First English: The Fifth Amendment Requires Just Compensation for a Regulatory Taking

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FIRST ENGLISH: THE FIFTH AMENDMENT REQUIRES JUST COMPENSATION FOR A REGULATORY TAKING

I. INTRODUCTION

The fifth amendment to the United States Constitution requires the government to pay just compensation for takings of private property. However, the question repeatedly has confronted the courts as to whether compensation is constitutionally required as the remedy for regulatory takings. Inherent in that question is the threshold issue of whether a governmental regulation may ever constitute a taking under the fifth amendment. The United States Supreme Court finally answered that question by holding that just compensation is constitutionally required for “temporary” regulatory takings.


2. Historically, landowners looked to the courts for declaratory relief invalidating an allegedly excessive regulation. Gordon, Compensable Regulatory Taking: A Tollbooth Rises on Regulation Road, 12 REAL EST. L.J. 211, 212 (1983); Johnson, Compensation for Invalid Land Use Regulation, 15 GA. L. REV. 559 (1981). However, landowners began to seek monetary compensation when alleging that the challenged regulation effected a taking of their property without payment of just compensation in violation of the fifth amendment. Id. at 559-60.

3. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 646-47 (1981) (Brennan, J., dissenting) (“Implicit in this question [of whether government must pay just compensation when regulation effects a taking] is the corollary issue whether a government entity’s exercise of its regulating police power can ever effect a ‘taking’ within the meaning of the Just Compensation Clause.”); see also Berger & Kanner, Thoughts on The White River Junction Manifesto: A Reply to the “Gang of Five’s” Views on Just Compensation for Regulatory Taking of Property, 19 Loy. L.A.L. REV. 685, 692 (1986) (two interrelated issues to be addressed: “(1) When does regulation of private property become so severe that it moves beyond the boundary of uncompensated police power action and becomes a taking . . . which requires compensation?: and (2) When a regulatory taking has occurred, what is the aggrieved property owner’s remedy?”).

4. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378 (1987). In First English, the Court described “temporary” regulatory takings as “those regulatory takings which are ultimately invalidated by the courts.” Id. at 2383; accord San Diego Gas, 450 U.S. at 653 (Brennan, J., dissenting) (temporary taking covers “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” (footnotes omitted)). The determination of a regulatory taking will result when a land-use regula-
The debate over the appropriate remedy available to a landowner, who successfully challenges a regulation on the grounds that it unconstitutionally effects a taking of private property without payment of just compensation, initially focused on the sufficiency of a judicial declaration that the regulation was invalid. Some state courts maintained not only that a declaration of invalidity was sufficient redress, but also that it was the exclusive remedy available to an aggrieved landowner. However, other courts adopted a contrary position and held that the challenger was entitled to just compensation when the excessive regulation went so far as to constitute a taking of private property in violation of the fifth amendment. While the latter view gained support among several of the Supreme Court Justices, others cautioned against such an approach. Those opposed agreed that a challenger may be entitled to a monetary remedy, but asserted that the due process clause of the four-

Regulatory takings are thus distinguished from traditional takings in that regulatory takings involve governmental restriction on the use of private property while traditional takings involve government’s physical use of private property.

5. See, e.g., San Diego Gas, 450 U.S. at 656 (Brennan, J., dissenting) (arguing that 'mere invalidation would fall far short of fulfilling the fundamental purpose of the Just Compensation Clause').

6. See, e.g., Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979) (declaratory relief or mandamus is appropriate relief for unconstitutional regulation rather than inverse condemnation); aff’d on other grounds, 447 U.S. 255 (1980); see also Bauman, The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls, 15 Rutgers L.J. 15, 47 & n.162 (1983) (California and New York courts reluctant to award damages when taking found); Comment, Just Compensation: The Constitutionally Required Remedy for Regulatory Takings, 55 U. Cin. L. Rev. 1237, 1245 & n.61 (1987) (discussing various approaches by state courts to remedial question in regulatory taking cases).

7. See, e.g., Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981) (just compensation required whenever exercise of police power effects taking) For a discussion of Burrows, see infra note 124. See also Bauman, supra note 6, at 47 & n.163 (federal courts willing to require just compensation in land use cases); Berger & Kanner, supra note 3, at 685-86 & n.3 (citing cases in six federal courts of appeals, United States Claims Court and state supreme courts, which adopted just compensation as remedy for regulatory takings); Comment, supra note 6, at 1245 & nn.62-63 (noting that even states that recognize regulatory takings differ as to appropriate remedy).
teenth amendment\textsuperscript{8} provided this remedy rather than the just compensation clause of the fifth amendment.\textsuperscript{9}

During the past decade, the "remedial question" of what constitutes the appropriate remedy for a temporary regulatory taking was before the Court in four cases, in each of which the Court concluded that it was unable to address the issue.\textsuperscript{10} However, the Court finally resolved the question in \textit{First English Evangelical Lutheran Church v. County of Los Angeles}.\textsuperscript{11} The Court answered the remedial question by holding, on the facts of \textit{First English}, that a landowner is entitled to just compensation under the fifth amendment when a "temporary" governmental regulation effects a taking of the landowner's property.\textsuperscript{12} However, \textit{First English} does not address many questions relating to the regulatory takings situation.\textsuperscript{13} Nevertheless, in light of the Court's answer to the remedial question, official land planners, landowners, observers and the judiciary will now see whether this decision will result in the anticipated "chilling effect" on the exercise of governmental regulatory powers\textsuperscript{14} or whether

\textbf{8.} The pertinent part of the fourteenth amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . . " \textit{U.S. Const. amend. XIV, }§ 1.

\textbf{9.} See, e.g., Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 205 (1985) (Stevens, J., concurring in the judgment) (property owner may have damages claim based on denial of procedural rights); see also Johnson, supra note 2, at 579-83 (appropriate constitutional tests applied to land use regulations are substantive due process and equal protection).

\textbf{10.} \textit{First English}, 107 S. Ct. 2378, 2383 (1987); see MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986) (Court could not determine whether taking had occurred by rejection of subdivision proposal or if county had failed to pay just compensation without determination by planning commission on how it would apply challenged regulation to the property); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (claim ruled premature because respondent had neither obtained final decision as to application of ordinance to particular property nor pursued available state remedies); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (appeal dismissed in absence of final judgment by state court regarding whether a taking had occurred and, if so, whether nonmonetary remedies were available); Agins v. City of Tiburon, 447 U.S. 255 (1980) (no need to determine whether state may limit remedies available to party whose land was taken when no taking had occurred).


\textbf{12.} \textit{Id.} at 2389.

\textbf{13.} Significant unresolved issues include: (1) what constitutes a regulatory taking, i.e. at what point does a governmental restriction cross the line from being a valid exercise of the police power to being overly restrictive and effecting a taking for which the fifth amendment mandates the payment of just compensation, and (2) what is the appropriate measure of just compensation once a regulatory taking has been found. For a discussion of these issues, see infra notes 131-53 and accompanying text.

\textbf{14.} See, e.g., Agins v. City of Tiburon, 24 Cal. 3d 266, 276, 598 P.2d 25, 30, 157 Cal. Rptr. 372, 377 (1979) (noting that commentators have predicted "chilling effect" on municipalities' enactment of land use regulations if just compensation must be paid when local entity's exercise of its police power exceeds...
a proper balance will be achieved among the various forces involved in the land planning process.\textsuperscript{15}

This Note will review the historical development of the Court's interpretation of the fifth amendment's applicability to governmental regulations which led to the \textit{First English} decision, focusing on two specific questions: first, may a regulatory action ever effect a taking\textsuperscript{16} and, second, if a regulatory action may effect a taking, does the fifth amendment require the payment of just compensation to the landowner.\textsuperscript{17} Finally, this Note will analyze the Court's decision in \textit{First English} and discuss the possible short-term and long-term effects of that case on future land use planning by official planners and developers.

II. BACKGROUND

Until \textit{First English}, a majority of the Court did not reach the question of whether just compensation is the required remedy for “temporary” constitutional limits, \textit{aff’d on other grounds.}, 447 U.S. 255 (1980); see generally \textit{First English}, 107 S. Ct. at 2399 (Stevens, J., dissenting) (expressing fears that majority opinion will result in important regulations never being enacted); Sallet, \textit{Regulatory “Takings” and Just Compensation: The Supreme Court’s Search for a Solution Continues}, 18 Urb. Law. 635, 636 (1986) (discussing practical significance of decision that fifth amendment requires monetary compensation for effective period of excessive land use regulation); Williams, Smith, Siemon, Mandelker & Babcock, \textit{The White River Junction Manifesto}, 9 Vt. L. Rev. 193, 240 (1984) [hereinafter Williams] (urging that determination that Constitution requires payment of just compensation when land use regulation effects impermissible taking “will produce timid implementation and an unwillingness to innovate [on the part of local governments] that will weaken and substantially curtail the effectiveness of the land use control system”).

\textsuperscript{15.}See \textit{San Diego Gas & Elec. Co. v. City of San Diego}, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting) (noting commentators’ suggestion that potential financial liability would lead to more rational decisionmaking involving cost-benefit analysis of restrictions); see also Berger & Kanner, \textit{supra} note 3, at 752-53 (arguing that “chilling” concept “is intended to protect the individual citizen from constitutional overreaching by the powerful government, not the other way around”).

\textsuperscript{16.}For a discussion of the Court’s treatment of the question whether a regulatory action may ever effect a taking, see \textit{infra} notes 23-61 and accompanying text. Although this Note will discuss how the Court has considered regulations as effecting takings of property, it will not delve into the fundamental question—what factually is a “regulatory taking.” The \textit{First English} opinion addresses the remedial issue, but it does not aid the struggle to predict what the Court will consider to be a taking in the regulatory context. Outside the typical physical takings situation, whether temporary or permanent, the Court has found the answer to this question to be elusive, particularly in the context of an alleged regulatory taking. For a discussion of appropriate tests for determining what is a police power taking, see Stoebuck, \textit{Police Power, Takings, and Due Process}, 37 Wash. & Lee L. Rev. 1057 (1980).

\textsuperscript{17.}For a discussion of how the Supreme Court Justices, prior to the \textit{First English} decision, addressed the question of whether the fifth amendment requires payment of just compensation for a regulatory taking, see \textit{infra} notes 62-87 and accompanying text.
regulatory takings.\textsuperscript{18} A landowner desirous of challenging a regulation under the federal Constitution was limited to seeking declaratory relief through the courts.\textsuperscript{19} Traditionally, the courts examined such a challenged regulation to determine whether it constituted a valid exercise of governmental police power.\textsuperscript{20} When a court found that there had been a valid exercise by the government of its regulatory powers, the court upheld the regulation and the complainant was not entitled to any relief.\textsuperscript{21} On the other hand, if a court determined that the government’s

\textsuperscript{18}Although the Court previously invalidated a statute as effecting a taking without compensation, the Court was not asked in that case to determine that the statute did effect a taking requiring the payment of just compensation under the fifth amendment. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). In Pennsylvania Coal, Mahon sought an injunction to prevent the Pennsylvania Coal Company from mining under Mahon’s property notwithstanding that the company had existing property and contract rights entitling it to mine the underlying coal. \textit{Id.} at 412. Mahon contended that such mining would remove the property’s support and cause subsidence of the surface and the house on it in violation of the Kohler Act previously adopted in Pennsylvania. \textit{Id.} Act of May 27, 1921, Pa. P.L. 1198 (construing Act of Pennsylvania, approved May 27, 1921, P.L. 1198). The Court denied the injunction because it found the statute to be an excessive exercise of the state’s police power to the extent that it affected previously reserved rights to mine the underlying coal. \textit{Id.} at 414. Pennsylvania Coal Company did not seek compensation from the government for an unconstitutional regulatory taking; rather, the Company sought the Court’s denial of Mahon’s requested injunction on the basis of the invalidity of the Act. \textit{Id.} at 412-13. Thus, the Court was not called upon to address the remedies available to the affected owner, Pennsylvania Coal Company. \textit{Id.} at 412; see Williams, \textit{supra} note 14, at 208.

