Constitutional Rights as Property?: The Supreme Court's Solution to the "Takings Issue"

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I. INTRODUCTION

The history of American land use law has been characterized by the classic constitutional conflict between individual rights and social interests. As with most, if not all constitutional issues, the problem results from the maintenance of a capitalist economy in an activist state.[1] In the area of land use regulation this conflict has been referred to as the "takings issue."[2] The issue involves the conflict between the states' police power to regulate land uses for the promotion and protection of the public's health, safety and welfare and the individuals' rights not to be unfairly burdened by such regulations.[3]

Prior to the decision of *Pennsylvania Coal Co. v. Mahon*,[4] the due process clause of the fourteenth amendment was the primary, if not sole, constitutional restriction on state exercises of the police power. In *Penn Coal*, however, Justice Holmes suggested that the power to regulate land uses might also be restricted by the takings clause of the fifth amendment,[5] when he said that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[6]

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1. For an excellent description of the problems of private property in the activist state, *see* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 1-5, 100-103 (1977).

2. F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKINGS ISSUE (1973).

3. U.S. CONST. amends. V & XIV: no person shall be deprived "of life, liberty, or property, without due process of law. . . ."

4. 260 U.S. 393 (1922).

5. U.S. CONST. amend. V: "nor shall private property be taken for public use, without just compensation." This provision was made applicable to the states as an element of 14th amendment due process in Chicago, Burlington & Quincy R.R. v. Illinois *ex rel.* Drainage Comm'r, 200 U.S. 561, 593 (1906).

6. 260 U.S. at 415.

For the next fifty years, land use litigation focused around the question of how far a regulation could go before it would be considered to be a "taking." If a regulation went "too far," it was found to be constitutionally invalid, though rarely were the opinions clear as to whether the invalidity resulted from a lack of due process or a lack of just compensation. Even when regulations were held to be unconstitutional because they went "too far," the analyses were generally based on substantive due process and the remedy was nearly always invalidation of the offending regulation. Not until *Agins v. City of Tiburon*[7] was the issue of just compensation for so-called "regulatory takings" addressed by the Supreme Court. The Court in *Agins* found that no taking had occurred, and thus never reached the issue of compensation. But after the *Agins* case, the focus of land use litigation shifted from the question of how far regulation could go to the question of whether just compensation must be paid if a regulation is found to have gone "too far."

After almost a decade of side-stepping the issue,[8] the Supreme Court apparently disposed of the so-called "takings issue" in a trilogy of cases decided in 1987.[9] In *Keystone* and in *Nollan* the issue was the more typical one of how far a regulation can go before it will be deemed a "taking." But in *First English* the Court finally answered the more controversial question of whether just compensation was required when a "regulatory taking" has occurred. The Court held that compensation is mandated when a governmental action effects a taking, even if the taking is only temporary.

Given the extensive media coverage the decision received and the flurry of law review articles and comments written about the issue,[10] it would seem that the decision of *First English* is of great

7. 447 U.S. 255 (1980).

8. On four occasions prior to the decision of First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), the Court took on the compensation issue without resolving it: MacDonald, Sommer and Frates v. Yolo County, 477 U.S. 340 (1986); Williamson County v. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas and Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980).

9. Keystone Bituminous Coal v. DeBenedictis, 480 U.S. 470 (1987); *First English*, 482 U.S. 304; Nollan v. California Coastal Commission, 483 U.S. 825 (1987). While these three cases have been consistently referred to as a trilogy, they are not entirely consistent with each other and none of them cites either of the other two.

10. *See, e.g.*, Bauman, *The First Church, Keystone, and Irving Cases: New Rules for Determining and Compensating Takings*, 1988 ZONING & PLANNING LAW HANDBOOK 251 (N. GORDON, ed.);

constitutional significance. Yet, the decision seems both simple and obvious: that a taking requires compensation and that temporary takings are compensable. Neither proposition is of particular constitutional significance; the first is simply a restatement of the fifth amendment takings clause, the second is a statement of established case law.[11] The real question at the heart of the "takings issue" is not whether a "regulatory taking" requires just compensation, but rather whether a regulation can ever actually affect a taking for fifth amendment purposes.

The following discussion looks first at the *First English* decision, what it said, what it appears to have said, and, more importantly, what it did not say. Then, in an effort to determine why the Court avoided the real question, it will look at the development of the "takings issue" prior to the *First English* decision. The development occurs in three stages. In the first stage, the confusion between due process and takings analyses is created with the conflicting decisions of *Mugler v. Kansas*[12] and *Penn Coal*. In the second stage, from *Penn Coal* to *Agins*, the confusion mounts as the Court struggles through the cases in an attempt to establish a coherent analytical framework in which to address the "takings issue." The Court's difficulty in dealing with the "takings issue" was noted by Professor Charles Haar who characterized the effort as "the lawyer's equivalent of the physicist's hunt for the quark."[13] In the last stage prior to *First English*, the "hunt for the

Berger, *The Year of the Taking Issue*, 1 B.Y.U.J. PUB. L. 261 (1987); Falik & Shimko, *The "Takings" Nexus — The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 HASTINGS L.J. 359 (1988); Geraci & Narbozny-Younger, *Damages for a Temporary Regulatory Taking: First English Evangelical Lutheran Church v. County of Los Angeles*, 24 CAL. W.L. REV. 33 (1988); Large, *The Supreme Court and the Takings Clause: The Search for a Better Rule*, 18 ENVTL. L. 3 (1987); Martinez, *Reconstructing the Takings Doctrine by Redefining Property and Sovereignty*, 16 FORDHAM URB. L.J. 157 (1988); Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 HASTINGS L.J. 335 (1988); Sax, *Property Rights in the U.S. Supreme Court: A Status Report*, 7 UCLA J. ENVTL. L. & POL'Y 139 (1988); Siemon & Larsen, *The Taking Issue Trilogy: The Beginning of the End?*, 33 WASH. U.J. URB. & CONTEMP. L. 169 (1988); Strong, *On Placing Property Due Process Center Stage in Takings Jurisprudence*, 49 OHIO ST. L.J. 591 (1988); Symposium, *The Jurisprudence of Takings*, 88 COLUM. L. REV. 1581-1794 (1988); Comment, *Affirmative Relief for Temporary Regulatory Takings*, 48 U. PITT. L. REV. 1215 (1987); Comment, *The Emergence of "Temporary Takings Damages" for Unconstitutional Restrictions on Land Use*, 1987 DET. C.L. REV. 1095 (1987).

