquire private property by the power of eminent domain. Rather, such authority must be expressly conferred by the state.²¹

The police power is an inherent attribute of state authority which is essential for the effective conduct and maintenance of government.²² The police power refers to the government's power to enact laws, within constitutional limits to protect the public health, safety, morals and general welfare.²³ The police power, like the power of eminent domain, is not inherent to municipalities. It may be either expressly or impliedly conferred by the state.²⁴ An effect of the police power, therefore, is to restrict property rights that are harmful, while the power of eminent domain appropriates useful property rights for public use.²⁵

A. *Constitutional Roots of Taking and Just Compensation*

The constitutional limitations on governmental power found in the fifth and fourteenth amendments can be traced back to the Magna Carta of 1215.²⁶ The English document provided, "[n]o freeman shall be . . . deprived of his freehold . . . unless by the lawful judgment of his peers and by the law of the land."²⁷ The English monarchs did not hold the property rights provided for in the Magna Carta with high esteem.²⁸ As a result, the English

public purposes has been implied under the necessary and proper clause. This implication is carried on to the extent necessary to support federal government programs while taking into account the fifth amendment's mandate that private property may not be taken for public use without just compensation.

21. 11 E. MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 32.11 (3d ed. 1983). Municipalities do not possess inherent authority to take private property by eminent domain. Such authority is expressly delegated to them by the State. Municipalities and local entities exercise, therefore, the state's power of the eminent domain. CAL. CONST. art. I § 19; CAL. CIV. PRO. CODE §§ 1235.150, 1235.190 (Deering 1981 & Supp. 1987); Charter of the City of San Diego, art. XIV § 220.

22. 6 E. MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 24.02 (3d ed. 1980).

23. *Munn v. Illinois*, 94 U.S. 113 (1876). See *supra* note 10.

24. The Authors acknowledge that this is certainly a simplification of the delegation of the police power. See 6 E. MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 24.37-24.38 (3d ed. 1980).

25. 11 E. MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 32.04 (3d ed. 1983).

26. The Magna Carta of England was granted by King John at Runnymede, June 15, 1215, to limit the arbitrary power of the King. SMITH, *THE CONSTITUTION, A DOCUMENTARY AND NARRATIVE HISTORY* 19-20 (1978).

27. "The clause is sometimes called Article 39 because the original 1215 Magna Carta contained 63 articles, of which the above was 39. By 1225, the Charter consisted of 37 Articles as the original 63 were pared down and consolidated of which the aforementioned was number 29." F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* 56 (1973) [hereinafter cited as *THE TAKING ISSUE*].

28. For a more complete history, see *THE TAKING ISSUE*, *supra* note 27, at 53-81.

were often deprived of those rights.²⁹ Yet, they nevertheless brought the idea with them to America at the time of colonization.

In the American colonies, powers of eminent domain were regularly employed for roads and other transportation projects.³⁰ Often colonial statutes authorized the taking of private property for these ventures, and compensation was provided when developed or enclosed land was taken.³¹ Colonial legislatures included taking provisions in their state constitutions,³² but just compensation clauses were noticeably absent due to a reliance on the Magna Carta.³³ In 1777, however, the Vermont Constitution provided for just compensation whenever private property was taken for public use.³⁴

As most state constitutions did not include a just compensation clause, those states were not obligated to compensate owners when the owner's property was taken for public use. Additionally, the express just compensation provision of the fifth amendment was held not to apply to the states.³⁵ Moreover, while the fourteenth amendment³⁶ provided that no state shall deprive a person of property without due process, it was first held that due process did not include just compensation.³⁷ Ultimately, in 1897, the fifth amendment was held to apply to the states through the fourteenth amendment.³⁸ Since then, the states have been obligated to compensate an owner of private property when the owner's property was taken for public use.

29. One such example occurred in 1224 when Henry III, being in financial need, ignored the rights expressed in the Magna Carta and seized the land for himself. See *THE TAKING ISSUE*, *supra* note 27, at 58.

30. See, e.g., *An Act For Clearing A Road From the Warm Springs in Augusta, and For Other Purposes therein mentioned*, Va. Stats. Ch. XXIV (1772).

31. See e.g., *M'Clenachan v. Curwin*, 3 Yeates 362, 371-73 (Pa. 1802).

32. For the relevant clause see 3 F. THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA* 1688 (1909).

33. The colonial taking provisions specifically relied upon Article 29 of the consolidated version of the Magna Carta. See *supra* note 27.

34. The compensation clause provided, in relevant part, "[w]hensoever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money." Vt. Const. of 1777, Ch.1, art. II, reprinted in *Introduction to Vermont State Papers* xv, xvii (W. Slade ed. 1823).

35. The Bill of Rights, of which the fifth amendment is a part, was not adopted within the Constitution at the Federal Constitutional Convention of 1787. Rather, it was proposed September 25, 1789, and ratified December 15, 1791.

36. The fourteenth amendment was proposed on June 13, 1866, and ratified July 21, 1868.

37. *Davidson v. City of New Orleans*, 96 U.S. 97 (1877).

38. *Chicago B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897).

B. History of Regulatory Takings

The first significant interpretation of the taking clause came eighty years after the fifth amendment was ratified.³⁹ In *Pumpelly v. Green Bay Co.*,⁴⁰ a compensable taking was recognized when a negligently built dam caused water to physically invade private property.⁴¹ The Supreme Court, however, limited a compensable taking to a physical invasion that destroyed or impaired the usefulness of the property.⁴²

The physical invasion test⁴³ expressed in *Pumpelly* was limited further by the Court in *Mugler v. Kansas*.⁴⁴ *Mugler*, a brewery owner, sued the state of Kansas when a statute prohibiting the manufacture and sale of intoxicating liquor rendered the brewery worthless.⁴⁵ *Mugler* contended the statute was an unconstitutional taking of property requiring compensation⁴⁶ as stated in *Pumpelly*.⁴⁷ Justice Harlan, writing for the majority of the Court, distinguished *Pumpelly* as an action for damages under the state's eminent domain power, while *Mugler* arose under the state's police power.⁴⁸ The Court held that a valid exercise of the police power is not a taking even if economic loss results.⁴⁹ Moreover, regulation may destroy property which is a public nuisance without establishing a compensable taking.⁵⁰

The question of how far the police power may be stretched before it creates invalid regulation was confronted in *Pennsylvania Coal v. Mahon*.⁵¹ The question of compensation was not an issue as the government was not a party to the action.⁵² The Mahon's

39. Both the fifth and fourteenth amendments were a part of the Constitution when *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871) was decided. However, the just compensation clause of the fifth amendment was held to apply only to the federal government and not to the states. See *supra* notes 35-36 and accompanying text.

40. 80 U.S. (13 Wall.) 166 (1871).

41. *Pumpelly*, 80 U.S. at 81.

42. *Id.*

43. The Supreme Court to date has developed four tests to determine when governmental action results in a compensable taking. 1) The physical invasion test: *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871); 2) The public nuisance test: *Mugler v. Kansas*, 123 U.S. 623 (1887); 3) The diminution in value test: *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922); and 4) The balancing test: *Penn Central*, 438 U.S. 104 (1978).

44. 123 U.S. 623 (1887).

45. *Mugler*, 123 U.S. at 657.

46. *Id.* at 667.

47. See *supra* notes 40-42 and accompanying text.

48. *Mugler*, 123 U.S. at 668.

49. *Id.* at 669.

50. *Id.*

51. 260 U.S. 393 (1922). See Freilich, *Solving the "Taking" Equation: Making the Whole Equal the Sum of Its Parts*, 15 THE URB. LAW. 447, 464 (1983); Williams, *The White River Junction Manifesto*, 9 VT. L. REV. 193, 208-09 (1984).