\textsuperscript{19}Agins v. City of Tiburon, 24 Cal. 3d 266, 272-73, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979), aff’d on other grounds, 447 U.S. 255 (1980). A landowner is afforded declaratory relief by way of a judicial declaration that the regulation is unconstitutional and, therefore, invalid. \textit{Id.}; Johnson, \textit{supra} note 2, at 559.

\textsuperscript{20}Goldblatt v. Hempstead, 369 U.S. 590, 594-95 (1962). The Court stated:

\begin{quote}
The term ‘police power’ connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of ‘reasonableness,’ this Court has generally refrained from announcing any specific criteria. The classic statement of the rule . . . is still valid today: ‘To justify the state in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.’
\end{quote}

\textit{Id.} (citing Lawton v. Steele, 152 U.S. 133, 137 (1894)).

The term “police power” also has been described as the right of the states to regulate their internal affairs for the protection of “the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of general government, or violate rights secured by the Constitution of the United States.” Mugler v. Kansas, 123 U.S. 623, 659 (1887).

\textsuperscript{21}See Goldblatt v. Hempstead, 369 U.S. 590 (1962). The Goldblatt Court upheld the town’s ordinance regulating dredging and pit excavating within the town’s limits, which the town adopted allegedly as a safety measure. \textit{Id.} at 595-96. Although the record provided the Court with little evidence on which to evaluate the reasonableness of the ordinance, the Court held that the ordinance
actions went beyond the scope of its regulatory powers, the court invalidated the regulation as an unconstitutional exercise of the government’s police powers. However, the court did not deem such a regulation to be a taking requiring the payment of just compensation under the fifth amendment; invalidation of the regulation was the extent of the complainant’s remedies.²²

A. May a Regulatory Action Effect a Taking?

Although the Court had not treated a regulation as having effected a taking for purposes of the just compensation clause of the fifth amendment, it did anticipate that a regulation could constitute a taking.²³ In its discussions, the Court frequently quoted the following statement from was valid because the appellant, Goldblatt, had failed to meet its burden of proof on the reasonableness issue. Id. Given Goldblatt’s failure to meet this burden of proof, the Court presumed that the ordinance was passed in the interest of public safety. Id. at 596 (citing Bibb v. Navajo Freight Lines, 359 U.S. 520, 529 (1959) (exercise of police power is presumed to be constitutionally valid); Salsburg v. Maryland, 346 U.S. 545, 553 (1954) (presumption of reasonableness is with the State); United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938) (exercise of police power will be upheld if any state of facts, either known or which could be reasonably assumed, affords support for it); see also Keystone Bituminous Coal Ass’n v. DeBenedictis, 107 S. Ct. 1232 (1987) (upholding Pennsylvania statute protecting surface land which may be affected by the mining of bituminous coal on theory that Pennsylvania has substantial and legitimate public interest in preventing subsidence damage to public or inhabited properties); Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) (upholding New York City’s Landmarks Law because imposed restrictions promoted public’s general welfare); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding zoning ordinance that bears rational relation to health and safety of community); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upholding Los Angeles zoning ordinance that prohibited continuation of brickmaking in area that had become residential); Mugler v. Kansas, 123 U.S. 623 (1887) (upholding Kansas statute that prohibited manufacture of intoxicating liquors).

²². Pennsylvania Coal, 260 U.S. 393 (1922). However, as noted previously, compensatory relief was not sought in Pennsylvania Coal. See supra note 18. In Pennsylvania Coal, the Court concluded with an observation that the state could proceed under its power of eminent domain assuming that an exigency existed upon which the statute was passed in the first place. Id. at 416. This observation has led many to debate whether Justice Holmes’ Pennsylvania Coal opinion meant that the statute did effect an unconstitutional taking or merely that the statute was invalid since it was an overly restrictive exercise of governmental police powers. Williams, supra note 14, at 211-12 & nn.58-62 (arguing that Justice Holmes did not mean that excessive regulation constituted taking for which just compensation is required).

²³. See Pennsylvania Coal, 260 U.S. 393 (1922). Prior to Pennsylvania Coal, the Court had considered a challenge to a Kansas statute which prohibited the manufacture of intoxicating liquors, and had dismissed any contention that the case should be governed by eminent domain principles. Mugler v. Kansas, 123 U.S. 623 (1887). In Mugler, the Court expressly stated: “A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.” Id. at 668-69. For a commentary on the opposite approaches to the appro-
Justice Holmes’ opinion in Pennsylvania Coal Co. v. Mahon: “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.”

When a “regulation goes too far” is not easily ascertained and the Court has recognized that there is no “set formula” to determine what constitutes a regulatory taking. Without the aid of a clear definition, the Court has considered several factors when asked to declare that a regulation constituted a taking under the fifth amendment.

In Penn Central Transportation Co. v. City of New York, the Court was confronted with an allegation that New York City’s Landmarks Preservation Law (Landmarks Law) effected a taking of Penn Central’s property without payment of just compensation as required by the fifth amendment. Penn Central sought a declaratory judgment to prevent the private remedy for regulatory excesses discussed by the Court in Mugler and Pennsylvania Coal, see Bauman, supra note 6, at 33-49.

24. 260 U.S. 393 (1922). For a discussion of the facts of Pennsylvania Coal, see supra note 18 and accompanying text.

25. Id. at 415. The judiciary as well as commentators view this statement as the source of arguments advocating the payment of just compensation as the appropriate constitutional remedy for regulatory takings. See, e.g., First English, 107 S. Ct. at 2586; San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 649 (1981) (Brennan, J., dissenting); Bauman, supra note 6, at 52; Gordon, supra note 2, at 214. But see Williams, supra note 14, at 208-12 & n.57 (urging that Justice Holmes used “taking” in metaphorical sense rather than literally, so that quoted statement cannot be source of just compensation remedy for excessive regulations).

26. Andrus v. Allard, 444 U.S. 51, 65 (1979) (recognizing that “[f]ormulas and factors have been developed in a variety of settings” to determine when takings clause of fifth amendment requires compensation); Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (characterizing Court’s review of alleged regulatory takings as “essentially ad hoc, factual inquiries”); Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962) (expressly stating that “[t]here is no set formula to determine where regulation ends and taking begins”); United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) (reflecting that Court traditionally has “treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case”); Berman v. Parker, 348 U.S. 26, 32 (1954) (“An attempt to define [the police power’s] reach or trace its outer limits is fruitless, for each case must turn on its own facts.”).

27. The Court discussed the factors it considered to be relevant in Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978). For a discussion of those factors, see infra notes 34-35 and accompanying text.


29. Id. at 109 (citing N.Y.C. Admin. Code, ch. 8-A, § 205-1.0 et seq. (1976)). New York adopted the Landmarks Law in 1965 to protect physically its historic properties and thereby to promote the well-being of its citizens and visitors. Id. at 108-09. As part of its administration of the Landmarks Law, the Landmarks Preservation Commission designated Penn Central’s terminal a “landmark” in 1967 over Penn Central’s opposition. Id. at 115-16.

30. Id. at 122. The Landmarks Law, which places special restrictions on landmark properties, applied to Penn Central’s Grand Central Terminal in Manhattan over which Penn Central planned the erection of a more than 50-story
the use of the Landmarks Law as an obstacle to construction of an office tower over Penn Central’s property, as well as just compensation for the taking of its property from the date it was designated a landmark property until the date the declaratory judgment would remove the restrictions under the Landmarks Law as an impediment to the construction.\textsuperscript{31} The issues before the United States Supreme Court were whether the Landmarks Law effected a taking and, if so, whether the transferable development rights available to Penn Central satisfied the demand for just compensation under the fifth amendment.\textsuperscript{32} Because the Court determined that a taking had not occurred, it did not reach the remedial question.\textsuperscript{33}

In its analysis of the Landmarks Law as applied to Penn Central’s Grand Central Terminal, the Court focused on whether it was fair and just to impose on some people or entities restrictions on the development of their property for the benefit of others.\textsuperscript{34} The Court identified office building. \textit{Id.} at 116-17. Several months after the designation of Grand Central Terminal as a landmark property, Penn Central entered into a lease and sublease agreement with UGP Properties, Inc., a United Kingdom corporation, pursuant to which UGP Properties, Inc. was to construct a multi-story building above Grand Central Terminal. \textit{Id.} at 116. The Landmarks Preservation Commission, which was empowered to administer the Landmarks Law, denied approval of the construction plans, stating that "to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would . . . reduce the Landmark itself to the status of a curiosity." \textit{Id.} at 117-18 (citation omitted).

31. \textit{Id.} at 119. Thus, Penn Central claimed that the period of the temporary taking began on the designation date of August 2, 1967, rather than the subsequent date on which the Commission denied approval of the construction plans. \textit{Id.} at 119; \textit{cf.} San Diego Gas & Elec. Co. \textit{v.} City of San Diego, 450 U.S. 621, 653 (1981) (Brennan, J., dissenting) (describing period of temporary taking as "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" (footnotes omitted)). The issue of how to determine when a regulatory taking commences remains unresolved. For a discussion of this issue, see infra notes 65 & 150 and accompanying text.

32. 438 U.S. at 122. Transferable development rights arose under New York City’s zoning laws, which permitted an owner who had not developed property to the full extent under the applicable zoning laws to transfer those unused development rights to contiguous parcels within the same city block. \textit{Id.} at 113-14. The Court concluded that the value of being able to transfer the development rights to other parcels within the vicinity of Grand Central Terminal mitigated whatever burden the Landmarks Law imposed on Penn Central’s property. \textit{Id.} at 137. However, the dissenters, who determined that the Landmarks Law had effected a compensable taking, argued that the judicial record did not support any conclusion that the transferable development rights fully constituted the just compensation required under the fifth amendment. \textit{Id.} at 150-52 (Rehnquist, J., dissenting).

33. \textit{Id.} at 122.

34. \textit{Id.} at 123-24. A prior taking case involving materialmen’s rights to acquire liens against uncompleted boat hulls guided the \textit{Penn Central} Court to consider factors founded on principles of fairness and justice. \textit{Id.} (quoting \textit{Armstrong v. United States}, 364 U.S. 40 (1960)). The \textit{Armstrong} case involved the government’s acquisition of navy personnel boats before completion by the
the factors relevant to this inquiry as "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations" and "the character of the governmental action."\textsuperscript{35} The Court concluded

defaulting builder. Armstrong v. United States, 364 U.S. 40, 41 (1960). The suppliers of materials for construction of the boats asserted that the government's acquisition of the boats effected a taking of the materialmen's compensable property interests in the boats. \textit{Id.} at 41-42. Their compensable property interests derived from the materialmen's liens on the hulls and materials before they were transferred by the defaulting builder to the government. \textit{Id.} The materialmen claimed the government's acquisition made their liens unenforceable since laborers and materialmen cannot acquire liens on a "public work". \textit{Id.} The Court determined that "[t]he total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure." \textit{Id.} at 48. The \textit{Armstrong} Court concluded with a recognition that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, \textit{in all fairness and justice}, should be borne by the public as a whole." \textit{Id.} at 49 (emphasis added).