11. *See* Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945).

12. 123 U.S. 623 (1887).

13. C. HAAR, LAND-USE PLANNING 766 (3d ed. 1976).

quark" is abandoned and the Court shifts its focus to the question of remedies, but effectively avoids any resolution of that issue. The discussion then returns to look at the *First English* decision in the context of its precedents, concluding that the Court has, in effect, created a property interest in the constitutional right to substantive due process. Finally, the lower courts' interpretations of the *First English* decision are examined. A survey of these cases leads one to the conclusion that although the Court failed to resolve many of the questions which the "takings issue" raises, its recent decision has refocused judicial attentions on the task of defining "regulatory takings" with surprising results.

II. THE FIRST ENGLISH DECISION

Of the three cases that comprise the Supreme Court's "takings trilogy," *First English* is perhaps the most noteworthy and certainly the most sensational.[14] It was this case which, after nearly a decade of avoiding the issue, finally took up and decided the sticky question of remedies for so-called "regulatory takings."

The case came out of California, where the state's supreme court had already clearly established in the *Agins* decision that inverse condemnation[15] is never an appropriate action when an exercise of the police power goes so far as to deprive a property owner of all reasonable use of her property.[16] It was the existence of the *Agins* rule which allowed *First English* to come before the U.S. Supreme Court without any lower court determination of whether a taking had even occurred.[17]

14. The case received a tremendous amount of media coverage, nearly all of which characterized the decision as a coup for developers and private property owners. *See, inter alia,* N.Y. Times, June 10, 1987, at 17; Washington Post, June 10, 1987, at A1; Time Magazine, June 22, 1987, at 64. In the discussion that follows, one will see that the effect of the case appears to have been quite the opposite.

15. Inverse condemnation is a cause of action under the fifth amendment to recover the value of property taken by the government when the government has not formally exercised its power of eminent domain. Ordinarily, the government takes property by instituting a direct condemnation proceeding in which the legitimacy of the public purpose is established and the amount of compensation is fixed. Here the proceeding is termed inverse since it is the property owner, rather than the government, who initiates the action. 6 J. SACKMAN, NICHOL'S LAW OF EMINENT DOMAIN § 24.1 (rev. 3d ed. 1980). *See also San Diego Gas & Electric,* 450 U.S. at 638 n.2 (Brennan dissenting).

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

17. *First English,* 482 U.S. at 311-313.

The plaintiff in this action maintained a summer camp on twenty-one acres of land it owned in the Mill Creek Canyon in Angeles National Forest. In 1977, a fire denuded the hills upstream from the camp, creating a serious flood hazard. A year later, such a flood occurred destroying all of the buildings on the camp and killing ten people. In response to the flood, the County of Los Angeles adopted an ordinance designating the Mill Creek Canyon a flood protection area and temporarily prohibiting the construction or reconstruction of any building in the flood protection area until measures could be taken to control the flooding.[18] The ordinance contained no permit or variance provisions. Shortly thereafter, the church brought an action in inverse condemnation alleging that the ordinance deprived it of any economic use of the land and was therefore a "taking."[19]

The trial court granted the county's motion to strike the allegation, basing its ruling on the holding in *Agins*. The California Court of Appeals affirmed, and the California Supreme Court declined to reconsider the *Agins* rule. The U.S. Supreme Court granted certiorari[20] to review the constitutional validity of the *Agins* rule, thus isolating the issue of remedies for the Court's consideration.

Justice Rehnquist's majority opinion begins with his attempt to justify the Court's treatment of the remedies issue in the absence of a determination of a taking. In the four previous "takings" cases,[21] the Court found that it would have been premature to consider the remedial question when there had been no final determination that a taking had in fact occurred.[22] Yet, in this case the appellant had neither sought a building permit or variance from the ordinance nor had it alleged that any efforts to do so would have been futile. More importantly, the complaint did not

18. Los Angeles, Cal., Ordinance 11,855 (1979). The ordinance subsequently became permanent, but this fact had no bearing on the Court's decision. 482 U.S. at 313 n.7.

19. The church actually set out two claims. The first claim alleged that the County was liable under Cal. Gov't Code § 835 for dangerous conditions on their upstream properties that contributed to the flooding of the church's land. The second claim sought damages in tort and in inverse condemnation for the County Flood District's cloud seeding during the storm which caused the flood. 482 U.S. at 308.

20. 478 U.S. 1003 (1986).

21. *Agins*, 447 U.S. 255 (1980); *San Diego Gas & Electric*, 450 U.S. 621 (1981); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986).

22. *First English*, 482 U.S. at 311.

allege a taking under the Constitution, nor did the California courts find that the church had stated a federal claim.

The Court cleverly evaded the final judgment rule established in the *Hamilton Bank*[23] decision by noting that the church's complaint for damages had been dismissed solely on the grounds that *Agins* precluded monetary compensation, and not because of any factual dispute as to whether or not a taking had actually occurred. At one point, Rehnquist stated that the Court must proceed under the assumption that a taking had in fact occurred.[24] In the next breath, however, he noted that the Court had

> no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations. These questions, of course, remain open for decision on the remand we direct today.[25]

The Court's apparent willingness, if not eagerness, to take on an issue it could easily have avoided as being premature would seem to indicate that it was then finally able to provide a clear resolution to this very confused and confusing area of the law. Yet, by addressing the remedies issue in the abstract, the decision seems only to add to the considerable confusion of "takings jurisprudence."