52. Only private litigants were involved as the Mahons sued *Pennsylvania Coal*, and

predecessor in title purchased only surface rights to property from the coal company and waived all claims for damages resulting from subsurface mining. The Mahons sued the coal company for mining under their house which caused it to subside in violation of a state statute prohibiting such mining.⁵³ In an opinion by Justice Holmes, the Court found the statute to be an invalid exercise of the police power and labeled it a “taking.”⁵⁴ Within the context of *Pennsylvania Coal*, a taking was only used to describe an invalid exercise of the police power rather than a compensable event;⁵⁵ thus, the police power is limited.⁵⁶ An exercise of the power of eminent domain, however, may be used to accomplish the same objective that may not be achieved through regulation.⁵⁷

The application of the taking clause to municipal zoning strategies came in *Village of Euclid v. Ambler Realty Co.*⁵⁸ There, the Court was asked to decide whether a comprehensive zoning plan⁵⁹ was an unconstitutional taking of property without due process of law under the fourteenth amendment. The plan regulated and restricted the location of industries and homes, the lot areas upon which improvements could be built, and the size and height of the buildings.⁶⁰ While upholding the ordinance as a valid exercise of the police power, the Court said that an ordinance will not be deemed a taking unless it is “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.”⁶¹ The Court also said, however, that an invalid exercise of the police power defies precise definition and therefore must be subjectively decided on a case-by-case basis.⁶²

The first modern analysis of a taking claim based upon a zoning

not the state of Pennsylvania.

53. *Pennsylvania Coal*, 206 U.S. at 412.

54. “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.* at 415.

55. See Freilich, *supra* note 51, at 464; Williams, *supra* note 51, at 208.

56. Police power is limited to the extent that it may not go “too far.” The invalidity of a regulation must be decided on a case by case or *ad hoc* basis. See *supra* note 54.

57. “[S]ome values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.” *Pennsylvania Coal*, 260 U.S. at 413.

58. 272 U.S. 365 (1926).

59. A comprehensive zoning plan is the basic instrument for land use planning. 82 AM JUR. 2D *Zoning and Planning* § 69 (1964).

60. On November 13, 1922, the Euclid village council adopted an ordinance establishing a comprehensive zoning plan. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 379-80 (1926).

61. *Id.* at 395.

62. *Id.* at 387.

ordinance is found in *Penn Central Transportation v. New York*.⁶³ The challenged ordinance, the Landmark Preservation Law,⁶⁴ was designed to preserve historic landmarks and districts within New York City. The Grand Central Terminal, owned by Penn Central Transportation Co., was designated a “landmark.” Penn Central sought approval from the Landmark Preservation Commission⁶⁵ to construct a 550-story office building atop the terminal.⁶⁶ The Commission denied the proposed construction and Penn Central brought an action claiming its property had been taken.⁶⁷ Penn Central claimed both a fifth and fourteenth amendment violation. It claimed that just compensation was not paid for the taking of their property, and that it was deprived of its property without due process.⁶⁸ In an opinion written by Justice Brennan,⁶⁹ the Court admitted that there is no precise test to determine when regulation ends and a compensable taking begins.⁷⁰ The Court set forth several significant factors⁷¹ to aid in the determination of whether a regulation is invalid or whether a compensable taking did occur.

First, the regulation’s economic impact on the claimant and the extent to which the regulation has interfered with “distinct investment-backed expectations”⁷² must be considered. The fact that a regulation has a more severe impact on some landowners does not

63. 438 U.S. 104 (1978).

64. Pursuant to a New York State enabling Act the Landmarks Preservation Act was adopted in 1965. See NYC Admin. Code, ch. 8-A, § 205.1.0 (1976). *Penn Central*, 438 U.S. at 109.

65. The primary responsibility for administering the law is vested in the Landmark Preservation Commission. The Commission is an 11-member agency that is required to include at least three architects, one historian qualified in the field, one city planner or landscape architect, one realtor, and at least one resident of each of the city’s five boroughs. NYC Charter § 534 (1976). *Penn Central*, 438 U.S. at 110.

66. *Penn Central*, 438 U.S. 116-17.

67. *Id.* at 117-19.

68. *Id.* at 118-19.

69. Justices Stewart, White, Marshall, Blackmun and Powell joined Justice Brennan in the majority opinion. Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger and Justice Stevens joined.

70. *Penn Central*, 438 U.S. at 123-24.

71. In his opinion, Justice Brennan suggests that invalidation and not compensation is the appropriate remedy for an unconstitutional regulation. “[W]hether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely upon the particular circumstances [in that] case.” *Id.* at 125. In addition, Justice Brennan uses Holme’s analysis in *Pennsylvania Coal*, 206 U.S. at 413. See *supra* note 54 and accompanying text. Brennan considered whether the interference with appellants’ property was of such a “magnitude” that “there must be an exercise of eminent domain and compensation to sustain [it].” *Penn Central*, 438 U.S. at 136.

72. Investment-backed expectations are those expectations concerning the present ability to use property for its intended purpose in a gainful fashion. *Penn Central*, 438 U.S. at 138 n.36.

mean that an ordinance effects a taking.⁷³ In *Penn Central*, the Landmark ordinance was upheld because it did not interfere with the present interest and primary expectations of use of the terminal.⁷⁴ More importantly, the Court found that the Landmark ordinance permitted Penn Central to “obtain a reasonable return on its investment.”⁷⁵ Second, the “character of the governmental action”⁷⁶ must be considered. A taking may be more readily found when there is a physical invasion as opposed to a regulatory invasion.⁷⁷

Justice Rehnquist, joined by Chief Justice Burger and Justice Stevens dissented on the ground that a compensable taking within the meaning of the fifth amendment had occurred.⁷⁸ Justice Rehnquist defined a compensable taking as an invasion that creates substantial damage to property regardless of whether the owner may make some reasonable use of the property.⁷⁹

Another taking claim based upon a municipal zoning ordinance found its way to the Supreme Court in *Agins v. City of Tiburon*.⁸⁰ The *Agins* case provided the modern view for analyzing available remedies for objectionable land-use regulation. In *Agins*, the City of Tiburon, in which the Agins owned five acres of unimproved land, passed a zoning ordinance designating the Agins’ property as a residential planned development and open space zone.⁸¹ This designation placed density restrictions on the land which in turn limited its potential development to five single family homes.⁸² The Agins brought suit for inverse condemnation⁸³ damages of two million dollars alleging that the zoning ordinance had taken their property without just compensation in violation of the fifth and fourteenth amendments.⁸⁴

The California Supreme Court struck down the claim saying “although a landowner so aggrieved may challenge both the con-

73. *Id.* at 133.

74. *Id.* at 136.

75. The Court felt that *Penn Central* “obtained a reasonable return on its investment” because its designation as a landmark permitted the continued use as a railroad terminal containing offices and concessions, a use the property had been put to for the past 65 years. *Id.* at 136.

76. *Id.* at 124.

77. *Id.*

78. *Id.* at 149-50 (Rehnquist, J., dissenting).

79. *Id.* at 149-50.

80. 447 U.S. 225 (1980).

81. *Agins*, 447 U.S. at 257.

82. *Id.* at 257.

83. “Inverse condemnation is a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceeding have not been instituted.” *Id.* at 258 n.2.

84. *Id.* at 258.

stitutionality 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".⁸⁵ By foreclosing the damage theory, the California Supreme Court implied that zoning ordinances are never properly challenged as being a fifth amendment taking.⁸⁶

The Agins appealed to the United States Supreme Court on the issue of whether the California Supreme Court could properly limit the remedies for excessive regulations deemed a taking. The Court, however, did not reach this issue because it affirmed the decision on the basis that no taking had occurred.⁸⁷ The Court recognized that while no precise rule exists to determine when a taking has occurred, private and public interests must be balanced to determine whether public regulation has infringed upon private usage to an extent prohibited by the fifth amendment.⁸⁸ In order to balance private and public interest, the Court considered whether the zoning ordinance substantially advanced legitimate governmental goals,⁸⁹ benefited the landowner as well as the public⁹⁰ and permitted the landowner to pursue reasonable investment expectations.⁹¹

The availability of compensation for regulatory takings was again at issue in *San Diego Gas & Electric Co. v. City of San Diego*⁹² when a public utility challenged the actions of The City of San Diego. In 1966, the utility company acquired 412 acres of land as a potential site for a nuclear power plant.⁹³ At the time of the acquisition, 116 acres were zoned for industrial use and the remainder was zoned agricultural.⁹⁴ A year later, the city enacted a master plan designating most of the tract for future industrial

85. *Agins v. City of Tiburon*, 24 Cal. 3d 266, 269-70, 598 P.2d 25, 26, 157 Cal. Rptr. 372, 373, *aff'd*, 447 U.S. 225 (1980).