35. \textit{Penn Central}, 438 U.S. at 124. Although one of these factors may point to the conclusion that a taking has occurred, the Court noted that such a conclusion is not the necessary result. \textit{Id.} This has been demonstrated by the Court's decisions to uphold regulations, notwithstanding their adverse impact on real property interests, when such regulations serve to promote the public health, safety, morals or general welfare. \textit{Id.} at 125; see, e.g., Goldblatt v. Hempstead, 369 U.S. 590 (1962) (upholding safety regulation restricting dredging and pit excavating within city's limits as constitutional notwithstanding that it may deprive landowner of most beneficial use of property); United States v. Central Eureka Mining Co., 357 U.S. 155 (1958) (upholding governmental order directing closing of gold mines as essential to war effort notwithstanding detrimental economic impact on mine owners); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding general validity of zoning ordinance when public interest justifications support it notwithstanding development restrictions some people will face); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upholding zoning ordinance as protecting public from a harmful use notwithstanding economic burden it imposes on owner).

However, four years after \textit{Penn Central}, the Court explicitly stated that the character of the governmental action may be determinative when analyzing a taking challenge. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982). The challenged statute, enacted by the State of New York, authorized the installation of cable television lines on apartment buildings and prohibited landlords from demanding any payments from tenants or the cable company in excess of the one-time one dollar payment determined to be reasonable by the State Commission on Cable Television. \textit{Id.} at 423-24. Focusing its review on the character of the governmental action, the Court acknowledged the distinctions made "between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property." \textit{Id.} at 430. The Court emphasized that permanent physical occupations are "different and warrant special treatment because appropriation of private property "is perhaps the most serious form of invasion of an owner's property interest." \textit{Id.} at 435. This view led the Court to adopt a bright line rule that a taking occurs "when the 'character of the governmental action'... is a permanent physical occupation of property... without regard to whether the action achieves an important public benefit or has only minimal economic
that the Landmarks Law as applied to Penn Central's Grand Central Terminal had not effected a taking\(^6\) because (a) it did not interfere with Penn Central's expectation of operating the site as a railroad station so that, even under the Landmarks Law, Penn Central still could obtain a reasonable return on its investment\(^7\) and (b) the Landmarks Law was merely a restriction on use rather than a denial of all use.\(^8\) The Court reasoned that "[t]he restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties."\(^9\)

Two years after *Penn Central*, the Court again faced the two-pronged issue involved in an alleged regulatory taking in the case of *Agins v. City of Tiburon*.\(^{40}\) Donald and Bonnie Agins owned five acres of unimproved land in Tiburon, Marin County, California when Tiburon adopted zoning ordinances that would limit any development of the Aginses' land.\(^{41}\)

impact on the owner." "Id. at 434-35 (citation omitted). Accordingly, the Court concluded that the challenged law effected a taking by authorizing a third party to permanently and physically occupy private property. "Id. at 438.

37. *Id.* at 129.
38. *Id.* at 137.
39. *Id.* at 138. In *Penn Central*, the Court determined that the "general welfare" promoted by the Landmarks Law and protected by the Court's decision was an intangible—the public's aesthetic well-being. "Id. at 108-12. The Court found the public interest justification for the restrictions on the use of private property in the Landmarks Law's protection of the public's sense of history and visually valued properties. "Id. at 108-12, 138.

A post-*First English* case again presented the Court with the taking issue involving the public's aesthetic well-being in the context of a physical intrusion on private property authorized by governmental action. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987). *Nollan* involved the issuance of a building permit to the owners of beachfront property on the condition that the owners allow a public easement across a portion of their beach property as a means of access between two public beaches on either side of the Nollans' property. "Id. at 3143. The Coastal Commission attempted to impose this condition as a means of "protecting the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches." "Id. at 3147. However, contrary to the Court's conclusion in *Penn Central* that the Landmarks Law did not effect a taking because it promoted the state's legitimate concern for the public's aesthetic well-being, the Court determined in *Nollan* that the imposition of the condition for the public's aesthetic well-being constituted "the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation." "Id. at 3148. The *Nollan* Court held that, if California wished to advance the public interest in visual and physical access to the beach across the Nollans' property, it could do so by exercising its power of eminent domain and compensating the Nollans for taking an easement across their property. "Id. at 3150.

41. 447 U.S. at 257. In response to a state requirement that the city pre-
The California Supreme Court rejected the Agines' contention that an excessive exercise of the police power by a local government amounted to the taking of private property for which the fifth amendment requires the payment of just compensation. Instead, the court opined that the only remedies available to a landowner challenging a local entity's exercise of its police power are to seek declaratory relief or mandamus to invalidate the regulation. The California court gave considerable weight to policy considerations relevant to the land use planning process, stating: "In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances." After expressing its opinion on the

pare a general plan for land use and open space, the city of Tiburon adopted zoning ordinances which limited development of the Agines' five acres to between one and five single-family residences, accessory buildings and open-space uses. Id. After the city adopted the ordinance, the Agines did not seek approval for any use or improvement of their land; instead, they instituted suit against the City of Tiburon seeking $2,000,000 under a claim in inverse condemnation and seeking declaratory relief based on their claim that the zoning ordinance constituted an unconstitutional taking of their property without just compensation. Id. at 257-58.

42. 24 Cal. 3d at 272, 598 P.2d at 28, 157 Cal. Rptr. at 375.

43. The court also admonished that a landowner has no right to sue in inverse condemnation when such a suit would have the effect of converting an invalid regulation into a lawful taking for which compensation must be paid. Id. Inverse condemnation is a cause of action against a government entity which a landowner may institute to recover just compensation for an alleged de facto taking of the landowner's property resulting from governmental action that does not involve formal condemnation proceedings. Agins, 447 U.S. at 258 n.2. Inverse condemnation is distinguished from the power of eminent domain pursuant to which the government formally condemns private property for public use and compensates the landowner for the property taken. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 638 n.2 (1981) (Brennan, J., dissenting); Agins, 447 U.S. at 258 n.2; United States v. Clarke, 445 U.S. 253, 257 (1980). For a discussion of inverse condemnation, see Bauman, supra note 6, at 44-49; Mandelker, Land Use Takings: The Compensation Issue, 8 Hastings Const. L.Q. 491, 495-99 (1981).

44. 24 Cal. 3d at 276-78, 598 P.2d at 31, 157 Cal. Rptr. at 378 (emphasis added). In considering the policies governing its decision, the California Supreme Court relied on the opinion issued by the United States Supreme Court in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). 24 Cal. 3d at 275, 598 P.2d at 30, 157 Cal. Rptr. at 377. At issue in Euclid was the constitutional validity of a comprehensive zoning plan that divided the village into six classes of use districts. 272 U.S. at 379-84. An owner of a 68-acre tract challenged the plan's validity as violative of the fourteenth amendment by depriving the complainant of due process and equal protection of the law. Id. at 379, 384. The Court rejected the landowner's claim and denied the injunction sought against enforcement of the ordinance. Id. at 396-97. Recognizing the changes in concentrations of people and modes of transportation, the Court saw a need to preserve a "degree of elasticity" in the application of constitutional principles "for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different condi-
remedial question, the California Supreme Court held that the zoning ordinances were not unconstitutional because they had not deprived the Aginses of "substantially all reasonable use of [their] property."\textsuperscript{45} The United States Supreme Court affirmed the judgment of the Supreme Court of California that the zoning ordinances, on their face, did not effect a taking of the Aginses' property without just compensation.\textsuperscript{46} The Court declared that a regulation "effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land."\textsuperscript{47} Applying these tests to the zoning law as applied to the Aginses' property, the Court concluded that the ordinances did not effect a compensable taking.\textsuperscript{48}

In addition to the policy considerations, the California Supreme Court in \textit{Agins} also expressed its concern for separation of power issues by noting commentators' opinion that:

'Determining that a particular land-use control requires compensation is an appropriate function of the judiciary, whose function includes protection of individuals against excesses of government. But it seems a usurpation of legislative power for a court to force compensation. Invalidation, rather than forced compensation, would seem to be the more expedient means of remedying legislative excesses.'


\textsuperscript{45} 24 Cal. 3d at 276-78, 598 P.2d at 31, 157 Cal. Rptr. at 378.

\textsuperscript{46} 447 U.S. at 259.

\textsuperscript{47} Id. at 260 (citing Nectow v. Cambridge, 277 U.S. 183, 188 (1928); Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 138 n.36 (1978)). In \textit{Agins}, the Court expressed these tests for a regulatory taking as being two independent tests: either the regulation did not substantially further legitimate governmental interests or it denied the owner economically viable use of his private property. However, when the Court applied these tests in later cases challenging governmental restrictions on uses of property, it approached them as two prongs of a single test. See Nollan v. California Coastal Cmm'n, 107 S. Ct. 3141 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987). Once it determined in \textit{Nollan} that the governmental issuance of a building permit conditioned on the grant of a public access easement across private property did not substantially advance legitimate state interests, the Court found grounds to support the taking challenge and did not proceed to analyze what the economic impact of the condition would be on the Nollans. \textit{Nollan}, 107 S. Ct. at 3148. In \textit{Keystone}, the Court also viewed the two prongs together under an analysis that required a weighing of the governmental interest being advanced against the economic impact of the regulation on the private landowner. \textit{Keystone}, 107 S. Ct. at 1246. The \textit{Keystone} Court upheld the challenged statute since the Court found the governmental interest, which was reflected in the statute as the prevention of subsidence, to be substantial while the challengers had failed to demonstrate that the statute had a material effect on their economic expectations. \textit{Id.} at 1242-51.

\textsuperscript{48} 447 U.S. at 263. The Court determined that the subject zoning ordinances advanced legitimate purposes of the State of California, specifically the protection of "the residents of Tiburon from the ill effects of urbanization" and it reasoned that, since the Aginses had not yet submitted a development plan for approval by the local officials, there was no basis for any claim that the zoning...
Therefore, the Court had no occasion to address the California Supreme Court's opinion that the remedies available for an alleged regulatory taking are limited to mandamus or declaratory relief.\(^49\)

Although the concept that a regulation may constitute a taking stems from Justice Holmes' opinion in *Pennsylvania Coal*, the issue of whether a temporary regulation could constitute a taking requiring the payment of just compensation was not addressed until Justice Brennan's dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*.\(^50\)

San Diego Gas & Electric Company (the Company) had assembled tracts of vacant land in San Diego, California as a possible site for a nuclear power plant.\(^51\) Seven years later, but before the Company had developed the tracts, the city rezoned the property.\(^52\) The Company brought an action\(^53\) alleging an unconstitutional taking without just compensation on the theory that the city's actions had deprived it of the entire beneficial use of its property.\(^54\) The case ultimately was dismissed by ordinances denied the Aginses all use of their property. *Id.* at 261-63. Because the Aginses had not submitted a development plan and because they were still free to do so, they could not establish that the zoning ordinance denied them their reasonable investment expectations. *Id.* In fact, the effect of application of the zoning ordinance as to their property was unknown. *Id.* Therefore, their taking claim was premature. *Id.* at 260.\(^49\)

\(^49\) *Id.* at 263.