Having disposed of the ripeness issue, the Court went on to address the question of whether just compensation is required when a regulatory taking, even if only temporary, is found. Looking primarily to the mandate of the fifth amendment, the Court had little trouble simply holding that just compensation is constitutionally required "in the event of [an] otherwise *proper interference* amounting to a taking."[26]

As for compensating temporary takings, the Court relied on a line of World War II cases in which the government had taken over the operations of various businesses in order to advance the

23. *Williamson County Regional Planning Comm'n*, 473 U.S. 172 (1985).

24. *First English*, 482 U.S. at 312n.6.

25. *Id.* at 313 (citations omitted). It should be noted that when the case was remanded to the California court, the county's ordinance was found to be a reasonable moratorium for a reasonable period of time and thus did not affect a taking. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (1989).

26. *Id.* at 315 (emphasis added).

war effort. The court noted that "[t]hough the takings were in fact 'temporary,' . . . there was no question that compensation would be required for the Government's interference with the use of the property . . . ."[27]

The more difficult question was whether just compensation would be due for the period of time before a regulation is found to amount to a taking. This is the issue that the California Supreme Court in *Agins* decided in the negative, holding that a taking would not occur until the government elected to continue enforcing a regulation after it had been judicially determined to amount to a taking.[28] In overruling *Agins*, the Court found that the government could not relieve itself of the obligation to pay just compensation by simply abandoning a regulation which, during the period it was effective, amounted to a taking. The Court noted that the result of the government's abandonment of a regulation upon the court's determination that it effects a taking is simply " 'an alteration in the property interest taken — from [one of] full ownership to one of temporary use and occupation . . . .' "[29] In other words, if a regulation "goes too far," it is the regulation that effects a taking and not the court's ultimate determination of its invalidity.

The question remains as to when the taking does begin and thus for what period of time compensation must be paid. The opinion simply states that compensation must be paid from the time that the regulation "effects a taking."[30] At the same time the Court limited its holding stating that it did not "deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us."[31]

When, then, does taking begin? If the taking is effected by the enactment of the offending regulation, then a landowner who successfully obtains a variance should be entitled to compensation for the temporary deprivation of use prior to obtaining the vari-

27. *Id.* at 318 (referring to Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945)).

28. Agins v. City of Tiburon, 24 Cal. 3d 266, 276-277, 598 P.2d 25, 30-31, 157 Cal. Rptr. 372, 377-378 (1979).

29. 482 U.S. at 318 (quoting United States v. Dow, 357 U.S. 17, 26 (1958)).

30. *Id.* at 320 n.10. This is essentially the language Justice Brennan used in his dissent in *San Diego Gas & Electric*, 450 U.S. at 653.

31. *Id.* at 321.

ance. Such a result is clearly contrary to the Court's intent.[32] Can one logically distinguish the landowner who obtains administrative relief by way of amendment, variance or special use permit from the landowner who obtains relief by judicial invalidation of the regulation? What event subsequent to enactment of the regulation and prior to judicial invalidation signals the beginning of the taking?[33] If the taking begins only after the landowner has exhausted all available administrative remedies, then the government will be paying compensation measured by the time it takes for the courts to hear and decide the landowner's claim. To hold the regulating body NOT LIABLE for damages suffered as a result of delays over which it does have control (issuing permits, granting variances, etc.), yet LIABLE for damages suffered as a result of delays over which it does not have control (i.e. a backed up docket), seems rather unfair.

Another question left unanswered by the court is how compensation is to be calculated once the period of the temporary taking is defined. With permanent takings, compensation is generally calculated as the fair market value of the property at the time of the taking. With temporary takings where the government actually took possession of the property for a finite period of time, the measure of compensation has been the rental value of the government's use. But measuring compensation when the government has not actually enjoyed the use of the property taken is a trickier proposition.

In the several states that approve monetary compensation for temporary regulatory takings, five principal methods have been employed to measure compensation: public benefits, rental value, option price, before-after valuation, and interest on lost profits.[34] Several articles have been written about the problems of valuation involved in measuring the landowner's loss in the event of a temporary regulatory taking.[35] For the purposes of this article, suf-

32. *Id.* at 318-20.

33. The complexity of this question is illustrated in the recent decision of the *Williamson County Regional Planning Comm'n*, 473 U.S. 172 (1985). *See* text accompanying notes 94-95, *infra*.

34. Hagman, *Temporary or Interim Damages Awards in Land Use Control Cases*, 4 ZONING & PLAN. L. REP. 129, 142 (1981). Another method of measuring compensation using an insurance approach is suggested in Blume & Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569 (1984).

35. *See, e.g.*, Hagman, *Temporary or Interim Damages Awards in Land Use Control Cases*, 4 ZONING & PLAN. L. REP. 129 (1981); Comment, *Affirmative Relief for Temporary Regulatory*

fice it to say that the first four methods mentioned above bear no relation to the actual losses a landowner may suffer and the fifth method involves losses too speculative to be recoverable.

In light of the substantial "chilling" effect the *First English* decision is likely to have on municipal land use legislation, it is especially important that municipal liability be clearly defined. Justice Rehnquist's opinion ignores this issue entirely, apparently following the expressed sentiments of Justice Brennan in his *San Diego Gas* dissent that "the vindication of [constitutional] rights [cannot] depend on the expense in doing so."[36]

The final, and perhaps most important, question left unanswered by the *First English* decision is whether and how an exercise of the police power can ever be considered the equivalent of an exercise of the power of eminent domain for fifth amendment purposes. Justice Brennan raised this very issue in his *San Diego Gas* dissent when he stated that the issue in that case was whether just compensation is due in the event of a regulatory taking and further noted that

> [i]mplicit in this question is the corollary issue whether a government entity's exercise of its regulatory police power can ever effect a "taking" within the meaning of the Just Compensation Clause.[37]

Unfortunately, he never addressed the issue in the rest of his opinion. Neither Rehnquist nor any of the *First English* dissenters even acknowledges this difficult question. The significance of this issue emerges as one looks at the development of the so-called "takings issue" in Supreme Court jurisprudence.