86. See Note, *Taking Law—Is Inverse Condemnation An Appropriate Remedy for Due Process Violations?—San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), 57 WASH. L. REV. 551, 560 (1982).

87. A unanimous Court upheld the validity of the zoning ordinance on its face and found that it did not amount to compensable taking *Agins v. City of Tiburon*, 447 U.S. 225, 262 (1980).

88. *Id.* at 260.

89. *Id.* at 261.

90. *Id.* at 262.

91. *Id.* at 262-63.

92. 450 U.S. 621 (1981).

93. *San Diego Gas*, 450 U.S. at 624.

94. The city had classified 116 acres as industrial and 112 acres as agricultural. The latter classification was reserved for "undeveloped areas not yet ready for urbanization and awaiting development, those areas where agricultural usage may be reasonably expected to persist or areas designated as open space in the general plan." *San Diego Gas*, 450 U.S. at 624 n.4 (citing San Diego Ordinance No. 8706 (New Series)).

use.⁹⁵ In 1973, however, the city “down-zoned”⁹⁶ thirty-nine acres from industrial to agriculture and changed the designation of 214 acres from “future industrial to open space.”⁹⁷ When a seismic offshore fault was discovered, the utility company abandoned its plans for a nuclear power plant and was thus confronted with the prospect of having to sell the property subject to its open space designation, which reduced the value of the land.⁹⁸

The utility company instituted an action for inverse condemnation alleging that the city’s “down-zoning” action in 1973 was a taking of property without just compensation.⁹⁹ The San Diego County Superior Court ruled that the findings established that the city had taken the property and just compensation was required.¹⁰⁰ A subsequent jury trial on the question of damages resulted in an award for over three million dollars for the utility company.¹⁰¹

The California Court of Appeal ultimately reversed the judgment of the superior court.¹⁰² In an unpublished decision, the appellate court held that the utility company could not recover monetary damages through inverse condemnation, but rather invalidation of the ordinance was the sole remedy.¹⁰³ Moreover, the Court of Appeal held that on the state of the record, insufficient evidence precluded a finding that a taking had occurred. Specifically, the plaintiff had not proved that the city’s zoning action effected a taking. The California Supreme Court denied further review, and the company appealed to the United States Supreme Court.¹⁰⁴ After hearing arguments on the merits, the Court dismissed the case on jurisdictional grounds stating that the Cali-

95. *San Diego Gas*, 450 U.S. at 624.

96. Downzoning and upzoning are words of art that provide a descriptive and universal shorthand. Upzoning refers to a rezoning or reclassification to a more intensive use category which is usually more profitable to the landowner. Downzoning is a rezoning or reclassification to a less intensive use which general decreases the land value. 6A A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 27.02 [3] (1987).

97. Open space is “any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation or other natural resources or historic or scenic purposes.” *San Diego Gas*, 450 U.S. at 625.

98. *Id.* at 627.

99. *Id.* at 625-26.

100. *Id.* at 627.

101. The California Court of Appeal originally affirmed the Superior Court’s decision. *San Diego Gas*, 146 Cal. Rptr. 103 (Cal. Ct. App. 1978) (opinion vacated by the California Supreme Court’s grant of the city’s petition for a hearing). Before the hearing, the California Supreme Court transferred the case back to the court of appeal for reconsideration in light of the intervening decision of *Agins*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff’d*, 447 U.S. 255 (1980). See *supra* notes 80-91 and accompanying text.

102. *San Diego Gas*, 450 U.S. at 630.

103. *Id.*

104. *Id.*

California Court of Appeal had not rendered a final judgment or decree upon which an appeal could be heard.¹⁰⁵

Dissenting, Justice Brennan, joined by Justices Stewart, Marshall and Powell, interpreted the California Court of Appeal's ruling that no taking had occurred as a final judgment.¹⁰⁶ The dissent concluded that the fifth amendment demands that just compensation be provided when property is taken by excessive land use regulation.¹⁰⁷ The dissent argued that once a court establishes that there has been a regulatory taking, the governmental entity must pay just compensation for the period commencing on the date the regulation first effected the taking and ending on the date the governmental entity chooses to rescind or otherwise amend the regulation.¹⁰⁸

Justice Rehnquist, in a concurring opinion stated that if jurisdiction had been found, he would "have little difficulty in agreeing with much of what is said in the dissenting opinion."¹⁰⁹ Thus, five justices¹¹⁰ laid the foundation for what was to become the law of the land:¹¹¹ Namely, that the fifth amendment requires that damages be available as a remedy in a regulatory taking case.¹¹²

The United States Supreme Court confronted the issue of damages for a regulatory taking claim a third time in *Williamson County Regional Planning Commission v. Hamilton Bank*.¹¹³ Hamilton Bank, owners of a tract of land being developed as a residential subdivision, filed suit in district court pursuant to 42 U.S.C. section 1983,¹¹⁴ after a zoning ordinance reduced the allowable density of the land.¹¹⁵ The suit alleged that the application of various zoning laws and regulations amounted to a taking

105. *Id.* at 630 n.10.

106. The Court of Appeal's "no taking" rule was a "classic final judgment" and therefore the dissent considered the merits of the case. *Id.* at 646 (Brennan, J., dissenting).

107. *Id.* at 658.

108. The rule that Justice Brennan proposed would establish compensation for temporary takings. *Id.* at 658.

109. *Id.* at 633-34 (Rehnquist, J., concurring).

110. The justices include Brennan, Stewart, Marshall, Powell and Rehnquist. *See supra* notes 107 and 108 and accompanying text.

111. Justice Brennan's dissent in *San Diego Gas* was repeatedly cited and quoted within the decision of *First English*, 107 S. Ct. 2378.

112. *See supra* note 9 and accompanying text.

113. 474 U.S. 172 (1985).

114. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. 42 U.S.C. § 1983 (1981).

115. *Williamson*, 474 U.S. at 178-79.

of the property without just compensation.¹¹⁶

After a three week trial, the jury found that Hamilton Bank had been denied “economically viable” use of its property in violation of the just compensation clause of the fifth amendment and damages were awarded.¹¹⁷ The trial court, however, granted a judgment notwithstanding the verdict in favor of the commission and refused to award damages for what it found to be a temporary taking.¹¹⁸ The Sixth Circuit Court of Appeals reversed, holding that application of government regulations affecting an owner’s use of property may constitute a taking if the regulation denies the owner all “economically viable” uses of the land.¹¹⁹ The Court of Appeal, relying upon Justice Brennan’s dissent in *San Diego Gas*, determined that damages were required for a temporary taking.¹²⁰

The United States Supreme Court granted certiorari to address the question of whether federal, state and local governments must pay monetary damages to a landowner whose property is temporarily taken by government regulations.¹²¹ In an opinion by Justice Blackmun, joined by Chief Justice Burger, Justice O’Connor, and Justice Rehnquist, the court passed on the merits of the case holding that the claim was “not ripe.”¹²²

In a separate opinion, Justices Brennan and Marshall concurred that the taking claim was premature, without departing from the view set forth in Justice Brennan’s *San Diego Gas* dissent.¹²³ Their concurring opinion restated the view that invalidation of an ordinance without just compensation is insufficient to compensate a landowner for economic loss suffered during the taking.¹²⁴

Justice Stevens, in a concurring opinion, wrote that a regulation that “goes too far” may be repealed without giving rise to compensation. If property is harmed without due process of law, however, damages may be based upon a denial of procedural rights.¹²⁵

Anxious to resolve the remedy issue for regulatory takings, the Supreme Court granted review to *MacDonald, Sommer & Frates*

116. *Id.* at 182.

117. *Id.* at 182-83.

118. *Id.* at 183.

119. *Id.* at 183-84.

120. *Id.* at 184.

121. *Id.* at 184.

122. The Court felt that the taking issue was premature for two reasons. First, a final decision regarding that application of the zoning ordinance as applied to the property in question had not been obtained. Second, a property owner must seek compensation through the procedures provided by the state before bringing an action under 42 U.S.C. § 1983 (1981) in federal district court. *Id.* at 186.