\(^50\) 450 U.S. 621 (1981) (Brennan, J., dissenting). However, as Justice Brennan pointed out, prior to *San Diego* "the Court has recognized in passing the vitality of the general principle that regulation can effect a Fifth Amendment 'taking,'" *Id.* at 648; accord *Agins*, 447 U.S. 255, 260 ("The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interest ... or denies an owner economically viable use of his land ... ." (citations omitted)); *Prune Yard Shopping Center v. Robbins*, 447 U.S. 74, 81 (1980) ("It is, of course, well established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision."); *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979) ("Whether a statute or regulation that went so far amounted to a 'taking,' however, is an entirely separate question."); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978) ("It is, of course, implicit in *Goldblatt* that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose ... .") (citing *Goldblatt v. Hempstead*, 369 U.S. 590 (1962)); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958) ("Traditionally, [the Court has] treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case.").

\(^51\) 450 U.S. at 624. The city's master plan adopted in the year following the Company's acquisition of the land designated almost all of the subject land for industrial use. *Id.*

\(^52\) *Id.* at 624-25. The city downgraded the zoning for part of the Company's land and established a plan for open space that included another portion of the Company's property. *Id.*

\(^53\) *Id.* at 626. The Company sought mandamus, declaratory relief and $6,150,000 in inverse condemnation. *Id.*

\(^54\) *Id.* The trial court found that the city's rezoning effected an unconstitu-
the United States Supreme Court. A majority determined that the Court lacked jurisdiction to decide the remedial question since the state court had not reached a final decision as to whether the city's actions in fact had effected a taking.

In dissent, however, Justice Brennan addressed the merits of the case. He asserted that, once a regulatory taking is established, the duration of the regulation is irrelevant. He based this assertion on prior decisions involving physical takings of limited duration in which the Court determined that the duration of a temporary physical taking is irrelevant to the question of whether a taking has occurred. Justice

tional taking because it deprived the Company of all practical, beneficial or economic use of the property. Id. at 626-27. Thus, the United States and California Constitutions required the payment of just compensation. Id. However, the trial court's findings did not withstand the ensuing appeals.

55. Id. at 633.

56. Id. The Court looked to a federal statute for guidance regarding the Court's jurisdiction. Id. at 630-31 n.10 (citing Title 28 U.S.C. § 1257 (1982)). Section 1257 grants the Court jurisdiction to review only “[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had.” 28 U.S.C. § 1257 (1982). The absence of a final judgment precluded the majority's consideration of San Diego on its merits. 450 U.S. at 633.

57. 450 U.S. at 636 (Brennan, J., dissenting). Justice Brennan determined that the state court had made a final judgment that no taking had occurred so that no payment of just compensation was required. Id. at 644-46 (Brennan, J., dissenting).

58. Id. at 657-58 (Brennan, J., dissenting). Justice Brennan expressly stated: “The fact that a regulatory ‘taking’ may be temporary, by virtue of the government's power to rescind or amend the regulation, does not make it any less of a constitutional ‘taking.’ Nothing in the Just Compensation Clause suggests that ‘takings’ must be permanent and irrevocable.” Id. at 657 (Brennan, J., dissenting).

59. Id. (Brennan, J., dissenting). Throughout his dissent, Justice Brennan emphasized the similarities of regulatory takings and other takings. Id. at 651-60 (Brennan, J., dissenting). Other taking situations include those discussed in Berman v. Parker, 348 U.S. 26 (1954) (formal condemnation proceedings initiated by government prior to taking possession), Danforth v. United States, 308 U.S. 271 (1939) (same) and United States v. Clarke, 445 U.S. 253 (1980) (action in inverse condemnation initiated by landowner after government takes possession). Justice Brennan noted that the Court previously recognized takings which fell outside the easily identifiable takings situations when a government exercises its power of eminent domain through formal condemnation proceedings. San Diego, 450 U.S. at 651-52 (Brennan, J., dissenting); see, e.g., Berman, 348 U.S. 26; Danforth, 308 U.S. 271.

60. See, e.g., United States v. Dow, 357 U.S. 17, 26 (1958) (discussing proposition that if government enters into possession of private property and later abandons its project, government is still liable for payment of just compensation for period of temporary use and occupation); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949) (government must pay compensation for its physical possession of laundry plant during World War II); United States v. Causby, 328 U.S. 256 (1946) (government's low altitude flights deprived landowner of use of his land for raising chickens and so diminished land's value that government must pay just compensation for easement it took through landowner's air space); United States v. Petty Motor Co., 327 U.S. 372 (1946) (government liable for compensation due tenants for value of their leasehold interests taken during
Brennan argued that the Court’s recognition of what constitutes a taking under the fifth amendment should be expanded to include a taking, even one of limited duration, effected by an excessive exercise of the government’s regulatory powers.61

B. If a Regulatory Action May and Does Effect a Taking, Is Just Compensation the Constitutionally Required Remedy Under the Fifth Amendment?

Although the Court did not reach the remedial question in San Diego because there was no final judgment on the preliminary taking issue, Justice Brennan, in dissent, did address the compensation issue.62 Justice Brennan recognized that mere invalidation of an excessive regulation is neither an adequate remedy for the landowner who already has suffered a loss by reason of the taking nor does it satisfy the purposes of the just compensation clause.63 He argued that the temporary character of a regulatory taking does not make the fifth amendment’s requirement of compensation for the time of the taking any less obligatory.64 In Justice Brennan’s view the Constitution mandates the payment of just compensation for regulatory takings, and that mandate cannot be avoided on the basis of policy concerns for freedom in the land-use planning function and against the inhibiting financial element inherent in the inverse condemnation remedy which were expressed by the California Supreme Court in Agins.65 Given Justice Brennan’s view of the similarities between regulatory takings and takings by which the government

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61. San Diego, 450 U.S. at 652 (Brennan, J., dissenting). Justice Brennan recognized that “[p]olice power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property.” Id. (Brennan, J., dissenting).

62. Id. at 646-61 (Brennan, J., dissenting). For a critical analysis of Justice Brennan’s dissent, see Bauman, supra note 6, at 84, 91-99; Berger & Kanner, supra note 3; Williams, supra note 14.

63. 450 U.S. at 655-56 (Brennan, J., dissenting).

64. Id. at 657 (Brennan, J., dissenting).

65. Id. at 660 (Brennan, J., dissenting). In fact, the tone of Justice Brennan’s dissent seems to derive from his incredulity at the extensive freedom enjoyed by official land planners in practice. See Berger & Kanner, supra note 3, at 697-703; Williams, supra note 14, at 197-202. Justice Brennan viewed the element of freedom as weighing too heavily in favor of officials and too lightly in favor of developers. 450 U.S. at 656 (Brennan, J., dissenting). Justice Brennan’s sense of outrage at the injustice rendered to the landowner by mere invalidation of a regulation that effects a taking is an undercurrent throughout his dissent. Id. (Brennan, J., dissenting). He expressly addressed these concerns in a footnote:

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

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intrudes on private property, "[o]rdinary principles determining the proper measure of just compensation, regularly applied in cases of permanent and temporary 'takings' involving formal condemnation proceedings, occupations, and physical invasions, should provide guidance to the courts in the award of compensation for a regulatory 'taking.""  

Indicating the importance of the appropriate remedy to landowners as well as the judiciary, the remedial question came before the Court in two additional cases\(^67\) before finally being answered in First English.  

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 110, 514 P.2d 111, [109 Cal. Rptr. 799] appears to allow the City to change the regulation in question, 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.'  

\(^{66}\) at 655-56 n.22 (Brennan, J., dissenting) (citation omitted) (emphasis in original).  

66. San Diego, 450 U.S. at 658-59 (Brennan, J., dissenting). Many have criticized Justice Brennan's cursory treatment of the measure of compensation for regulatory takings. D. Mandelker & R. Cunningham, Planning and Control of Land Development 134 (2d ed. 1985). Initially, one must determine when the regulation first effected a taking. See San Diego, 450 U.S. at 653-54 (Brennan, J., dissenting). However, unlike a taking involving governmental appropriation of property, the date on which a regulatory taking begins is not clear. D. Mandelker & R. Cunningham, supra at 135. Is it when any of the following occur: "[W]hen the regulation was first adopted? When the landowner initially asks the public body for relief from the restrictions? When the public body refuses? When the complaint is filed? When the regulation is judicially determined to be a 'taking?'" Williams, supra note 14, at 223. Once the commencement date is determined, then the temporary taking period can be determined with the ending date being "the date the government entity chooses to rescind or otherwise amend the regulation." San Diego, 450 U.S. at 653 (Brennan, J., dissenting) (footnote omitted).  

Assuming that the period of the temporary taking can be established, the next question is what is the appropriate measure of just compensation due the landowner. The "ordinary principles" suggested by Justice Brennan for guidance require the payment of compensation equal to the fair market value of the property taken. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473-74 (1973). "That might be option or rental value ... [or] the landowner's lost opportunity cost." Williams, supra note 14, at 223. For a discussion of formulas to determine just compensation for regulatory takings offered by some commentators, see D. Mandelker & R. Cunningham, supra at 134-35. Justice Brennan left open this issue in his San Diego dissent and it remains unresolved after First English. See infra notes 147-51 and accompanying text.  

67. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561
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First, in *Williamson County Regional Planning Commission v. Hamilton Bank*,

(1986). Both *Williamson County* and *MacDonald* presented the possibility of awarding an aggrieved landowner money damages under 42 U.S.C. § 1983 as an alternative to just compensation under the fifth amendment; however, the lack of a ripe claim in each of these cases prevented the Court from reaching the remedial question again. Section 1983 provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or 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 in an action at law, suit in equity, or other proper proceeding for redress.


The landowner in *Williamson County* brought its claim in federal court under section 1983 alleging a taking of its property without just compensation and an invalid exercise of the governmental police power in violation of the fourteenth amendment. 473 U.S. at 172. *Williamson County* is thus distinguished from *First English, MacDonald, Agins* and *San Diego*, which all went to the Court from the state courts in California. Of those cases, only *MacDonald* sought monetary relief under section 1983 as an alternative to fifth amendment just compensation. 106 S. Ct. at 2565 n.5.

68. 473 U.S. 172 (1985). The *Williamson County* facts revolved around the application of revised zoning regulations to proposals for the cluster residential development of a tract of land in Williamson County, Tennessee. *Id.* at 175. For a review of the "essence" of the complex facts of this case, see Sallet, supra note 14, at 645-46. In the United States District Court for the Middle District of Tennessee the suit, which alleged a taking without just compensation, resulted in a jury award of $350,000 for the temporary taking. 473 U.S. at 182-83. However, as to the taking claim, the district court granted judgment notwithstanding the verdict in favor of the Williamson County Regional Planning Commission after reasoning "in part that respondent was unable to derive economic benefit from its property on a temporary basis only, and that such a temporary deprivation, as a matter of law, cannot constitute a taking." *Id.* at 183.

The United States Court of Appeals for the Sixth Circuit reversed by holding that a governmental regulation "may constitute a taking if the regulation denies the owner all `economically viable' use of the land, and that the evidence supported the jury's finding that the property had no economically feasible use during the time between the Commission's refusal to approve the preliminary plat and the jury's verdict." *Id.* at 183-84. The court of appeals concluded "that damages are required to compensate for a temporary taking." *Id.* at 184 (footnote omitted). For a discussion of the dissenting opinion in the court of appeals
the Court granted certiorari to address the question of whether the government must pay money damages when private property allegedly has been taken temporarily by the application of regulations. However, the Court determined that the claim was not ripe since the landowner had neither sought variances from the zoning regulations, which might have been available to allow the proposed development, nor had it sought compensation through available state remedies. The Court reasoned that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."