III. The Development of the 'Takings Issue'

Ever since Holmes' opinion in the *Penn Coal* case, confusion has developed about whether excessive land use regulations should be reviewed under a substantive due process analysis or under a

Takings, 48 U. Pitt. L. Rev. 1215 (1987); Johnson, *Compensation for Invalid Land-Use Regulations*, 15 Ga. L. Rev. 559 (1981); Note, *It's Not Just Compensation, It's a Theory of Valuation as Well: Valuing "Just Compensation for Temporary Regulatory Takings,"* 14 Colum. J. Envt'l. Law 247 (1989). While a full discussion of the arguments made by these authors is beyond the scope of this article, each of them concludes that the difficulties in effectively measuring damages for temporary regulatory takings make inverse condemnation an undesirable avenue of relief.

36. *San Diego Gas & Electric*, 450 U.S. at 661 (1981) (Brennan, J., dissenting).

37. *Id.* at 646-47.

takings analysis.[38] Prior to *Penn Coal* it seemed clear that the only limitation on the government's exercise of police power was the fourteenth amendment's due process clause. A notable example of this kind of review is Justice Harlan's opinion in the case of *Mugler v. Kansas*.[39]

In that case, Mugler, the owner of a beer brewery, claimed that the effect of a state statute prohibiting the manufacture of alcoholic beverages was to deprive him of property without just compensation. The Court disagreed:

> 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. Such legislation does not disturb the owner in the control or use of his property *for lawful purposes*, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.[40]

In effect the Court was saying that no property interest exists in a use which is determined by the legislature, in the exercise of its police power, to be contrary to the public interest. Having no property interest in such a use, one cannot claim that deprivation of that use constitutes a taking of property.

The focus of the Court's analysis in *Mugler* was on the validity of the regulation in light of its public purpose rather than on whatever loss had been suffered by the individual. Thus, a valid exercise of the police power could never amount to a taking of property, for it is the very exercise of the police power which defines individual property interests.[41]

38. Many commentators point to Holmes' opinion in *Penn Coal* as the starting point of the confusion surrounding regulatory takings. *See, e.g.*, Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980).

39. 123 U.S. 623 (1887).

40. *Id.* at 668-69 (emphasis added).

41. Various commentators have advocated the position that property under our constitution is not defined in the Lockean sense as an absolute, pre-political right but rather as a right existing within a societal context and determined by social needs. *See, e.g.*, Lipsker & Heldt, *Regulatory Takings: a Contract Approach*, 16 FORDHAM URB. L.J. 195 (1988); Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 WASH. L. REV. 583 (1981); Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); and Schwartz, *Property Rights and the Constitution: Will the Ugly Duckling Become a Swan?*, 39 AM. U.L. REV. 9 (1987); Comment, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985).

A very different view of property interests seems to have been taken by the Court in the *Penn Coal* case. The plaintiff in that case had purchased the surface property from the defendant coal company, which retained not only the right to mine under the surface, but the right to cause subsidence without liability.[42] The plaintiff brought the action for violation of the Kohler Act which prohibited the mining of coal in such a way as to cause subsidence of land used for residential purposes. The coal company claimed that application of the Kohler Act to its property amounted to a taking without just compensation.

The Court, in an opinion written by Justice Holmes, agreed. Focusing on the diminution in value of the company's interest, Holmes concluded that the legislature had exceeded its power to reduce values in the exercise of its regulatory power. In effect, Holmes saw the government's power existing on a spectrum, with valid limitations at one end and takings at the other. When in the exercise of regulatory power the extent of the diminution "reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."[43] Thus, while recognizing the government's right to diminish property values to a certain extent, he concluded that "if regulation goes too far it will be recognized as a taking."[44]

On its face, it would seem that the *Penn Coal* decision, resting on the newfound idea of regulatory takings and the application of a diminution in value test, clearly contradicts the position taken by the Court in *Mugler*, which found no such limitation on otherwise proper exercises of the police power. It would seem that if Holmes' new takings analysis were applied to the facts of *Mugler*, the result would have been a finding that the Kansas statute was unconstitutional. Yet, Holmes neither overruled nor even mentioned the *Mugler* case in his opinion and, only six years later, appeared to back away from this position. In the case of *Miller v. Schoene*[45], Holmes sided with the majority which relied on *Mugler* in upholding the power of the state to destroy the plaintiff's cedar trees in order to protect nearby apple orchards from the possibility of damage due to cedar rust.

42. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 395 (1922).

43. *Id.* at 413.

44. *Id.* at 415.

45. 276 U.S. 272 (1928).

How are we to reconcile these two conflicting positions? Some have suggested that those who cite Holmes' "takings" language in *Penn Coal* have misinterpreted his use of the term "taking."[46] They argue that Holmes, in an effort to avoid a discussion of substantive due process, used the word "taking" metaphorically rather than literally.[47] What he meant was simply that regulations exceeding the limits of the police power have the same impact on the landowner as a direct condemnation without compensation being paid. Or so the argument goes.[48]

Proponents of this theory argue that the validity of state regulation rests solely on fourteenth amendment substantive due process grounds. The three prong test for substantive due process, developed in the case of *Lawton v. Steele*[49], requires that state regulations must advance the interests of the public generally, rather then those of a particular class, by means which are reasonably necessary to accomplish that public purpose and which are not unduly burdensome upon individuals. Or, stated another way, 1) the *end* must be a proper one; 2) the *means* must be appropriate; and 3) the *end* must justify the *means*.

Indeed, Holmes' analysis of the validity of the Kohler Act would seem to follow the standard "three prong" test for sub-

46. Hippler, *Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine: The Principles of "Noxious Use," "Average Reciprocity of Advantage," and "Bundle Of Rights" from Mugler to Keystone Bituminous Coal*, 14 B.C. ENVTL. AFF. L. REV. 653 (1987); McGinley, *Regulatory "Takings": The Remarkable Resurrection of Economic Substantive Due Process Analysis in Constitutional Law*, 17 ENVTL. L. REP. 10369 (1987); Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manisfesto*, 9 VT. L. REV. 193 (1984).