123. *See supra* notes 107 and 108 and accompanying text.

124. *Williamson*, 474 U.S. at 201 (Brennan, J., concurring).

125. *Id.* at 203-05 (Stevens, J., concurring in judgment).

v. Yolo County in 1985.¹²⁶ In *MacDonald*, a California property owner submitted a proposal to the Yolo County Planning Commission to subdivide certain property into 159 single-family and multi-family lots.¹²⁷ The Commission rejected the proposal, and the Yolo County Board of Supervisors affirmed on the ground that the proposal failed to provide public access, sewer service, water supply and police protection.¹²⁸ An action was filed in superior court alleging a taking had occurred without just compensation.¹²⁹ The court sustained a demurrer, holding that monetary damages for inverse condemnation were foreclosed by *Agins*.¹³⁰ The California Court of Appeals affirmed and the California Supreme Court denied further review. The United States Supreme Court noted probable jurisdiction because “of the importance of the question whether a monetary remedy in inverse condemnation is constitutionally required in appropriate cases involving regulatory ‘takings’.”¹³¹

In an opinion by Justice Stevens, joined by Justices Brennan, Marshall, Blackmun, and O’Connor, it was held that an essential prerequisite to a claim of regulatory taking is a “final and authoritative determination of the type and intensity of development legally permitted on the subject property.”¹³² The Court refused to decide the case on the merits as the antecedent issue of whether the property in question had been taken was not yet final.¹³³ A dissenting opinion written by Justice White, joined by Chief Justice Burger and partly joined by Justices Powell and Rehnquist, however, expressed the view that the allegations were sufficient to state a regulatory taking claim.¹³⁴

During the 1986 term, there were three cases before the United States Supreme Court dealing with regulatory takings.¹³⁵ The first case, *Keystone Bituminous Coal Association v. DeBenedictis*, reaffirmed the ability of governmental agencies to regulate private property to protect public health, safety and welfare.¹³⁶ The second case, *First English*, held that compensation is available when land use regulation deprives an owner of all use of his property,

126. 106 S. Ct. 2561 (1986).

127. *MacDonald*, 106 S. Ct. at 2563.

128. *Id.* at n.2.

129. *Id.* at 2563-64.

130. *See supra* notes 80-86 and accompanying text.

131. *MacDonald*, 106 S. Ct. at 2565-66.

132. *Id.* at 2566.

133. *Id.* at 2568-69.

134. *Id.* at 2569.

135. *See infra* notes 136-38 and accompanying text.

136. 107 S. Ct. 1232 (1987). *Keystone* was decided on March 9, 1987, and reaffirmed *Pennsylvania Coal*. *See also supra* notes 51-57.

and is the focus of this article.¹³⁷ The third case, *Nollan v. California Coastal Commission*, held that an unconstitutional regulation is one that bears no reasonable connection to the public interest it seeks to protect.¹³⁸

II. FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE V. COUNTY OF LOS ANGELES

The Supreme Court in *First English* held that when property owners are denied even temporary use of their property as the result of an unconstitutional regulation, they are entitled to damages.¹³⁹ The facts of *First English* are simple.¹⁴⁰

The First English Evangelical Lutheran Church of Glendale owns twenty-one acres of land in a canyon along the banks of the Middle Fork of Mill Creek in the Angeles National Forest.¹⁴¹ The church operated a camp known as "Lutherglen" on twelve of the twenty-one acres.¹⁴²

In 1977, a forest fire destroyed approximately 3,860 acres of the watershed area upstream from Lutherglen. This created a potential flood hazard.¹⁴³ In 1978, a storm dropped eleven inches of rain in the burned out watershed area causing the banks of the Middle Fork and Mill Creek to overflow. Lutherglen was flooded, and its buildings were destroyed.

In the aftermath of the flood, Los Angeles County adopted an interim ordinance¹⁴⁴ prohibiting construction in the area that in-

137. 107 S. Ct. 2378 (1987). *First English* was decided on June 7, 1987.

138. 107 S. Ct. 3141 (1987). *Nollan v. California Coastal Comm'n* was decided on June 26, 1987.

139. The Court found the constitutional question of just compensation "squarely presented" in *First English* due to the California Supreme Court's decision in *Agins* that foreclosed the availability of damages to redress a "temporary regulatory taking". *First English* 107 S. Ct. at 2384.

140. As the result of the United States Supreme Court decision discussed *infra*. *First English* was remanded back to the trial court for both the determination that a "taking" had occurred and the damages resulting therefrom.

141. The church purchased this land, located just north of the City of Los Angeles, California in 1957. The Middle Fork of Mill Creek is the natural drainage channel for a watershed owned by the National Forest Service. *Id.* at 2381.

142. Lutherglen served as a retreat and a recreational area for handicapped children. The camp consisted of a dining hall, two bunkhouses, a caretaker's lodge, an outdoor chapel and a footbridge across Mill Creek. *Id.* at 2381.

143. "The vegetation of a watershed area normally protects against flooding because the vegetation slows the flow of water, which can then percolate into the soil or be carried away by steams. When the vegetation is burned, however, there is no slowing of the flow, and the crust on the ground formed by the fire's intense heat prevents percolation of water into the soil." *First English*, Supreme Court Brief for Appellant, Jurisdictional Statement, App. A, pp. A2-2, n. 1.

144. On January 11, 1979, interim ordinance No. 11, 855 which provided in relevant part, "[a] person shall not construct, reconstruct, place, enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim

cluded the land on which Lutherglen had stood. A little more than a month after the ordinance was adopted, the Church filed suit in the Los Angeles County Superior Court.¹⁴⁵ The complaint alleged that the ordinance denied the church all use of Lutherglen and sought to recover damages in inverse condemnation of the loss of use.¹⁴⁶

The Los Angeles County Superior Court, relying on *Agins*,¹⁴⁷ dismissed the suit. The trial court explained that "when an ordinance, even a nonzoning ordinance, deprives a person of the total use of his lands, his challenge to the ordinance is by way of declaratory relief or possibly mandamus."¹⁴⁸

On appeal, the California Court of Appeal followed *Agins* and affirmed the trial court decision.¹⁴⁹ The Court of Appeal read the complaint as one seeking "damages for the uncompensated taking of all use of Lutherglen."¹⁵⁰ Further review was denied by the California Supreme Court. The United States Supreme Court noted probable jurisdiction and granted review.¹⁵¹

A. *The Court's Reasoning: The Majority Opinion*

Chief Justice Rehnquist, writing for the majority and joined by Justices Brennan, White, Marshall, Powell and Scalia decided whether the just compensation clause of the fifth amendment requires compensation as a remedy for temporary regulatory takings.¹⁵² Without deciding whether the particular ordinance denied the Church all use of its property,¹⁵³ Chief Justice Rehnquist de-

flood protection area located in Mill Creek Canyon . . ." On August 11, 1981, the temporary ordinance was superseded when the county added Mill Creek to the list of areas that are subject to the county Code restrictions applicable to flood protection districts. *First English*, Supreme Court Brief for Appellant, Jurisdictional Statement, App. F pp. A31-32.

145. On February 21, 1979, this action was filed in Los Angeles County Superior Court against the County of Los Angeles and the County Flood Control District. *First English*, 107 S. Ct. at 2382.

146. The complaint alleges two claims against the County and the Flood Control District. The first claim alleged that the defendants were liable under California Government code Section 835 for a dangerous condition on their upstream properties that contributed to the flooding of Lutherglen. The second claim alleged the Flood District engaged in cloud seeding during the storm, for which it is liable in tort and inverse condemnation.

147. *See supra* notes 80-91 and accompanying text.

148. *First English*, 107 S. Ct. at 2382 (quoting the trial court).

149. The California Court of Appeal in an unpublished opinion concluded "that because the U.S. Supreme Court has not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief, this court is obligated to follow *Agins*." *First English* Supreme Court Brief for Appellant, jurisdictional Statement, App. A. p. A16.

150. *First English*, 107 S. Ct. at 2838.

151. The Supreme Court granted certiorari in April 1986.

152. *See supra* note 139.