Justice Stevens wrote a concurring opinion in which he described his view of zoning restrictions as "a species of governmental regulation arguing that a different, less stringent standard should be applied in regulatory cases than that applied when there has been either a permanent or temporary physical taking of private property by the government, see Sallet, supra note 14, at 646-47, 652. For a discussion of other courts which, prior to First English, also interpreted the fifth amendment as requiring the payment of just compensation in the event of a regulatory taking, see infra note 124.

To support its conclusion that the remedial question was not ripe for its review, the Court in Williamson County noted the relevant factors it had considered in Penn Central and subsequent cases in determining whether a taking had occurred. 473 U.S. at 191. Those factors included the economic impact of the challenged action on the property and the extent to which such impact interferes with the landowner's reasonable investment-backed expectations, which "factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." Id. at 191. Without a final determination as to whether there had been a taking, the Court could not address the remedial question.

Justice Stevens, joined by Justice Marshall, also wrote a separate concurring opinion on the ripeness issue. Id. at 201 (Brennan, J., concurring). However, he expressly stated that he con-
that may impair the value of private property . . . in one of two ways,” which he categorized as “permanent harms” which “may permanently curtail the economic value of the property,” and “temporary harms” which “may temporarily deprive the owner of a fair return on his investment.”

He divided temporary harms “into two broad subcategories: (1) those that result from a deliberate decision to appropriate certain property for public use for a limited period of time; and (2) those that are a by-product of governmental decisionmaking.” The temporary harms alleged by reason of the subject zoning regulations would fall into the second subcategory. Although a property owner suffering a temporary harm in the second category may have a claim based on a violation of the fourteenth amendment’s guarantee of due process, Justice Stevens saw no basis for any recovery if fair procedures were employed.

Next, the appeal of MacDonald, Sommer & Frates v. Yolo County, occurred without any departure from his San Diego dissent. Id. (Brennan, J., concurring).

74. Id. at 202 (Stevens, J., concurring).

75. Id. at 203-04 (Stevens, J., concurring). Justice Stevens also divided permanent harms into three subcategories, which he characterized as those that “may be impermissible even if the Government is willing to pay for them,” those that “may be permissible provided that the property owner is compensated for his loss” and those that “may be permissible even if no compensation at all is paid.” Id. at 202 (Stevens, J., concurring) (footnotes omitted). He saw the permanent harm that could result from the subject zoning regulations as falling into either the second or third category. Id. (Stevens, J., concurring). However, since the landowner had not pursued its available remedies, the Court had nothing on which to base a determination that compensation must be paid (if the regulations fell into the second category) or that no compensation was payable (if the regulations fell into the third category). Id. (Stevens, J., concurring).

76. Id. at 204 (Stevens, J., concurring).

77. Id. at 205 (Stevens, J., concurring). Although Justice Stevens did not designate it as such, his suggestion is that a landowner, who suffers a temporary harm by a deprivation of due process at the hands of state or local government, should pursue the remedies available under 42 U.S.C. § 1983 (1982). 473 U.S. at 205 (Stevens, J., concurring).

78. 473 U.S. at 205 (Stevens, J., concurring). Justice Stevens’ concurring opinion presented a strong argument that mere invalidation of a regulation is a satisfactory remedy for an affected property owner when fair procedures are adhered to in the administration and enforcement of regulations. Id. (Stevens, J., concurring). He stated:

We must presume that regulatory bodies such as zoning boards, school boards, and health boards, generally make a good-faith effort to advance the public interest when they are performing their official duties, but we must also recognize that they will often become involved in controversies that they will ultimately lose. Even though these controversies are costly and temporarily harmful to the private citizen, as long as fair procedures are followed, I do not believe there is any basis in the Constitution for characterizing the inevitable byproduct of every such dispute as a “taking” of private property.

Id. (Stevens, J., concurring).

79. 106 S. Ct. 2561 (1986). The MacDonald case arose after the Yolo
presented the Court with the question of whether a taking without just compensation occurred by reason of the rejection of an owner's subdivision proposal.80 “Because of the importance of the question whether a monetary remedy in inverse condemnation is constitutionally required in appropriate cases involving regulatory takings, [the Court] noted probable jurisdiction” for the appeal of MacDonald.81 However, after further consideration, a majority of the Court determined that again the remedial question was not ripe for the Court's adjudication.82

Contrary to the majority’s view, Justice White read the factual allegations in the lower opinions as stating a takings claim83 and, thus, ad-
dressed both prongs of the regulatory taking issue. Relying on Justice Brennan's dissent in San Diego, Justice White affirmatively answered the first prong by clearly stating "that land use restrictions may constitute a taking under the Constitution" and that the appellant had adequately alleged a takings claim. With respect to the second prong, the remedial issue, Justice White determined that a state may not limit the available remedies to declaratory and injunctive relief when the landowner's property effectively has been taken by a regulation in violation of the fifth amendment. "Even where a property owner is deprived of its property only temporarily, if that deprivation amounts to a taking the Constitution requires that just compensation be paid."

III. First English

Within a year after MacDonald, the Court heard the appeal of First English Evangelical Lutheran Church (the Church), which had alleged a regulatory taking and was seeking to recover damages in inverse condemnation. The Church owned twenty-one acres on which it operated at 2569-73 (White, J., dissenting). However, Justices Powell and Rehnquist did not join Part IV in which Justice White expressed his opinion that the Constitution requires the payment of just compensation even for a temporary property deprivation. Id. at 2573 (White, J., dissenting). Nor did they join his argument in Part V that at least the judgment of the court of appeal should be vacated and the case be remanded. Id. at 2574 (White, J., dissenting).

84. Id. at 2572-74 (White, J., dissenting). The first prong, whether a takings cause of action was stated, consisted of two parts. The first part asked "whether a land use regulation restricting the use of the property may ever amount to a taking," then, if so, the second part asked "whether the allegations here are sufficient to state a takings claim." Id. at 2572 (White, J., dissenting). The second prong questioned "whether a State can limit to declaratory and injunctive relief the remedies available to a person whose property has been taken by regulation or whether the state must pay compensation." Id. at 2573 (White, J., dissenting).

85. Id. at 2573 (White, J., dissenting).

86. Id. (White, J., dissenting). Justice White again expressed his agreement with Justice Brennan's San Diego dissent.

87. Id. (White, J., dissenting).

88. First English, 107 S. Ct. at 2383. Specifically, the Church requested the Court to hold that the California Supreme Court erred in its Agins decision by maintaining that the fifth amendment does not require the payment of compensation in the event of a temporary regulatory taking. Id. The Church sought relief from the Court after the Court of Appeal of California for the Second Appellate District affirmed the Superior Court of California's decision to grant a motion to strike the Church's allegations and the California Supreme Court denied review. Id. at 2382-83. Based on Agins, the trial court required a plaintiff to seek declaratory relief or mandamus when challenging an ordinance that allegedly deprived the plaintiff total use of the plaintiff's land. Id. at 2382 However, the Church sought only monetary compensation under an inverse condemnation claim. Accordingly, the trial court deemed the Church's allegations that the ordinance denied it all use of Lutherglen to be irrelevant. Id. The California Court of Appeal classified the complaint as "seeking damages for the uncompensated taking of all use of Lutherglen by County Ordinance No. 11,855. . . ."
a campground known as "Lutherglen," which served as a retreat center and as a recreational area for handicapped children. Following a storm that caused Mill Creek to overflow its banks, flooding Lutherglen and destroying its buildings, the County of Los Angeles responded with an ordinance establishing an interim flood protection area. The ordinance prohibited any construction within the interim flood protection area, which included the flat areas on either side of Mill Creek where the Church's buildings had stood.

Less than two months after the county adopted the ordinance, the Church brought suit against the County of Los Angeles and the Los Angeles County Flood Control District claiming that the ordinance denied it all use of Lutherglen and that it was entitled to recover in inverse condemnation. Following the unfavorable decisions of the California

Therefore, it too relied on Agins in affirming the trial court's decision to strike the allegations. The court determined it was "obligated to follow Agins 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. at 2383 (citation omitted).

Id. at 2381. The National Forest Service owned a watershed area which naturally drained into the Middle Fork River, along the banks of which lay the Church's property. Id.

Id. at 2381-82. The county enacted the ordinance effective immediately in the interest of preserving the public's health and safety. Id.

Id. Interim Ordinance No. 11,855, adopted by the County of Los Angeles six months after the flooding in January, 1979, "provided that '[a] person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon. . . .'" Id. (citation omitted).

Id. at 2382. It is unclear from the Court's opinion whether the ordinance affected, and thereby prohibited any building on, all of the Church's 21 acres or only the 12 flat acres on which the Church's buildings stood prior to the flood. See id. at 2381. The answer to that question may affect the determination of whether the ordinance in fact effected a taking, which the Court directed to be resolved on remand. Id. at 2384-85. On remand, the Court must prove that the ordinance "actually denied [it] all use of its property." Id. at 2384. That issue first requires the relevant property to be established since, under an analysis pursuant to Keystone or Penn Central, the landowner's entire bundle of property rights is to be considered when evaluating the impact of the challenged regulation. Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1248-51 (1987); Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 130-31 (1978).

107 S. Ct. at 2384. Specifically, the Church's complaint for inverse condemnation alleged:

On January 11, 1979, the County adopted Ordinance No. 11,855, which provides:

"Section 1. A person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon, vicinity of Hidden Springs, as shown on Map No. 63 ML 52, attached hereto and incorporated herein by reference as though fully set forth."
lower courts, the Church appealed to the United States Supreme Court asking it "to hold that the Supreme Court of California erred in Agins v. Tiburon in determining that the Fifth Amendment, as made applicable to the States through the Fourteenth Amendment, does not require compensation as a remedy for 'temporary' regulatory takings—those regulatory takings which are ultimately invalidated by the courts."95

The Court initially noted that First English presented it with the remedial question ripe for the Court's review, in contrast to the posture in which MacDonald, Williamson County, San Diego and Agins each had come before the Court.96 The California appellate court had held "that regardless of the correctness of appellants' [sic] claim that the challenged ordinance denies it 'all use of Lutherglen' appellant may not recover damages until the ordinance is finally declared unconstitutional, and then only for any period after that declaration for which the county seeks to enforce it."97 Therefore, the Court approached the remedial question with the assumption that the ordinance denied the Church all use of Lutherglen.98 This assumption allowed the Court to proceed directly to the remedial question, although the threshold issue of whether the regulation had effected a taking "or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations" would remain open for the lower court's

17 Lutherglen is within the flood protection area created by Ordinance No. 11,855.

18 Ordinance No. 11,855 denies First Church all use of Lutherglen. Id. at 2390 (Stevens, J., dissenting) (citation omitted).

94. Id. at 2382-83. For a discussion of the lower courts' decisions, see supra note 88 and accompanying text.

95. Id. at 2383. Governmental regulatory action that effects a taking is temporary in that "[o]nce a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain." Id. at 2389.

96. Id. at 2383-84. The Court summarized that there was no final determination on the remedial issue by the lower courts for its review in MacDonald, Williamson County and San Diego because of factual disputes yet to be resolved in each of those cases that might result in the conclusion that the subject regulations had not effected a taking. Id. at 2383 (citing MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 437 U.S. 172 (1985); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981)). In Agins, since the Court concluded that no taking had occurred, it had no occasion to address the remedial question. Id. (citing Agins v. City of Tiburon, 447 U.S. 255 (1980)).