47. *Id. See also* McGinley, *Regulatory "Takings": The Remarkable Resurrection of Economic Substantive Due Process Analysis in Constitutional Law*, 17 ENVTL. L. REP. 10369 (1987), for a discussion of why Holmes may have avoided any reference to substantive due process in his *Penn Coal* opinion.

48. The New York Court of Appeals apparently followed this argument when it held that "when the State 'takes', that is appropriates, private property for public use, just compensation must be paid. In contrast, when there is only regulation of the uses of private property, no compensation need be paid." Fred French Investing Co. v. City of New York, 39 N.Y.2d 587, 593, 385 N.Y.S.2d 5, 8, 350 N.E.2d 381, 384 (1976). This is not to say that excessive regulation would be immune from constitutional scrutiny, rather that exercises of the police power would be examined under the Due Process Clause of the 14th Amendment and not the Just Compensation Clause of the 5th Amendment. Thus, an overly restrictive regulation "amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid." 39 N.Y.2d at 594, 385 N.Y.S.2d at 8, 350 N.E.2d at 385.

49. 152 U.S. 133 (1894). This 3-prong test for substantive due process has become known as the *Lawton* test.

stantive due process.[50] Looking at the purpose of the Act, Holmes saw the private house owner as the primary beneficiary of this mining prohibition. Subsidence damage to privately owned houses was not, in his opinion, a public nuisance even if similar damage was suffered by many individual owners. Hence, the goal of the regulation was not the promotion of the common or public good. Arguably, then, the Act failed on the first prong of the *Lawton* test. Holmes went on to consider the extent of the Act's interference with the coal company's interests and concluded that "the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights."[51] From this statement, most have derived a diminution of value test for takings under the fifth amendment. Yet, it seems equally plausible that Holmes struck down the regulation for failing the third prong of the *Lawton* test, that is, that even if the end was legitimate, it did not justify the means.

Traditionally, the remedy for violations of due process has been invalidation of the offending regulation. When, however, the government actually takes property, the remedy dictated by the fifth amendment is the payment of just compensation. In light of the ultimate holding of the case (invalidation, not compensation), this interpretation appears even more likely.[52]

This clearly has not been the traditional interpretation of the *Penn Coal* opinion.[53] Indeed, since the decision of *Penn Coal*, Holmes' opinion is nearly always cited by courts when striking down overly burdensome land use regulations. And while these cases have generally resulted in mere invalidation of the offending regulation, references to the fifth amendment and to Holmes' takings language are usually employed.

50. Brandeis' dissent in *Penn Coal* clearly follows this substantive due process argument. It has been suggested that the Holmes-Brandeis debate in this case was one of apples and oranges, Holmes concluding that the apple was rotten while Brandeis concluded that the orange was perfectly edible.

Still others believe that Holmes' and Brandeis' opinions are reconcilable. *See, e.g.*, Hippler, *Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine: The Principles of "Noxious Use," "Average Reciprocity of Advantage," and "Bundle of Rights" from Mugler to Keystone Bituminous Coal*, 14 B.C. ENVTL. AFF. L. REV. 653, 680-87 (1987).

51. *Penn Coal*, 260 U.S. at 414.

52. There are, however, those who suggest that the only reason just compensation was not awarded in this case is that the state of Pennsylvania was not a party. *See, e.g.*, White, et al., *Manifesto, supra* note 46 at 208 n.51.

53. *Fred F. French Inv. Co.*, 39 N.Y.2d 587, is a notable exception.

On the other hand, when courts seek to uphold regulations which would seem to interfere with private property interests as much, if not more than many of the regulations struck down as "takings," the courts often cite to the language of *Mugler* and look only to the fourteenth amendment as the measure of the regulations' validity.[54]

It is the survival of these two conflicting lines of precedent that has resulted in much confusion in the law of land use regulation. While Holmes' "takings" analysis was readily accepted by the courts, his failure to lay down a clear test to determine when a taking had occurred only added to the confusion. For the following fifty years or more, the courts struggled to develop some coherent standards to determine how far regulation could go before it would amount to a taking. The issue of remedies was not to arise until the late 1970's.[55]

IV. THE SEARCH FOR "TAKING" CRITERIA

The task of formulating some coherent standards for evaluating the validity of regulation under the newly recognized "takings" analysis proved to be difficult, if not impossible. While commentators have developed several theories defining the fifth amendment limitations on state regulation,[56] most of which have found some judicial support, no single theory has emerged to provide definitive guidance to the regulating bodies. And while much effort and ink has been spent developing these "new" theories, none of them seems to do much more than restate one of the three prongs of the *Lawton* test for substantive due process.[57] A brief survey of the most popular of these theories will illustrate the point.

54. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (confiscation of owner's yacht used by a lessee to illegally transport drugs); Miller v. Schoene, 276 U.S. 272 (1828) (destruction of plaintiff's cedar trees to protect apple industry); Steele v. City of Houston, 603 S.W.2d 786 (Tex. 1980) (razing of owner's house in order to capture escaped prisoners).

55. *San Diego Gas and Electric*, 450 U.S. 621; *Agins*, 447 U.S. 255.

56. Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U.L. REV. 165 (1974); Callies, *Property Rights: Are There Any Left?*, 20 URB. 597 (1988); Johnson, *Compensation for Invalid Land-use Regulations*, 15 GA. L. REV. 559 (1981); Large, *The Supreme Court and the Takings Clause: The Search for a Better Rule*, 18 ENVTL. L. 3 (1987).

57. *See*, Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980).

Economic Loss Theory. This theory developed directly from Holmes' "diminution of value" language in *Penn Coal* and focuses on the economic loss suffered as the result of a land use regulation to determine whether a taking has occurred. In practical application, the courts are divided on how much value must be lost before a taking occurs. While some courts have held that any significant diminution in value is sufficient to find a taking,[58] the majority will find a taking only when a regulation denies a landowner any "reasonable" or "viable" use of his land.[59] References to reasonableness or viability of the remaining use do nothing to lessen the ambiguity of the economic loss theory.