153. The Court rejected the suggestion that they must resolve the "taking" claim on the merits and remanded the case for further proceedings.

clared that temporary takings that deny “all use” of property “are not different in kind from permanent takings.”¹⁵⁴ The Court added that while invalidating the ordinance converts the taking into a temporary one, invalidation alone “is not a sufficient remedy to meet the demands of the just compensation clause.”¹⁵⁵ The Court concluded that the just compensation clause of the fifth amendment, therefore, requires the payment of compensation whenever a taking occurs, even when the taking is only temporary.

The majority opinion in *First English* can be broken down into three foundational elements. First, land-use restrictions can effect a taking. Second, temporary land-use restrictions can effect a taking. Third, just compensation is available as a remedy whenever land-use restrictions effect a taking.

1. *Land-use Restrictions Can Effect A Taking*—The theory that land-use restrictions can effect a taking is not new. The regulatory taking doctrine is said to have originated with *Penn Coal*, in which Justice Holmes wrote that a taking will be recognized if regulations go “too far”.¹⁵⁶ The *First English* Court noted that takings typically occur when the government condemns property in the exercise of the power of eminent domain. Takings however, may occur without formal eminent domain proceedings when landowners institute inverse condemnation actions against a government.¹⁵⁷

2. *Temporary Land-use Restrictions Can Effect A Taking*—The majority in *First English* conceded that the availability of damages for temporary regulatory takings required an interpretation of the just compensation clause of the fifth amendment.¹⁵⁸ In this light, the Court drew upon a comparison between interim regulations and abandonment of condemnation proceedings.¹⁵⁹ In cases where condemnation proceedings were abandoned and the government only temporarily exercised its right to use private property, there is no question that compensation is required.¹⁶⁰ It follows, therefore, that temporary regulatory takings that deny

154. *First English*, 107 S. Ct. at 2384.

155. *Id.* at 2388.

156. See *supra* note 54. The *First English* Court asserted this premise even though *Pennsylvania Coal* was an injunctive relief action between private parties where from Justice Holmes was presenting the “too far” concept in the due process context.

157. *First English*, 107 S. Ct. at 2386; see *supra* notes 17 and 83.

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

159. The Court looked to cases in which government temporarily exercised its right to use private property under its power of eminent domain as substantial guidance for the imposition of damages for interim regulations. *Id.* at 2387.

160. *Id.* at 2378.

landowners all use of their property “are not different in kind from permanent takings.”¹⁶¹

Further, Chief Justice Rehnquist, borrowing from Justice Brennan, restated that “[n]othing in the just compensation clause suggests that ‘takings’ must be permanent and irrevocable.”¹⁶² The Court opined that since the United States has been required to pay compensation for leasehold interests of shorter duration than the interim ordinance at issue in *First English*, the just compensation clause requires that the government pay the landowner for the value of the use of the land during the interim period.¹⁶³ The Court, therefore, directly linked regulatory taking cases, even for temporary regulations, to the just compensation clause of the fifth amendment.

3. *Remedy For Property Owner Is Just Compensation*—After linking excessive regulatory cases to the just compensation clause, even for temporary regulations, the Court quickly disposed of the sufficiency of *Agins*’ “no compensation rule.”¹⁶⁴ The Court stated that “invalidation of the ordinance is not a sufficient remedy to meet the demands of the just compensation clause.”¹⁶⁵

The Court emphasized that its holding is limited to the facts presented in *First English* and did not deal with the “quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances and the like.”¹⁶⁶ The Court admitted that the holding in *First English* “[would] undoubtedly lessen to some extent the freedom and flexibility of land use planners and government bodies of municipal corporations when enacting land-use regulations.”¹⁶⁷ The Court reasoned, however, that many constitutional provisions, including the just compensation clause of the fifth amendment, are designed to limit the power of governmental authorities.¹⁶⁸

161. *Id.* at 2388.

162. *Id.* at 2389 (quoting *San Diego Gas*, 101 S. Ct. at 1307 (Brennan, J., dissenting)).

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

164. *Id.* at 2389.

165. *Id.* at 2389.

166. The Court went on to hold 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.” *Id.* at 1289.

167. *Id.* at 2388.

168. *Id.* at 2389.

B. *The Court's Reasoning: The Dissenting Opinion*

Justice Stevens, joined in part by Justice Blackmun and Justice O'Connor lashed out at the majority acrimoniously.¹⁶⁹ The dissent challenged the majority opinion as “superficial”, “imprudent” and “dangerous”.¹⁷⁰ Justice Stevens stressed that “in order to protect the health and safety of the community,”¹⁷¹ the government may impose regulations without the burden of compensating property owners for individual pecuniary losses sustained as a result of the regulation.¹⁷²

Justice Stevens highlighted “four flaws” of the majority opinion: (1) the majority’s presumption of unconstitutionality;¹⁷³ (2) the majority’s interpretation of what facts constitute a temporary regulatory taking;¹⁷⁴ (3) the majority’s understanding of the *Agins*’ “no compensation rule”;¹⁷⁵ and (4) the majority’s use of the just compensation clause as a vehicle for dilatory procedures in the land-use area.¹⁷⁶

1. The Majority’s Presumption Of Unconstitutional Taking Is Improper—Justice Stevens noted that the Court should have ruled that the property owner’s complaint did not allege a taking under the Constitution.¹⁷⁷ He asserted that regardless of the property owner’s bold allegations that the ordinance denied it “all use” of its property, the Court’s precedents clearly demonstrate that the ordinance, as a valid exercise of the state’s police power, cannot constitute a taking.¹⁷⁸

Further, Justice Stevens argued that the long-standing rule of presumption of constitutionality that applies to legislative enactment applies in this case.¹⁷⁹ The property owner did not allege that the ordinance is invalid, pray for a declaration of invalidity or seek an injunction against its enforcement, nor are there any facts regarding the interference with future use of the property.¹⁸⁰ Therefore, Justice Stevens argued that the Court should have rejected *First English* on its merits.¹⁸¹

169. *Id.* at 2389-2400 (Stevens, J., dissenting).

170. *Id.* at 2393.

171. *Id.* at 2391.

172. *Id.* at 2391-92.

173. *Id.* at 2390.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 2391.

178. *Id.*

179. *Id.* at 2392.

180. *Id.*

181. *Id.* at 2393.

2. *The Majority Misconstrues What Facts Constitute A Temporary Regulatory Taking*—Justice Stevens did not dispute the proposition that a regulation which goes “too far”¹⁸² is a taking.¹⁸³ He asserted, however, that in most cases, invalidation of a regulation will mitigate any diminution in property value. As such, the regulation cannot be classified a taking.¹⁸⁴

Temporary interference with an owner’s use of his property may constitute a taking for which just compensation is required if the interference is physical.¹⁸⁵ Justice Stevens insisted, however, that only when a regulation destroys a major portion of a property’s value will the temporary existence of a regulation be so extreme that invalidation alone will not mitigate damages.¹⁸⁶ According to Justice Stevens, the issue was not whether the “regulation would constitute a ‘taking’ if allowed to remain in effect” but whether the regulation was so severe as to constitute a taking during the period the regulation was in effect.¹⁸⁷

Justice Stevens, writing alone in this section,¹⁸⁸ illuminated the “diminution in value” inquiry that is unique to regulatory taking analysis.¹⁸⁹ He argued that the “diminution in value” of the property in question must be evaluated along with the extent to which the owner may not use the property, the amount of property encompassed by the restriction and the duration of the restriction.¹⁹⁰ Justice Stevens concluded that only careful balancing can determine the “dividing line” between everyday regulatory inconveniences and those so severe that they constitute takings.¹⁹¹

3. *The Majority Misinterprets The Agins Rule*—The dissenting opinion expressed concern regarding the majority’s apparent misunderstanding of the rule pronounced by the California Supreme Court in *Agins*.¹⁹² In *Agins*, the California Supreme Court

182. See *supra* note 54 and accompanying text.

183. *First English*, 107 S. Ct. at 2393.

184. *Id.* at 2393.