97. Id. at 2384. Thus, the Court determined that the California Court of Appeal had made a final determination and had isolated the constitutional remedial question for the Court's review. Id.

98. Id. at 2384-85.
The concept that a land use regulation of limited duration, which effectively denies a landowner all use of its property, may constitute a taking is implicit in the Court's assumption.\textsuperscript{100} Turning to the remedial question, the Court examined the pertinent language of the fifth amendment: "nor shall private property be taken for public use, without just compensation."\textsuperscript{101} As the Court recognized, the language secures compensation to the landowner in the event of a governmental taking, but it does not prohibit the government from taking private property.\textsuperscript{102} Given the "self-executing chara-
ter"103 of the just compensation clause, whenever there is a taking, the Constitution requires compensation as the appropriate remedy.104 In First English, the Court interpreted the mandate of the fifth amendment as extending to a “temporary” regulatory taking and concluded that the fifth amendment requires compensation for temporary regulatory takings just as it does for permanent and temporary physical takings.105 The Court reasoned that, once a regulation “goes too far”106 and effects a taking, mere invalidation of the regulation “though converting the taking into a ‘temporary’ one, is not a sufficient remedy to meet the demands of the Just Compensation Clause.”107 Specifically, the Court held “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.”108

Anticipating the debates that the decision would stimulate, the Court expressly cautioned that its holding was limited to the facts of the

ent government . . . . The provision . . . for just compensation . . . is merely a limitation . . . . It is no part of the power itself, but a condition upon which the power may be exercised.”).


104. First English, 107 S. Ct. at 2386. This understanding prevailed in the context of prior Court decisions involving governmental appropriation of private property, whether of permanent or temporary duration, pursuant to inverse condemnation actions as well as formal eminent domain proceedings. See Kirby Forest Industries, Inc. v. United States, 467 U.S. 1 (1984) (determining date on which physical taking of private property for national preserve occurred where government was responsible for payment of just compensation for permanent taking); United States v. Causby, 328 U.S. 256 (1946) (concluding that government must pay just compensation for easement it acquired through landowner’s air space whether easement is found to be permanent or temporary); see also Jacobs v. United States, 290 U.S. 13 (1933) (fifth amendment imposes duty to pay just compensation for a taking regardless of whether government institutes condemnation proceedings or property owners bring action in inverse condemnation). For a discussion of inverse condemnation as distinguished from eminent domain, see supra note 43.

105. 107 S. Ct. at 2388.


107. 107 S. Ct. at 2388. The Court thus adopted a position contrary to the California Supreme Court’s finding in Agins that inverse condemnation is not an appropriate remedial action when a regulatory taking is alleged. Id. at 2389. The Court literally interpreted Justice Holmes’ warning that “if a regulation goes too far it will be recognized as a taking.” See Pennsylvania Coal, 260 U.S. at 415. Once an action is deemed to be a taking, the fifth amendment requires payment of just compensation. First English, 107 S. Ct. at 2389.

108. 107 S. Ct. at 2389.
The Court concluded with a recognition that its decision would restrict "the freedom and flexibility" of those land-use planners and entities enacting land-use regulation, but noted that the imposition of those restrictions was justified since "such consequences necessarily flow from any decision upholding a claim of constitutional right."

In his dissenting opinion, Justice Stevens did not accept the Church's allegations in the pleadings that the ordinance denied it all use of Lutherglen so as to constitute a taking for which the fifth amendment requires payment of just compensation. Justice Stevens maintained that the taking claim should be summarily rejected on its merits since "the type of regulatory program at issue here cannot constitute a taking." Accordingly, without an affirmative answer to the initial question of whether the regulation in fact had effected a taking, Justice Stevens saw First English as another case in which the Court was precluded from reaching the remedial issue.

Justice Stevens further argued that there are differences between regulatory takings and physical takings. However, he reluctantly acknowledged that the consequences of some temporary regulations may be so severe that invalidation or repeal will not be sufficient to eliminate a taking label. In those situations, Justice Stevens suggested that the Court must consider not only the important diminution in value inquiry, but also the effects on the property's future value.

109. Id. The Court cautioned that cases involving delays in the issuance of building permits or changes in zoning ordinances would present different questions than those addressed in First English. Id.

110. Id.; accord Bauman, supra note 6, at 99 ("The Constitution was never meant to make things easy but to make them right.").

111. 107 S. Ct. at 2391, 2392 (Stevens, J., dissenting).

112. Id. at 2391 (Stevens, J., dissenting). Justices Blackmun and O'Connor joined Justice Stevens in this position although they did not join in the entire dissent. Justice Stevens found support for this position in Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987). Keystone involved a regulatory taking claim which the Court had considered just prior to First English. Id. at 1236. Although Keystone presented a factual situation very similar to Pennsylvania Coal, the Court upheld the challenged act and regulations as a valid exercise of the state's police powers to prevent public nuisances. Id. at 1240. In accordance with Keystone, Justice Stevens in his First English dissent argued that the government may not be burdened with a compensation obligation when it enacts regulations designed to protect the health and safety of the community. First English, 107 S. Ct. at 2391-92 (Stevens, J., dissenting); accord Mugler v. Kansas, 123 U.S. 623 (1887).

113. 107 S. Ct. at 2393 (Stevens, J., dissenting).

114. Id. at 2393-96 (Stevens, J., dissenting). Justices Blackmun and O'Connor did not join this argument. Justice Stevens saw a difference since "virtually all physical invasions are deemed takings . . . [but] a regulatory program that adversely affects property values does not constitute a taking unless it destroys a major portion of the property's value." Id. at 2393 (Stevens, J., dissenting) (citations omitted).

115. Id. (Stevens, J., dissenting). Justice Stevens agreed that when a regulation goes too far, "the Government has a choice: it may abandon the regulation or it may continue to regulate and compensate those whose property it takes." Id. (Stevens, J., dissenting). However, contrary to the majority's position, he
but also the amount of the landowner's property which is affected and the duration of the restriction. He argued that, rather than the just compensation clause of the fifth amendment, it is the due process clause of the fourteenth amendment which provides protection to the property owner if the owner is entitled to any protection at all.

IV. ANALYSIS OF FIRST ENGLISH

The First English decision seems to provide the conclusion to a simple syllogism:

1. The fifth amendment conditions the taking of private property on the payment of just compensation.
2. A regulatory action may constitute a taking of private property.
3. Just compensation is the constitutionally required remedy for a regulation that effects a taking of private property.

However, this represents a long, controversial struggle by the Court, not only as to the conclusion on the just compensation issue, but also as to the determination that a regulation may effect a taking.

urged that "[i]n the usual case, either of these options is wholly satisfactory." Id. (Stevens, J., dissenting).

116. Id. at 2393-94 (Stevens, J., dissenting).

117. Id. at 2399 (Stevens, J., dissenting). For a discussion of the remedies available under the fourteenth amendment in a section 1983 action, see supra note 67 and infra note 148 and accompanying text.

118. U.S. Const. amend. V. For the First English Court's discussion of the fifth amendment, see infra note 125 and accompanying text.

119. For a discussion of those cases in which the Court has addressed the possibility that a regulatory action may effect a taking, see supra note 50 and accompanying text; see also United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).


The First English decision specifically addressed the remedy for "temporary" regulatory takings, which the Court defined as "those regulatory takings which are ultimately invalidated by the courts." 107 S. Ct. at 2383. The Court's emphasis on temporary regulatory takings begs the question—what about permanent regulatory takings? However, the definition assumes that a regulation will be invalidated and thus become temporary once the judiciary determines that the regulation effected a taking. See Williams, supra note 14, at 222-23. Based on that assumption, land-use regulations which are allowed to remain permanently or to continue indefinitely will be those that are found to be proper exercises of the police power that do not effect a taking and, accordingly, are not invalidated; therefore, by definition, there can be no such action as a permanent regulatory taking.

121. See Bauman, supra note 6, at 16. As Mr. Bauman pointed out several years before the First English decision:

"If a land use regulation can be held by a court to be so harsh as to effect a taking, is just compensation the required constitutional remedy, or is invalidation of the offending regulation sufficient? While the ex-
At least since *Mugler v. Kansas*, a century before *First English*, the Court debated whether a regulatory action may effect a taking of private property. Early in the debate, the answer appeared to be present in Justice Holmes' famous statement for the Court in *Pennsylvania Coal* that "if a regulation goes too far it will be recognized as a taking." However, rather than answering the question, his statement served to spark the debate. No clear answers were forthcoming because of the uncertainty as to what constitutes going "too far" and as to whether Justice Holmes had used the word "taking" in a literal fifth amendment sense or in a metaphorical sense as a shorthand description of a regulation that is invalid because of its impact on the value of private property. Finally, press words of the fifth amendment's just compensation clause would seem to have answered that question easily and long ago, such has not been the case.

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122. 123 U.S. 623 (1887). The *Mugler* Court's view that a "prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit," id. at 668-69, can be compared with the *First English* Court's discussion of the meaning of the fifth amendment: "[I]t is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *First English*, 107 S. Ct. at 2386 (emphasis in original).


124. Williams, *supra* note 14, at 208-14 (arguing that in *Pennsylvania Coal* Justice Holmes used word "taking" metaphorically to describe effect of public action on value of property and not literally in constitutional sense). *Contra First English*, 107 S. Ct. at 2386-87 (established doctrine since *Pennsylvania Coal* that taking is to be recognized when government denies landowner all use of land); *San Diego*, 450 U.S. at 649 n.14 (Brennan, J., dissenting) ("[metaphorical] view ignores the coal company's repeated claim before the Court that the Pennsylvania statute took its property without just compensation"); Berger & Kanner, *supra* note 3, at 726-28 (responding to Williams, *supra* note 14, that whether Holmes used "taking" metaphorically is irrelevant; rather it is Court's subsequent decisions that just compensation is constitutionally mandated for takings that are relevant to determining Court's intent).

Since the Court's decisions failed to provide clear guidance on the issue of regulatory takings, some state courts refused to recognize takings in the regulatory context, while others recognized that a regulation may effect a taking requiring the payment of compensation. For example, the Court of Appeals of New York read *Pennsylvania Coal* as addressing an excessive exercise of the police regulatory power in violation of the fourteenth amendment. Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, cert. denied, 429 U.S. 990 (1976). As opposed to when the government physically appropriates private property for public use, in which case the government must pay just compensation, when there is only regulation of the uses of private property, no compensation need be paid. Of course, and this is often the beginning of confusion, a purported "regulation" may impose so onerous a burden on the property regulated that it has, in effect, deprived the owner of the reasonable income productive or other private use of his property.
the First English decision settled the debate by implicitly holding that a regulation may go so far as to in fact effect a taking.

Upon application of the taking label to an excessive regulation, the Court's answer to the remedial question flows logically from the explicit language of the fifth amendment: once a taking of private property has occurred, the government must pay the landowner just compensation for what has been taken. The First English decision reflects the Court's desire to heed Justice Holmes' warning that "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." In First English, the Court commits itself to the constitutional mandate of requiring the government to pay for a taking that results from regulatory actions.

and thus has destroyed its economic value. In all but exceptional cases, nevertheless, such a regulation does not constitute a "taking", and is therefore not compensable, but amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid.