Courts have also had trouble agreeing about what property is to be considered when applying a diminution of value test. In *Penn Coal,* Holmes considered the estate in the support of the surface to be the property affected by operation of the Act.[60] By defining the Company's interest this way, the effect of the Act was a total diminution in value. Brandeis saw the relevant property as being the Company's total interest in the land, an estate in both the subsurface minerals and the support of the surface.[61] Viewed this way, the impact of the Act was much smaller.

Whatever approach is taken to resolve these problems in the application of an economic loss theory, the courts rarely consider economic losses without reference to the purposes of the offending regulation. In any event, consideration of the property owner's economic losses is essentially identical to the third prong of the *Lawton* test, which requires that any exercise of the police power be not overly burdensome on individual interests. One can surely say that when a regulation leaves an owner with no reasonable use for her property, the end does not justify the means.

58. Galt v. Cook County, 405 Ill. 396, 91 N.E.2d 395 (1950); Alsensas v. Brecksville, 29 Ohio App. 2d 255, 281 N.E.2d 21 (App. Ct. 1972).

59. Krause v. City of Royal Oak, 11 Mich. App. 183, 160 N.W.2d 769 (App. Ct. 1968); Stevens v. Town of Huntington, 20 N.Y.2d 352, 229 N.E.2d 591, 283 N.Y.S.2d 16 (1967).

60. *Penn Coal,* 260 U.S. at 414.

61. *Id.* at 419-20 (Brandeis dissenting). The "whole property" rule was later adopted by the court in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). A more recent example of the application of this view of the relevant property is *Keystone Bituminous Coal,* 480 U.S. 470, in which the Court sustained the validity of an act substantially identical to that struck down in *Penn Coal.*

Enterprise-Arbitration Theory. This theory was proposed by Professor Joseph Sax in his article, *Taking and the Police Power*.[62] He suggested the following rule to determine when regulation would amount to taking:

> [W]hen economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required; it is that result which is to be characterized as a taking. But losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a non-compensable exercise of the police power.[63]

An ordinance severely restricting land uses near a municipal airport would then be characterized as a taking since it is designed primarily to benefit a government activity. A prohibition on industrial uses in a residential area, having as its goal the elimination of private disputes, would not be considered a taking.

Sax's theory works well when considering regulations which fall clearly into one class of government activities or the other. Unfortunately, it is often unclear whether the government is acting in its enterprise capacity or its capacity as an arbiter when it regulates land uses. How, for example, should one characterize an open space regulation?

However one addresses this sort of problem, the focus of this theory of taking is on the purpose of the government action. When the purpose is improper (here, that is, to benefit an enterprise activity of the government), the action is characterized as a taking. How is this different from the first prong of the *Lawton* test which asks whether an exercise of the police power advances a legitimate public purpose, or, in other words, if the end is a proper one?

Harm-Benefit Theory. The harm-benefit theory has a long history predating the *Penn Coal* decision.[64] The theory has been interpreted by several commentators[65] and has been adopted in vari-

62. 74 YALE L.J. 36 (1964).

63. *Id.* at 63.

64. This theory was first articulated in a textbook written at the turn of the century by Professor Ernst Freund, who said, "[i]t may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful." E. FREUND, THE POLICE POWER at 546-47 (1904).

65. *See, e.g.*, A. Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650 (1958); J. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

ous forms by the courts.[66] Like the enterprise-arbitration theory, the harm-benefit theory focuses on the purpose of government action. Regulations enacted for the purpose of preventing harm to private owners, particularly that caused by "noxious uses," would be upheld while those which confer a public benefit would be found invalid. Comprehensive zoning ordinances, for example, would be valid since their goal is to prevent harm to landowners caused by mixing incompatible uses.[67] Examples of regulations that primarily confer a public benefit might include historic preservation or open space zoning.[68]

Closely related to the harm-benefit theory of takings is the notion of "average reciprocity of advantage," a phrase coined by Holmes in his *Penn Coal* opinion.[69] The idea is that landowners burdened by a particular regulation may also enjoy the benefits the regulation is enacted to achieve. Courts following this idea hold that a taking does not occur if the regulation at issue confers an average reciprocity of advantage. Thus in *Keystone Bituminous Coal Association v. DeBenedictis*,[70] the Court noted that its

> hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of "reciprocity of advantage" that Justice Holmes referred to in *Pennsylvania Coal.* . . . While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.[71]

Like the enterprise theory discussed above, the harm-benefits theory looks to the legitimacy of a regulation's purpose. As such it may be viewed as merely an extension of the first prong of the *Lawton* test, an additional example of proper and improper ends.

66. Cases decided under this theory are often referred to as "noxious use" cases. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915); Goldblatt v. Hempstead, 369 U.S. 590 (1962).

67. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)(upholding the validity of a comprehensive zoning ordinance which prohibited the landowners' proposed commercial use, thereby reducing the land's value by 75%).

68. Yet, both of these purposes have been upheld by the Supreme Court. Berman v. Parker, 348 U.S. 26 (1954) & *Penn Central Transportation Co.*, 438 U.S. 104 (aesthetic regulation); *Agins*, 447 U.S. 255 (open space regulation). *See generally* Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491, 499-506 (1981)(discussion of proper public purposes).

69. *Penn Coal*, 260 U.S. at 415 (1922).

70. 480 U.S. 470 (1987).

71. *Id.* at 491 (citations omitted).