185. *Id.*

186. *Id.*

187. To determine if a regulatory taking has occurred you must examine depth, width and length of the regulation. “As for the depth, regulations define the extent to which the owner may not use the property in question. With respect to width, regulations define the amount of property encompassed by the restrictions. Finally, for purposes of this case, essentially, regulations set forth due duration of the restriction. It is obvious that no one of these elements can be analyzed alone to evaluate the impact of a regulation, and hence to determine whether a taking had occurred.” *Id.* at 2394.

188. *Id.* at 2393-96.

189. *Id.* See also *supra* note 56 and accompanying text.

190. See *supra* note 186.

191. *First English*, 107 S. Ct. at 2394.

192. *Id.* at 2396-97.

decided that mandamus or declaratory relief rather than inverse condemnation provided “the appropriate relief” for one who challenges a regulation as a taking.¹⁹³ Justice Stevens stated that the majority in *First English* erred when it claimed that the California Supreme Court held that landowners may not recover damages for the time before a regulation is deemed a taking.¹⁹⁴

First, Justice Stevens, referring to previous dissenting opinions,¹⁹⁵ stated that “the court recognizes” that California courts have the right to choose what remedies are available to an aggrieved landowner.¹⁹⁶ Second, Justice Stevens believed the majority had unjustifiably speculated on how the California courts would deal with the “temporary regulatory” issue.¹⁹⁷ Justice Stevens argued that the *Agins* rule may be interpreted by California courts to mean that a property owner must exhaust equitable remedies *before* asserting a claim for damages.¹⁹⁸ Further, even if the *Agins* rule precludes damages for a temporary regulatory taking, the property owner must allege why declaratory relief would not provide an adequate remedy.¹⁹⁹

4. *The Due Process Clause, Not The Taking Clause, Protects Property Owners From Improper Governmental Decisionmaking*—Justice Stevens renewed his argument²⁰⁰ that the due process clause, not the just compensation clause, should be used to protect landowners from regulation that goes “too far.”²⁰¹ In fact, under this view, excessive regulation is not a taking at all, but a deprivation of due process under the fourteenth amendment.²⁰² However, because the Court held that excessive regulation is a taking requiring just compensation, Justice Stevens warned that the majority’s decision will open a floodgate of litigation and have a chilling

193. *Id.* at 2397 (citing *Agins*, 24 Cal. 3d at 277).

194. *First English*, 107 S. Ct. at 2397 (citing to the majority opinion, 107 S. Ct. at 2381).

195. *MacDonald*, 106 S. Ct. at 2569 (White, J., dissenting); *San Diego Gas*, 101 S. Ct. at 1306 (Brennan J., dissenting); *First English*, 107 S. Ct. at 2396.

196. *First English*, 107 S. Ct. at 2396.

197. *Id.* at 2397.

198. *Id.* at 2397.

199. *Id.* at 2397-98.

200. See Justices Stevens’ concurrence in *Williamson County Planning Commission v. Hamilton Bank*, 474 U.S. 172 (1985); see *supra* note 125 and accompanying text. See also Justices Steven’s dissent in *First English*, 107 S. Ct. at 2398-2400.

201. *First English*, 107 S. Ct. at 2399.

202. Since the due process clause of the fourteenth amendment requires a state to employ fair procedures in the administration and enforcement of regulations, property owners are protected from improperly motivated, unfairly conducted or unnecessarily protracted governmental decisionmaking. As such, violation of these procedural safeguards are a due process violation.

effect on the regulatory land use process.²⁰³ “Cautious local officials and land-use planners may avoid needed legislative 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.”²⁰⁴

III. ANALYSIS: LAND-USE REGULATION FROM LEGISLATIVE AND LITIGATION PERSPECTIVES

The United States Supreme Court’s decision in *First English* bridges the compensation remedy to circumstances where excessive government regulation denies a landowner all use of his property, even for a temporary period.²⁰⁵ While the ruling seems straightforward, the Court expressly limited the holding of *First English* to the facts of the case.²⁰⁶

Before the decision in *First English*, invalidation of an ordinance without compensation was viewed as adequate remedy for an unconstitutional regulation.²⁰⁷ Damages could be obtained for violations of due process during the legislative process, if a property owner was damaged thereby. Under *Agins*, damages under an inverse condemnation theory were actionable once a court determined that the challenged regulation was unconstitutional on its face or as applied. If the ordinance was deemed unconstitutional on its face, then that was the end of the query. If the ordinance was deemed unconstitutional as applied and the government chose to continue the effect of the ordinance, then the government would be responsible for compensating the property owner for the loss. Now, *First English* states that the government is going to be responsible for compensating the property owner retroactively after the ordinance is ruled unconstitutional on its face or as ap-

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

204. *Id.* at 2399-2400.

205. *See supra* note 9.

206. *See supra* note 166 and accompanying text.

207. *But see San Diego Gas*, 450 U.S. at 655 n.22 (Brennan, J., dissenting). Invalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity. At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow city attorneys the following advice: “If all else fails, merely amend the regulation and start over again.” If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation or if you try the case and lose, don’t worry about it. All is not lost. One of the extra “goodies” contained in the recent [California] Supreme Court case of *Selby v. City of San Buenaventura*, 10 C.3d 101, appears to allow the City to change the regulation, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again. . . . See how easy it is to be a city attorney. Sometimes you can lose the battle and still win the war. Good luck. Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (including Inverse Condemnation)*, 38B NIMLO MIN. L. REV. 192-93 (1975).

plied. Further, compensation for damages will be required if an emergency ordinance or temporary regulation is found to be unconstitutional as applied or if an ordinance or regulation is found to effect a taking.²⁰⁸

A. *The Future of Land-Use Regulations*

1. *Other Recent Supreme Court Decisions*—An analysis of *First English* could not be complete without looking at two other cases decided by the Supreme Court in the same term: *Keystone Bituminous Coal Association v. DeBenedicts*,²⁰⁹ and *Nollan v. California Coastal Commission*.²¹⁰

Keystone revisited *Penn Coal*²¹¹ in that several coal companies claimed that a Pennsylvania act violated, *inter alia*, the taking clause because it required that approximately fifty percent of the coal under structures remain in the ground to prevent building subsidence.²¹² Since Pennsylvania law recognizes three estates in land, “the mineral estate, the surface estate and the support estate,”²¹³ the coal companies asserted a taking of their “support estate” in the untouchable coal.²¹⁴

The Supreme Court, stating that portions of its *Penn Coal* decision were “advisory,”²¹⁵ held that no taking had occurred for two reasons. First, the character of the governmental action was to abate a public nuisance.²¹⁶ Second, the act allowed the coal companies to engage profitably in their business.²¹⁷

Nollan, involved a small house on a beach front lot, between two public beaches.²¹⁸ Between the house and the beach stands an

208. An alternative remedy has always been, and remains, for a plaintiff faced with injuries attributable to an unreasonable regulation to petition for writ of mandate pursuant to CCP § 1095 and “recover the damages which he has sustained,” and that such damages “shall be recovered (from) the public entity represented by such officer. . . .” This remedy, though, is limited for failure of a public officer to discharge mandatory duty where the plaintiff seeks ancillary writ in addition to damages authorized by Gov’t Code § 15.6. See also, Van Alstyne, *California Government Tort Liability Practice* (CEB) (1987) §§ 2.13, 2.47.

209. 107 S. Ct. 1232 (1987).

210. 107 S. Ct. 3141 (1987).

211. 260 U.S. 393 (1922).

212. *Keystone*, 107 S. Ct. at 1238-39. See the Bituminous Mine Subsidence and Land Conservation Act, Pa. Stat. Ann. tit. 52 § 1406.1 (Purdon Supp. 1986).

213. *Keystone*, 107 S. Ct. at 1238.

214. *Id.* at 1239.

215. *Pennsylvania Coal* does not control this case because the Court felt that the similarities between *Keystone* and *Pennsylvania Coal* were far less significant than the differences. *Id.* at 1240.

216. *Id.* at 1240-41.

217. *Id.* at 1248.