The Supreme Court of New Hampshire followed a literal reading of Pennsylvania Coal when it reviewed a claim of inverse condemnation arising in response to an amendment of the city of Keene's zoning ordinance. Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981). The court distinguished reasonable regulations that do not violate either the Constitution of the United States or the New Hampshire Constitution from those that are "arbitrary or unreasonable restrictions which substantially deprive the owner of the 'economically viable use of his land' in order to benefit the public in some way." Id. at 598, 432 A.2d at 20. The court expressed that, in the latter case, the restrictions effect a taking and the government must pay compensation. Id. The court reasoned:

Because the constitution prohibits any taking of private property by whatever means without compensation, the just compensation requirement applies whenever the exercise of the so-called police power results in a "taking of property." The government may not do under an implied power that which it cannot do under an express power. In other words, it cannot do indirectly that which it cannot do directly.

The Court's application of the just compensation mandate to the regulatory taking context continues the evolution of the expanding interpretation of the fifth amendment. The basic, historical
The First English Court adopted Justice Brennan’s position that mere invalidation of a regulation which has effected a taking “is not a sufficient remedy to meet the demands of the Just Compensation Clause.”128 Invalidation serves only as a prospective remedy for the landowner; it provides no remedy at all for the denial of all use of private property that already has occurred.129 Once a landowner suffers the effects of a taking, the fifth amendment’s protection is triggered and “no subsequent action by the government can relieve it of the duty to provide just compensation for the period during which the taking was effective.”130

Unfortunately, the questions left unresolved in Justice Brennan’s San Diego dissent131 continue to be unresolved. The First English Court did not discuss any of the open issues raised by numerous commentators132 during the intervening years between San Diego and First English. The result is that the practical reach of the First English decision is not

application of the just compensation clause arises in the typical taking situation where the government exercises its power of eminent domain to acquire title to private property. See, e.g., Danforth v. United States, 308 U.S. 271 (1939) (discussing valuation of property taken by government through exercise of its eminent domain powers); Comment, supra note 6, at 1238 & nn.3-4 (eminent domain power exercised by government paying just compensation in exchange for title). From that beginning point, the Court recognized that the fifth amendment preserved the compensation remedy for a landowner, via an inverse condemnation action, when the government’s activities effected a physical taking by denying the landowner all use of private property even though the government had not accomplished the taking through formal condemnation proceedings. The next expansion of the fifth amendment’s applicability embraced those instances of physical taking by the government for a limited period of time without exercising its power of eminent domain. For a discussion of those cases involving a temporary physical appropriation of private property by the government, see supra note 60 and accompanying text. Finally, the Court adopted a per se rule that a taking occurs whenever the government enters into, or authorizes a third party to enter into, a permanent physical occupation of private property. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982). For a discussion of Loretto, see supra note 35. Against this background, the Court in First English took a long step to expand the fifth amendment’s protective umbrella over private property owners to include those temporary periods when governmental regulations effect a taking without any physical appropriation by the government.

129. San Diego, 450 U.S. at 655 (Brennan, J., dissenting). Further, “mere invalidation would fall far short of fulfilling the fundamental purpose of the Just Compensation Clause. That guarantee was designed to bar the government from forcing some individuals to bear burdens which, in all fairness, should be borne by the public as a whole.” Id. at 656.
130. First English, 107 S. Ct. at 2389.
131. For a discussion of the issues left unresolved in the San Diego dissent, see supra note 65.
132. See, e.g., Berger & Kanner, supra note 3, at 692-96 (lamenting Court’s “determination to adhere to its ‘I know it when I see it’ philosophy”); Williams, supra note 14, at 219-34 (arguing against just compensation in regulatory context because of many unanswered takings questions).
clear, primarily because the opinion supplies no assistance in understanding what in fact constitutes a regulatory taking. In addition, it does not discuss the appropriate standards by which to determine what equals just compensation. All that we actually know from First English is that once a regulatory taking is found, the Constitution demands the payment of just compensation. Moreover, the understanding of what constitutes a taking is critical in the regulatory context since there is no readily identifiable physical appropriation of private property by the government. Equally important are the standards by which to determine just compensation, without which the courts will have wide latitude in calculating just compensation, with the potential result that the compensation awarded to some aggrieved landowners will fall short of being "just."

Two additional land use regulation cases, which also were handed down by the Court in 1987, provide some insight into the issue of what legally constitutes a regulatory taking. Just prior to First English in Keystone Bituminous Coal Association v. DeBenedictis, the Court found legislation enacted to prevent activities dangerous to the health, safety and economic welfare of Pennsylvania's citizens to be a valid exercise of the police power. Where such legislation impacts minimally on the affected property owner, the Court held that it does not constitute an

133. First English, 107 S. Ct. at 2389.

134. A factual understanding is critical because of the extreme consequences a takings determination has for both the government and the landowner. A valid regulation will be upheld, the government will not pay any compensation and the landowner will not be entitled to relief. On the other hand, an invalid regulation that constitutes a taking will be struck down, the government must abide by the fifth amendment mandate to pay just compensation and the landowner will recover for the loss of property.

135. See Johnson, supra note 2, at 604. Although Professor Johnson views the remedy of invalidation as adequate in most instances, he urges that "[i]f compensation for burdensome land-use regulation is deemed desirable, entitlement should be based upon criteria that are ascertainable, consistent, and fair."


138. Id. at 1242-46. The Court held that the public interest justification supported Pennsylvania's exercise of its police powers. Id.
unconstitutional taking.\textsuperscript{139} Thus, applying the rationale of \textit{Keystone}, the Court would uphold regulations enacted “to arrest what [the legislature] perceives to be a significant threat to the common welfare”\textsuperscript{140} when that threat outweighs the impact of the regulation on the affected property owner.

However, it appears from the post-\textit{First English} case of \textit{Nollan v. California Coastal Commission}\textsuperscript{141} that the Court will scrutinize carefully the public interest justification allegedly promoted by governmental regulations, at least when the regulations involve physical intrusion on private property and thereby interfere with the landowner’s right to exclude others.\textsuperscript{142} The California Coastal Commission attempted to serve the public by “protecting the public's ability to see the beach, assisting the public in overcoming the ‘psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on public beaches.”\textsuperscript{143} To meet those ends, the Commission required private owners who sought a building permit to grant a public easement across their property, but did not pay them any compensation.\textsuperscript{144} The Court concluded that a sufficient relationship was lacking between the imposed condition and the public interest allegedly advanced by the condition.\textsuperscript{145} Absent this required nexus, the Court declared that if a state

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\noindent\textsuperscript{139.} \textit{Id.} at 1242. Although the petitioners claimed that the statute in question would prevent them from mining almost 27 million tons of coal, the Court minimized that impact since the 27 million tons represented less than two percent of petitioner’s coal. \textit{Id.} at 1248.

\textsuperscript{140.} \textit{Id.} In upholding the regulations, the Court distinguished \textit{Keystone} from \textit{Pennsylvania Coal} although the two cases involved substantially similar facts. \textit{Id.} at 1243-50. The Court maintained that a distinction existed since the subject Act in \textit{Pennsylvania Coal} served only private interests as opposed to the common welfare protected by the governmental action at issue in \textit{Keystone}. \textit{Id.} at 1243. Also, in \textit{Pennsylvania Coal}, the Act effectively prohibited the mining of certain areas of coal, whereas the record in \textit{Keystone} did not support a similar finding that the coal companies could not “profitably engage in their business, or that there [had] been undue interference with their investment-backed expectations.” \textit{Id.} at 1242. For a discussion of the facts of \textit{Pennsylvania Coal}, see supra note 18.


\textsuperscript{142.} \textit{Id.} at 3146-50. In dissent, Justice Brennan argued that the majority should have applied a mere rationality standard of review to the condition on the permit. \textit{Id.} at 3151-54 & n.1 (Brennan, J., dissenting). However, the majority asserted “that this case does not meet even the most untailored standards.” \textit{Id.} at 3148.

\textsuperscript{143.} \textit{Id.} at 3147.

\textsuperscript{144.} \textit{Id.} at 3148.

\textsuperscript{145.} \textit{Id.} The Court reasoned that if the Commission had made the permit conditional on some action to protect the public’s ability to see the beach, such as a height restriction, a legitimate state interest would be served. \textit{Id.} However, the Court stated that “unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion.” \textit{Id.} at 3148 (citing J.E.D. Associates, Inc. v. Atkinson, 121 N.H. 581, 584, 432 A.2d 12, 14-15
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wishes to serve such public interests by securing a public easement across private property, which the Court characterized as an appropriation, the state must pay for the taking.\textsuperscript{146}

In addition to not defining what constitutes a regulatory taking, the Court in \textit{First English} also did not establish the appropriate measure for determining just compensation when a regulation is held to effect a taking.\textsuperscript{147} In the context of temporary regulatory takings, the difficult questions\textsuperscript{148} include not only what is the appropriate measure of just

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(1981). The Commission had asserted that the Nollan's house would "interfere with 'visual access' to the beach" and thus create "a 'psychological barrier' to 'access.'" \textit{Id.} at 3149. In turn, this would increase the use of the public beaches. \textit{Id.} The Court responded that it was impossible to determine that a requirement to allow people already on public beaches to walk across the Nollan's property would eliminate obstacles to viewing the beaches, reduce psychological barriers to using the beaches or improve congestion on the beaches. \textit{Id.}

\textit{Id.} at 3150. The Nollan decision reflects a significantly more restrictive approach with respect to how paternalistic land regulators may be, as compared to the broad discretion accorded by the \textit{Penn Central} decision. \textit{Penn Central} supported an extension of the power of official regulators to protect the public from aesthetic harms, while the Nollan Court was unwilling to allow the regulators to protect the public from a perceived aesthetic harm by means of a condition unrelated to that goal. \textit{Id.} This difference may be attributable to the Court's characterization of the condition in Nollan as a "permanent physical occupation." \textit{Id.} at 3145. In contrast, the Court characterized the regulation at issue in \textit{Penn Central} as being merely a restriction on use which involved neither a physical intrusion by the government nor a complete prohibition on use. \textit{Penn Central Transp. Co. v. City of New York}, 438 U.S. 104, 136-37 (1978). For a discussion of \textit{Penn Central}, see supra notes 28-39 and accompanying text.

147. The temporary nature of regulatory takings presents problems in calculating just compensation that do not arise in typical, physical appropriations when the government acquires title to the property it takes or occupies property for a limited period of time. In those cases, the fair market value at the time of the taking is recognized generally as the appropriate measure of just compensation for the property interest taken. \textit{See}, e.g., \textit{United States v. 564.54 Acres of Land}, 441 U.S. 506 (1979). For a discussion of the problems with measuring damages in the regulatory taking context, see Sallet, \textit{supra} note 14, at 652-53; Williams, \textit{supra} note 14, at 223-25.