Nexus Theory. Under this theory a regulation may effect a taking, even though its purpose is proper, if it is not reasonably calculated to achieve that purpose. The Court first suggested this limitation in *Nectow v. Cambridge*, when it held a zoning classification invalid as applied, because it failed to substantially advance legitimate state interests.[72]

As Brennan stated in *Penn Central Transportation Co. v. New York City*, "a use restriction. . .may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose."[73]

While there is some disagreement as to how closely related the regulation must be to its purpose,[74] the focus under this theory is essentially the same as that of the second prong of *Lawton* test, which requires that an exercise of the police power be "reasonably necessary for the accomplishment of [its] purpose. . . ."[75] In *Nollan v. California Coastal Commission*, however, Scalia argues that substantive due process requires only a "reasonable" rela-

72. 277 U.S. 183, 188 (1928).

73. 438 U.S. 104, 127 (1978) (by implication from Goldblatt v. Hempstead, 369 U.S. 590 (1962)).

74. In *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141 (1987), Justice Scalia, writing for the majority, argues that standards for determining "what type of connection between the regulation and the state interest satisf[y] the [takings] requirement that the former 'substantially advance' the latter" are not the same as those applied to due process or equal protection claims. *Nollan*, 483 U.S. at 834-35 n.3, 107 S.Ct. at 3147 n.3. Citing the Court's opinion in *Agins*, he argues that in takings cases "[w]e have required that the regulation '*substantially* advance' the 'legitimate state interest' sought to be achieved," not merely that the State "*could rationally have decided* the measure adopted might achieve the State's objective." *Id.*

Justice Brennan disagreed that the standard in takings cases was different. In response to Scalia's comments, Brennan argued that

> . . .our standard for reviewing the threshold question whether an exercise of the police power is legitimate is a uniform one. As we stated over 25 years ago in addressing a takings challenge to government regulation:
>
> > 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 in *Lawton v. Steele* is still valid today: '. . . [I]t must appear, first, that the interests of the public . . . require [government] interference; and, second, that the means are reasonable necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.' Even this rule is not applied with strict precision, for this Court has often said that 'debatable questions as to reasonableness are not for the courts but for the legislature. . . .

Nollan, 483 U.S. at 843-44 n.1, 107 S.Ct. at 3151 n.1 . (Brennan, J., dissenting) (citations omitted).

75. *Lawton*, 152 U.S. at 137 (1894). As Brennan points out in his dissent in *Nollan*, this rule has not been applied with strict precision. 483 U.S. at 843-44 n.1.

tionship, while a takings analysis requires a "substantial" relationship.[76] Yet, if the threshold is higher under *Nollan*'s nexus test, it seems clear that any regulation that would fail under a substantive due process analysis would necessarily amount to a taking according to *Nollan*.

Balancing Theory. Under this theory the validity of a regulation is tested by weighing the burdens imposed on individuals against the public purposes it serves. When private harm exceeds public benefit a taking is found. The test assumes that a system of regulations in which social gains outweigh private burdens is inherently fair. There are, however, those who would question that assumption.[77]

As some commentators have noted,[78] this test mirrors the traditional test of substantive due process established by the *Lawton* case.[79] This apparent inability of the Court to develop a takings test distinct from the traditional due process analysis was not much of a problem so long as the remedy provided under either approach was invalidation of the offending regulation. In fact, this doctrinal blurring seems to have gone unnoticed before the issue of remedies was first raised in *Agins v. City of Tiburon.*[80]

V. Wrestling with the Remedies Issue

It was only a matter of time before someone decided that if an excessive land use regulation could amount to a taking, then just compensation under the fifth amendment ought to be paid. The Supreme Court first faced the question of compensation with the *Agins* case.[81]

76. *Nollan*, 483 U.S. at 834-35 n.3.

77. *See, e.g.*, Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967).

78. *See, e.g.*, D. Mandelker, Land Use Law, § 2.11 (1988); Humbach, *Constitutional Limits on the Power to Take Private Property: Public Purpose and Public Use*, 66 Or. L. Rev. 547 (1988).

79. *See supra* text accompanying note 49.

80. 447 U.S. 255 (1980). For a discussion of the blurring between substantive due process and eminent domain *see* Stoebuck, *Police Power, Takings, and Due Process*, 37 Wash. & Lee L. Rev. 1057 (1980); Frielich, *Solving the "Taking" Equation: Making the Whole Equal the Sum of Its Parts*, 15 Urb. 447 (1983); *see also* Orion Corporation v. State of Washington, 747 P.2d 1062, 1076-1077.

81. The issue was actually first raised two years earlier in *Penn Central*, where the plaintiff asked for damages in addition to declaratory relief. But, having concluded that the landmark designation did not effect a taking, the Court never addressed the issue of damages. *Penn Central*, 438 U.S. at 119.

Agins came before the Court from California, where the City of Tiburon, in an effort to carry out the mandatory open-space element of its comprehensive plan,[82] enacted new zoning ordinances which placed the plaintiffs' property in a zone restricted to single-family dwellings on large lots. The new ordinances would have permitted the plaintiffs to build between one and five single-family homes on their five acres. Without having sought approval for any plan of development, the plaintiffs brought an action in inverse condemnation against the city claiming that the ordinances "completely destroyed the value of their property."[83]

At the trial level, the court sustained the city's demurrer, finding that the complaint failed to state a cause of action upon which relief could be granted. The California Supreme Court affirmed in an opinion which provides perhaps the most clearly articulated rationale for denying compensation in regulatory taking cases.

In response to the plaintiffs' assertion that, according to *Penn Coal*, an excessive regulation amounts to a taking for which just compensation is due, the California court noted the confusion between the constitutional limitations of due process and of just compensation generated by Holmes' opinion. Despite Holmes' language, the court found it "clear both from context and from the disposition in [*Penn Coal*], however, that the term 'taking' was used solely to indicate the limit by which the acknowledged social goal of land control could be achieved by regulation rather than by eminent domain."[84] The court found that an award of compensation, prior to a determination that the regulation is indeed excessive, is a usurpation of the legislative discretion to exercise its power of eminent domain. Allowing the landowner to recover in inverse condemnation would be to allow the landowner to "transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid"[85] without the consent of the local legislature.