218. *Nollan*, 107 S. Ct. at 3143.

eight-foot high seawall.²¹⁹ The Nollans wanted to replace the house with a new home and accordingly applied to the California Coastal Commission for a permit to demolish the old house and construct the new one.²²⁰ After an extended administrative process, the permit was granted with the condition that the Nollans grant a public easement between the seawall and the mean high tide line.²²¹

The Supreme Court found that the condition was an unconstitutional taking for which damages must be paid.²²² In an opinion written by Justice Scalia, the Court held that the permit condition did not serve the interest it claimed to serve. Justice Scalia stated that there must be a “nexus” or reasonable relation between a land-use regulation and the “legitimate state interest” it is supposed to protect.²²³ Justice Scalia concluded that the governmental interest in protecting a continuous strip of publicly accessible beach is “a good idea” and can be advanced by using the power of eminent domain.²²⁴

In *Keystone*, Justice Stevens wrote the opinion of the Court while Chief Justice Rehnquist wrote the lead dissent, the flip-side of the writing assignment in *First English*.²²⁵ The key observation to note about *Keystone* is the narrowness of the state’s victory, even though, as Justice Stevens highlights, a property owner “face[s] an uphill battle” when attacking legislation under the taking clause.²²⁶

In *Nollan*, Justice Stevens noted that Justice Brennan’s position in *San Diego Gas* and *Nollan*, vis-a-vis his position with the majority in *First English*, are subjectively inconsistent at best.²²⁷ In *San Diego Gas*, Justice Brennan stated: “The constitutional rule I propose requires that, once a court finds a police power regulation has effected a ‘taking’, the government entity must 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.”²²⁸ In *First English*, Justice Brennan joined the majority in accord with his proposed rule.²²⁹ But in *Nollan*, he wrote the lead dissent sup-

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 3147.

223. *Id.* at 3148.

224. *Id.* at 3150.

225. See *supra* notes 152 and 169 and accompanying text.

226. *Keystone*, 107 S. Ct. at 1247.

227. *Nollan*, 107 S.Ct. at 3163 (Stevens, J., dissenting).

228. *Id.*

229. See *supra* note 152 and accompanying text.

porting the state's police power in imposing a condition on private development.²³⁰

Justice Brennan defended his position by stating that he sees his dissent in *Nollan* as completely consistent with his position in *First English*.²³¹ He suggested that governments should be given great latitude in regulating private development; but *if* regulation denies the property owner the use of his land and is found to effect a taking, compensation is the appropriate remedy for the constitutional violation.²³² These concepts seem consistent, but they are dangerously obtuse in light of the fact that the Court has again failed to enunciate a clear taking test.²³³

The implication of damage awards against governments explains the possibility of a "chilling effect" on their regulatory efforts. Justice Stevens argued in his *First English* dissent that local governments which would have taken the broad public interest into account when enacting new regulations might now back off for fear of being sued by landowners.²³⁴

2. Perspective of the Government and Land-Use Planners—Regardless of how many times the Court implies that government must pay when regulation goes "too far," land use regulation, in its many forms,²³⁵ will be evaluated by the sturdiness of the foundation upon which it exists, namely, the police power. A court's vantage of government regulation will continue to be based upon the "reasonableness" of the regulation.²³⁶ Despite the inevitable and expectable increase in litigation as a result of *First English* as is discussed below, the continual lack of a specific and usable test for determining when a regulation or ordinance founded upon the police power imposes constitutionally compensable damages is what is most disappointing about the *First English*

230. *Nollan*, 107 S. Ct. at 3160 (Brennan, J., dissenting).

231. *Id.* at 3162 n.14.

232. See Williams, *The White River Junction Manifesto*, *supra* note 51, at 240.

233. There is no precise test to determine when regulation ends and taking begins, however, the Court has established several factors to aid in the determination. See *supra* notes 88-91 and accompanying text.

234. *First English*, 107 S. Ct. at 2399-2400 (Stevens, J., dissenting).

235. *E.g.*, Subdivision controls, dedication on development, building moratoriums, environmental controls, and zoning.

236. There are four aspects of the term "reasonable" which courts consider. (1) The regulation must promote an objective which is a proper topic of governmental concern and there must be a demonstrable relationship between the regulation and the objective. (2) The objective, though a proper subject of government concern, must not be one ordinarily attained through eminent domain. (3) Land owners who are similarly situated must receive equal treatment. (4) The extent to which the regulation reduces the economic value of the land must not be "too severe," but the extent of permitted devaluation may be . . . related to the objective of the regulation. See Broadhead & Rosenfield, *Open Space Zoning Handbook* 15 (California Assembly Select Committee on Open Space Lands 1973).

decision.²³⁷ What good is it for a local official to know that a temporary or interim ordinance might result in a compensable taking when the official knows as little about the temporary taking standard as he or she did about the permanent taking standard.

Many planners in California are devising strategies to control growth so that government can provide expected services to the public. Some municipalities, for example, are adopting interim ordinances controlling or limiting development.²³⁸ While certainly meeting constitutional demands of due process, it will be difficult to forecast how these ordinances will hold up against the “great latitude” but “just compensation” scale that the *First English* Court has conjured.²³⁹

If the test for temporary takings is the government’s denial of “all use” of property, then planners have a bright-line taking test, at least for a temporary taking.²⁴⁰ But the Court did not establish an “all use” test. Instead, the Court “assumed” that all use of the property was denied by the interim ordinance in order to reach the remedy issue.²⁴¹ Planners are thus forced to deal with emergency legislation in the same unpredictable light as permanent legislation and should not be tempted to believe that the Court is heading toward an “all use” test for interim legislation.²⁴²

The more likely future is that the Court will unmask the case-by-case approach that has been the Court’s solution in past cases.²⁴³ Hopefully, the Court will establish guidelines for planners to fathom as they prepare and recommend interim legislation.

For example, reasonableness can be measured by a well-docu-

237. See Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1970); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

238. San Diego, Cal., Interim Development Ordinance O-16908 (New Series) (July 21, 1987), as amended by O-1940 (New Series) (Sept. 14, 1987).

239. *Nollan*, 107 S. Ct. at 3163 (Brennan, J., dissenting) (“state agencies therefore require considerable flexibility in responding to private desires for development. . . . They should be encouraged to regulate development in the context of the overall balance of competing uses.”). See *supra* note 232 and accompanying text. See also G. Bauman, *The Supreme Court Becomes Serious About Takings Law: The First Church, Keystone and Irving Cases*, 10 ZONING AND PLANNING LAW REPORT 8, at 151 (Sept. 1987).

240. The majority in *First English* noted that it had “no occasion to 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 states authority to enact safety regulations” *First English*, 107 S. Ct. at 2384.

241. *Id.* at 2389.

242. *Accord* Merritt & Dillon, *Damages as a Remedy for Temporary “Regulatory Takings” of Property: The Impact of First Lutheran*, Real Property Law Reporter Vol. X, No. 6, p. 125 (Aug. 1987) at 131.

243. See *supra* notes 88-91 and accompanying text.

mented legislative record which includes all hearings in which affected property owners had the opportunity to participate. The legislative mind processes must be articulated and alternative methods considered and logically eliminated. The benefits which are created as a result of the legislation should be articulated prospectively rather than retrospectively when and if the legislation is challenged in court. Benefits include those which are unique to the landowner as well as to the public at large.

Much can also be done at the grass roots level, especially since many land-use decisions are scrutinized by special interest groups.²⁴⁴ For example, effective liaison and communication with community leaders usually renders an effective consensus which results in legislation supported by homeowners associations and adversely affected property owners.

Of course, these examples of documentation are sometimes impracticable in light of the fact that planners are already overworked in meeting their responsive duties let alone being proactive in advancing interim legislation. The correct response by planners as a result of *First English*, is to maintain a responsible and steadfast posture—unaffected by the noise *First English* is bound to make.²⁴⁵

B. *The Litigation Explosion and Beyond*

In the words of Justice Stevens, “[o]ne thing is certain. The Court’s decision [in *First English*] will generate a great deal of litigation.”²⁴⁶

First, land-use litigation may be more attractive to property owners when compensation is available in addition to invalidation of the involved ordinance. However, the loss of rather than in lieu of use of the property during a temporary taking may be so minimal that litigation may be deemed “unproductive.”²⁴⁷

Second, since the key issue of when regulation ends and a compensable taking begins has been left unresolved,²⁴⁸ further litiga-

244. E.g., environmentalists, no-growth proponents, and neighborhood preservationists are among the common groups affecting land-use decisions.