148. These difficulties support the position of those who urge that the just compensation clause is not the appropriate constitutional remedy for an excessive regulatory action. Rather, they assert that the due process clause of the fourteenth amendment protects landowners against excessive regulation. \textit{See generally} Bauman, \textit{supra} note 6, at 56-58 (damages for section 1983 violation); Cunningham, \textit{Inverse Condemnation as a Remedy for "Regulatory Takings,"} 8 Hastings Const. L.Q. 517, 541-44 (1981) (compensation under fourteenth amendment and section 1983); Johnson, \textit{supra} note 2, at 598-602 (same); Mandelker, \textit{supra} note 43, at 506-12 (section 1983 remedies analogous to constitutional remedies); \textit{Comment, Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations,} 29 UCLA L. Rev. 711, 723 n.69 (1982) (same). In a section 1983 action based on deprivation of due process in violation of the fourteenth amendment, the successful challenger would be entitled to money damages for the economic harm suffered rather than to just compensation. \textit{Id.} For a comparison of the just compensation and due process clauses, see Carlisle, \textit{supra} note 67, at 569-77.
compensation, 149 but also when did the temporary taking begin 150 and what was the property interest taken. 151

The First English decision does not discuss the possibility of money damages under a section 1983 action as an alternative or supplemental remedy to the just compensation remedy in the regulatory context. Thus, it is unclear whether just compensation under the fifth amendment is the exclusive remedy available once a regulatory action has been labeled a "taking" or whether a section 1983 action may be pursued in lieu of, or in addition to, a direct claim under the fifth amendment. 152 In light of the unknown criteria that must be established to demonstrate a regulatory taking and to determine just compensation, it is suggested that challengers should seek just compensation and section 1983 damages either concurrently or alternatively. 153

Despite the unresolved issues after First English, the case does offer landowners who challenge excessive regulations the potential for monetary compensation rather than merely the inadequate remedy of invalidation. It is submitted that the First English decision may encourage official land planners to be more responsible in performance of their duties in the public interest when faced with potential monetary liability where before the only risk was of a regulation being invalidated. 154 If

149. For a discussion of the question regarding the appropriate measure of just compensation, see supra note 65. For a suggestion that the lower courts should determine the amount of just compensation on a case-by-case basis, see Comment, supra note 6, at 1259-63.

150. For a discussion of the commencement date issue, see supra note 65; D. Mandelker & R. Cunningham, Planning and Control of Land Development 85 (2d ed. Supp. 1987).

151. It has been suggested that the interest taken by an excessive regulation "is a 'negative easement' or 'servitude.' " D. Mandelker & R. Cunningham, supra note 150, at 85.

152. D. Mandelker & R. Cunningham, supra note 150, at 86. For the text of section 1983, see supra note 67.

153. See Bauman, supra note 6, at 57-58. In Burrows v. City of Keene, the New Hampshire Supreme Court awarded the landowner both just compensation for a regulatory taking and section 1983 damages for costs and attorneys' fees. 121 N.H. 590, 432 A.2d 15 (1981). For discussions of Burrows, see Gordon, supra note 2, at 222-23; supra note 124.

"[O]ne advantage of the [section 1983] remedy is that claims can more easily be made for consequential damages, punitive damages against malicious officials and attorneys' fees." Bauman, supra note 6, at 57. In addition, under a section 1983 action, there would be no need to identify the property interest taken although it still would be necessary to find when the alleged harm to the landowner began in order to determine the actual loss suffered. D. Mandelker & R. Cunningham, supra note 150, at 86; see also Johnson, supra note 2, at 599 (section 1983 damages focus on "the full range of damages suffered"). However, Professor Johnson believes that section 1983 actions would prove to be less successful than takings claims. Id. at 600.

154. See Comment, supra note 148, at 731 ("some threat of fiscal liability can be beneficial as an incentive to responsible public planning"). In addition to risking governmental financial liability, municipal officials who act irresponsibly with regard to land-use regulations also may risk the security of their elected or
this results in "a chilling effect upon the exercise of police regulatory powers at the local level,"\textsuperscript{155} perhaps that is necessary in order to ensure that official land planners function not only with a concern for the public welfare, but also with a respect for the rights of private property owners.

The long-term effect of \textit{First English} may be that regulators will live up to the expectation of many that municipal officials, in good faith, enact land use regulations to serve legitimate public interests.\textsuperscript{156} Other recent Court decisions indicate that the Court will find a taking when the nexus between the regulation and the public interest is tenuous or nonexistent so that the government's objectives would be more appropriately effectuated by an exercise of its eminent domain powers and the payment of just compensation.\textsuperscript{157} However, the Court will not find a regulatory taking where the government seeks to protect the public from a dangerous activity by means of a restriction that does not impact severely on the landowner.\textsuperscript{158}

As to the landowner/developer, does the \textit{First English} decision supply that person or entity with "the coercive threat of a compensation remedy as a lever with which to pry loose regulatory relief from a reluctant official," appointed positions. Voters/taxpayers will likely be reluctant to bear the burden through their tax payments for any just compensation award for which the municipality is held liable. On the other hand, it is ironic that those local residents who subscribe to the "not in my backyard" approach to protest a landowner's development of property may now be the taxpayers who ultimately are bearing the financial burden of compensating the landowner when a regulation goes so far that it effects a taking. Perhaps, they too will be encouraged to consider more carefully the need to strike a balance between their concerns and the rights of an individual property owner. \textit{See generally id.} at 729-31; Bauman, \textit{supra} note 6, at 85-91.


\textsuperscript{156} \textit{Compare} Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 205 (1985) (Stevens, J., concurring in the judgment) ("[R]egulatory bodies . . . generally make a good-faith effort to advance the public interest when they are performing their official duties.") \textit{and} Andrus v. Allard, 444 U.S. 51, 65 (1979) ("[G]overnment regulation—by definition—involves the adjustment of rights for the public good.") \textit{and} Hadacheck v. Sebastian, 239 U.S. 394, 414 (1915) ("We must accord good faith to the city in the absence of a clear showing to the contrary and an honest exercise of judgment upon the circumstances which induced its action.") \textit{with} Berger & Kanner, \textit{supra} note 9, at 733-37 (motives underlying regulations are often "considerably less than in 'good faith'") \textit{and} Williams, \textit{supra} note 14, at 201-02 ("[The] assumption that local government is often arbitrary in dealing with the developers is by no means groundless. No one with first-hand experience in the field would deny that municipal caprice is far more common than it should be.").

\textsuperscript{157} Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987). For a discussion of \textit{Nollan}, in which the Court rejected the conditioning of a building permit on an easement requirement unconnected to a legitimate public interest justification, see \textit{supra} notes 39 & 141-46 and accompanying text.

\textsuperscript{158} Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987). For a discussion of \textit{Keystone}, in which the Court upheld, as valid regulatory actions, statutes that prohibited mining of underlying coal supports, see \textit{supra} notes 166-68 and accompanying text.
tant local government?" The submitted answer for the long term is no. It is in developers' interest to submit plans that reflect due consideration for the concerns of official land planners and members of the community, since developers want to spend their efforts, time and money pursuing their development businesses rather than litigating where the line should be drawn between a taking and a valid regulation. Although the availability of compensation under the fifth amendment for a regulatory action that effected a taking is far more satisfactory than mere invalidation of the regulation, development, rather than compensation, is the developer's primary goal.

Furthermore, a property owner alleging a regulatory taking will continue to face a formidable challenge in establishing that a regulation has in fact effected a taking which requires the payment of just compensation. If and when the owner succeeds in establishing regulatory action sufficient to bring the owner's loss within the protection of the fifth amendment, First English provides the monetary remedy for the deprivation of all use suffered by the landowner—a remedy which has been deemed to be constitutionally secured.

V. Conclusion

Following many years of speculation and uncertainty, the Court in First English has adopted the position that, if a regulatory action effects a taking of private property for public use, the fifth amendment demands the payment of just compensation. Nevertheless, the effect of the First English decision will be tempered by what the Court ultimately characterizes as a regulatory taking. It is likely that the Court will award compensation under the fifth amendment in the regulatory context only when a regulation has gone so far as to deny an owner all use of private property so that the Court has no choice but to label it a taking. Once labeled a taking, the government's action is subject to the mandate of the fifth amendment.

159. Williams, supra note 14, at 207.

160. Developers will be reluctant to engage in litigation with local municipalities not only for reasons related to the subject project, but also because of their need for a satisfactory, ongoing, working relationship with governmental agencies as to the developers' future projects. See Bauman, supra note 6, at 58 n.228 (noting importance of good working relationships between developers and public officials); Berger & Kanner, supra note 3, at 752 (urging that property owners want to use their property rather than engage in lawsuits). But see Williams, supra note 14, at 207 (arguing that developers will use threat of litigation for just compensation as lever against opposing regulators).

161. See Callies, supra note 136, at 205; Williams, supra note 14, at 238.

162. First English, 107 S. Ct. at 2389.

163. Id.

164. See Williams, supra note 14, at 238 ("The most likely judicial course will be to deny compensation, except in the most extreme cases, through decisions that moot the confrontation by avoiding decisions on constitutional grounds.").
In the interim, before such a decision is issued, the effects of *First English* will be experienced at the local level. The predicted ramifications on the land-use regulatory process include "a significant adverse impact" resulting in the failure of cautious local officials and land-use planners to enact health and safety regulations,\(^{165}\) limitations on the freedom and flexibility required by local governments to carry out their functions,\(^{166}\) "quick and combative confrontation followed by an accommodation that can only weaken the land use process"\(^ {167}\) and "a chilling effect upon the exercise of police regulatory powers at a local level because the expenditure of public funds would be, to some extent, within the power of the judiciary."\(^ {168}\) In addition, it is anticipated that the decision "will generate a great deal of litigation"\(^ {169}\) while strapping fiscally limited municipalities with the financial burden of defending the increased litigation.\(^ {170}\) However, the effect of *First English* may be much more positive. It may result in the striking of a healthy balance between land planning officials concerned with the public welfare and landowners vested with individual property rights protected by the Constitution.\(^ {171}\)

Increased litigation should be anticipated in the short term until there are more judicial decisions drawing the line between valid regulations and regulatory takings. Without such judicial decisions there are few parameters to guide official land planners. When those decisions are made, officials will be aided, but their dilemma will not disappear for it is highly improbable that there will ever be a clear definition of what constitutes a regulatory taking.\(^ {172}\)

165. *First English*, 107 S. Ct. at 2390, 2399-400 (Stevens, J., dissenting).
167. Williams, supra note 14, at 237.
169. *First English*, 107 S. Ct. at 2389-90 (Stevens, J., dissenting); accord Williams, supra note 14, at 237.
170. See Williams, supra note 14, at 203-04.
171. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting) ("[T]he threat of financial liability for unconstitutional police power regulations would help to produce a more rational basis of decisionmaking that weighs the costs of restrictions against their benefits"). See generally Bauman, supra note 6, at 99 ("Questions of takings and compensation remedies require a balancing of public responsibility and individual rights, tempered by a constitutionally sanctioned sensitivity to what is just and fair to the community of one. The Constitution was never meant to make things easy but to make them right."); Gordon, supra note 2, at 228 ("The ultimate goal of the 'compensation for regulatory taking remedy' is to make government fully responsible for its regulatory actions to the extent that such actions have had a confiscatory impact on the property rights of private landowners.").
172. In his *San Diego* dissent, Justice Brennan noted that "one distinguished commentator has characterized the attempt to differentiate 'regulation' from 'taking' as 'the most haunting jurisprudential problem in the field of contemporary land-use law . . . one that may be the lawyer's equivalent of the physicist's
It is suggested that the gray area distinguishing a valid regulation from a regulatory taking will remain. Courts will have the final responsibility of upholding, as proper exercises of the police power, those regulations which merely restrict property uses for the good of the general public. On the other hand, the courts' responsibility will include declaring as takings those exercises of the police power that are improper because they deprive a landowner all use of private property or attempt to stretch "too far" the public interest justification. However dismal that gray area looms over the land planning process for those whose regulatory decisions are subject to a fifth amendment challenge, which may result in liability for payment of compensation, the First English decision does hold out the long overdue, bright relief of just compensation for the landowner who suffers an unconstitutional regulatory taking.

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