245. Such overreaction as that which occurred in San Francisco is unwarranted. Just a few days after *First English* was decided, Mayor Dianne Feinstein of San Francisco, on the advice of City Attorney, Louise Renne, vetoed a building moratorium in a five-block area of a congested neighborhood, saying she couldn’t approve it because of the *First English* ruling. Fulton, *A New Era for Private Property Rights*, CALIF. LAWYER, Nov. 1987, p. 27, 28.

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

247. Justice Stevens believes that most of the litigation generated by the *First English* decision will be “unproductive.” *Id.*

248. See *supra* note 233 and accompanying text.

tion will be necessary to establish what is a taking.²⁴⁹

1. *Federal Court Remedies*—Another area of concern relates to municipal liability for “policy or custom” established through the acts of its public officials charged with the responsibility of drafting regulations for the public welfare.²⁵⁰ Such civil liability may overreach “just compensation” where acts of high-ranking policymakers are deemed to effect a taking.²⁵¹ A property owner, therefore, may claim that a regulation or ordinance takes his property without just compensation, opening the door for a windfall under 42 U.S.C. section 1983.²⁵²

Federal courts have been willing to consider the compensation issue directly pursuant to 28 U.S.C. section 1331(a)²⁵³ in addition to 42 U.S.C. section 1983. Qualified immunity has been held not to apply to municipalities.²⁵⁴

Very simply, a property owner who brings a municipality to federal court can protect his damage claim in case it is found that the subject regulation was not enacted in furtherance of the public health, safety, morals, or general welfare. In such a case, a municipality may not be compelled to pay just compensation under the fifth amendment because there has been no “taking for public use,” but an actionable claim remains under 42 U.S.C. section 1983 since such a taking may constitute the deprivation of property without due process of law under the fourteenth amendment.²⁵⁵ Either way, the measure of damages would be measured by an amount equal to just compensation for the value of the property during the period of the taking.²⁵⁶

2. *Procedural Prerequisites*—California will have to evaluate procedural requirements for an action for damages under the temporary taking theory. As a procedural prerequisite, the California

249. The *First English* Court assumed a taking had occurred, and therefore, never addressed that issue. *First English*, 107 S. Ct. at 2384. n.7. See also *supra* notes 240-242 and accompanying text.

250. See *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292 (1986).

251. The *Pembaur* decision states that municipalities may be liable for single actions of “high-ranking” policymakers.

252. See *supra* note 114.

253. 28 U.S.C. § 1331(a) states: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” See also *Dahl v. City of Palo Alto*, 372 F. Supp. 647 (N.D. Cal. 1974).

254. *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1197 (5th Cir. 1981).

255. *San Diego Gas*, 101 S. Ct. at 1305 (Brennan, J., dissenting).

256. *Hernandez*, 643 F.2d at 1200.

legislature should amend Government Code section 905.1,²⁵⁷ and include claim presentation requirements for inverse condemnation under the California Tort Claims Act.²⁵⁸ This would not be without precedent. Before 1976, there was no doubt that the claim presentation requirement applied to inverse condemnation actions.²⁵⁹ Because it was difficult to determine when an inverse condemnation action occurred, the California legislature enacted Gov't Code § 901.1. As a minimum requirement, the California legislature can exclude from the exemption for claim filing requirements, inverse condemnation action resulting from temporary regulatory taking facts.

The rationale, of course, is the same as the general purpose of claim presentation procedure already pronounced.²⁶⁰ First, it gives the governmental entity an opportunity to settle just claims before suit is brought.²⁶¹ Second, it permits the entity to make an early investigation of the facts on which the claim is based, thus enabling itself to defend against unjust claims or correct the regulation or practice which gave rise to the claim.²⁶² Third, it allows for prospective purchasers of real property to make meaningful decisions when buying real property. Conversely, the entity will have finality added to its regulatory process, lest latent claims be made by successors in title.

3. *Measuring Temporary Damages*—The majority opinion in *First English* alluded to the difficult task in measuring temporary damages.²⁶³ Although analogies to the true eminent domain case may be useful, they are not entirely applicable. The Court offers absolutely no guidance on how to handle the dilemma.²⁶⁴ For ex-

257. In 1975, the legislature adopted Cal. Code of Civ. Proc. § 426.70(b), which provides that a cross-complaint in a direct condemnation action need not be preceded by a claim. In 1976, the legislature abolished the claims requirement for inverse condemnation actions. If a claim is presented, however, it must be processed in the usual manner. See *City of Los Angeles v. Superior Court*, 73 Cal. App. 3d 509 (1977); Norman E. Matteon & Henry Veit, *Condemnation Practice in California*, California Continuing Education of the Board (Supp. April 1987) § 13.7, at 208-09.

258. CAL. GOVERNMENT CODE § 810 *et seq.* CAL. CONST. Art. XI, § 12 provides: "The Legislature may Prescribe Procedure for presentation, consideration, and enforcement of claims against counties, cities, their officers, agents, or employees."

259. See *Mehl v. People ex. rel Dep't of Pub. Works*, 13 Cal. 3d 710 (1975), and *Mosesian v. City of Fresno*, 28 Cal. App. 3d 493 (1972).

260. Recommendation Relating to Sovereign Immunity, 4 CAL. L. REV'N COMM'N REPORTS 1001, 1008 (1963).

261. See also *Knight v. Los Angeles*, 26 Cal. 2d 764 (1945); *Eaton v. Ventura Port Dist.*, 45 Cal. App. 3d 862 (1975); *Bozaich v. State*, 32 Cal. App. 3d 688 (1973).

262. *Id.*

263. 107 S. Ct. at 2389 n.10.

264. See, e.g., Comment, "*Fair*" is Fair: Valuing the Regulatory Taking, 15 U.C. DAVIS L. REV. 741, 753 (1982).

ample, when does the taking begin? If the taking occurs when the ordinance is adopted, that means property owners need to continually appraise the value of their property to see if there is evidence that they have been damaged. If a property owner fails to do so, an estoppel argument in favor of the government may attach. If the taking occurs when the property owner discovers the devaluation resulting from new regulation, i.e., upon the attempted sale of his property, then the government cannot protect against stale claims by using the California Torts Claims Act as a shield.²⁶⁵

Moreover, how should enhancement be considered in measuring damages? If a new public improvement enhances the affected property's value, then the increase attributable to the public improvement should offset the amount of just compensation.

These are some of the issues that *First English* has left for another day. Traditionally, we think of just compensation as the fair market value of the property interest taken. The concept of temporary damages conjures new valuation problems. For example, in *First English*, since there are no facts which support a financial loss or diminution in value resulting from the subject interim ordinance, assuming the trial court finds that a taking occurred, it is possible that no damages occurred as a result of the taking.

CONCLUSION

It has taken the Supreme Court a decade to give some indication of the vague constitutional demands under the regulatory taking theory. *First English* gives the illusion of an answer. *First English* eliminates the *Agins* "no compensation" rule and forces government to bear the cost of improper land-use planning. However, the converse is also true: *First English* will have little, if any effect on governments who engage in responsible land-use regulation. The query remains: Can government effectively regulate land-use under its police power after *First English*?

Developers and private property owners might construe the *First English* rule as an adequate check on overzealous regulators. But the "chilling effect" that the *First English* rule might have on public officials charged with the responsibility of drafting and implementing regulations designed to protect the public welfare cannot be measured. Finally, *First English* raises concerns about increased litigation of taking claims. California must evaluate its claim presentation requirement and include inverse condemnation claims in the act's scope to cope with the new litigation incentives created for property owners in *First English*. Even under a tempo-

265. See *supra* notes 257-262 and accompanying text.

rary regulatory claim, property owners can bring their action in federal court. However, the problem still remains—valuation of a temporary taking is highly speculative at the very best and more likely an impossible task. For these reasons, retrospection allows us to realize that *First English* is nothing more than a paper tiger.

Justice Stevens has stated that “the rule of liability created by the Court in *First English* is a shortsighted one.” “Let’s hope that a broader vision ultimately prevails.”²⁶⁶

266. *Nollan*, 107 S. Ct. at 3164 (Stevens, J., dissenting).