The court was ultimately persuaded by various policy considerations, including the need to preserve legislative control over

82. California requires all local governments which regulate land uses by zoning to adopt a comprehensive plan which must include various elements such as plans for the development of open-space land. CAL. GOV'T CODE § 65302 (West Supp. 1989).

83. Agins v. Tiburon, 24 Cal. 3d 266, 271, 157 Cal. Rptr. 372, 374, 598 P.2d at 27 (1979), *aff'd*, 447 U.S. 255 (1980).

84. *Id.* at 274, 157 Cal. Rptr. at 376, 598 P.2d at 29.

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

land use policy and the desire to avoid "fiscal chaos," that inverse condemnation is an "inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged."[86] In the end, the court found that Tiburon's ordinance did not effect a taking, and so even invalidation was unnecessary.

The Supreme Court affirmed the California court's holding that no taking could be found, particularly when the plaintiffs had not submitted and been denied any plans for development. Having found no taking, the Court believed the issue of remedies was not ripe for review.

The Court ducked the issue again in *San Diego Gas & Electric Co. v. City of San Diego*,[87] another dispute grown out of California's open-space planning requirement. In this case the city placed the gas company's proposed power plant site under an open-space zoning classification which restricted the land to park and recreational uses. The gas company sought damages in inverse condemnation and was awarded $3 million by the trial court. The city's petition for rehearing was denied by the California Court of Appeal, but was granted by the state supreme court, thus vacating the Court of Appeal's decision. Before the hearing, however, the Supreme Court remanded the case to the Court of Appeal for reconsideration in light of the intervening decision of *Agins v. City of Tiburon*. The Court of Appeal then reversed the judgment of the trial court in reliance on *Agins*, holding that the gas company could not recover in inverse condemnation. It did not, however, invalidate either the zoning ordinance or the open-space plan. The California Supreme Court denied further review and the gas company appealed to the U.S. Supreme Court.

After a hearing on the merits of the appellant's claim that *Agins* decision should be overruled, the Court concluded that it lacked jurisdiction because no final judgment of a taking had been made below. But in a dissenting opinion written by Justice Brennan, four members of the Court found not only that the judgment below was final, but that inverse condemnation should be available to landowners for temporary takings resulting from excessive regulation. Relying heavily on the *Penn Coal* opinion, Brennan took the position that the California court's decision in *Agins* "flatly contradicts clear precedents of this Court" which has "frequently

86. *Id.* at 275, 157 Cal. Rptr. at 376, 598 P.2d at 29.
87. 450 U.S. 621 (1981).

found 'takings' outside the context of formal condemnation proceedings. . . ."[88] In his view, a taking is a taking, whether accomplished by regulation or by condemnation: "From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it."[89] Under the rule Brennan proposed, once a taking is found, the government *must* pay compensation for the period of the taking, which, in the case of regulatory takings, begins "on the date the regulation first effected the 'taking,' and end[s] on the date the government entity chooses to rescind or otherwise amend the regulation."[90]

Justice Rehnquist concurred with the Court's holding that it lacked jurisdiction, but stated that he agreed with the dissenters that compensation was constitutionally mandated whenever a taking is found, whether by eminent domain, by physical invasion, or by excessive regulation. It appeared, then, that a majority of the Court was in agreement that compensation was the appropriate remedy for regulatory takings despite the absence of any case holding to that effect. Many state courts took Brennan's dissent, coupled with Rehnquist's concurrence, as a green light to awarding damages under the fifth amendment to aggrieved landowners.[91] Others held to the position that inverse condemnation is not the appropriate remedy, and limited the remedy to invalidation.[92] And while the question of compensation continued to

88. *Id.* at 647-48, 651-52.

89. *Id.* at 652.

90. *Id.* at 658.

91. *E.g.*, Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981) (city's amendment of zoning ordinance constituted inverse condemnation entitling landowners to damages); Scheer v. Township of Evesham, 184 N.J. Super. 11, 445 A.2d 46 (App. Div. 1982) (landowners whose property is temporarily "taken" as a result of certain zoning designations were entitled to the option value of parcel from date of enactment of ordinance); Rippley v. City of Lincoln, 330 N.W.2d 505 (N.D. 1983) (city zoning ordinance which deprived landowners of all reasonable use of their property was a taking for which just compensation is required).

92. *E.g.*, Dade County v. National Bulk Carriers, Inc., 450 So. 2d 213 (Fla. 1984); Johnson v. Chatham County, 167 Ga. App. 283, 306 S.E.2d 310 (1983) (alleged act by county and metropolitan commision of maintaining inacurate zoning map did not in any way cause a taking of plaintiff's property for public use, and thus pliantiff did not have a claim for inverse conidemnation); Van Duyne v. City of Crest Hill, 136 Ill. App. 3d 920, 483 N.E.2d 1307 (1985) (landowners were not entitled to damages for permanent taking of their property based on theory of inverse condemnation, where trial court ruled in favor of landowners in action requesting declaration that city's zoning ordinance was void).

plague the lower courts, the Supreme Court continued to avoid the issue.

In *Williamson County Regional Planning Commission v. Hamilton Bank*,[93] the Court extended the ripeness rule of *Agins*, stating that it could not evaluate the claim for compensation until the plaintiff had exhausted its administrative remedies. This case involved a planning commission's refusal to approve a developer's subdivision plans after the controlling zoning ordinance was amended to decrease the maximum density permitted. The developer had obtained preliminary approval for its development plan prior to the zoning amendment. With preliminary approval, the developer proceeded to expend $3.5 million installing roads, water and sewer facilities and making other improvements. But the planning commission refused to grant final approval of the plan, finding the development would exceed the maximum density permitted under the new zoning ordinance. The trial court awarded compensation, concluding that this retroactive application of the zoning amendment effected a taking. The court of appeals affirmed the award.

In an opinion written by Justice Blackmun, the Supreme Court reversed and remanded, stating that the claim for compensation was not ripe for review until the plaintiff has sought and been denied variances from the offending zoning and subdivision ordinances. Until that time, the administrative agency has not arrived at a "final, definitive position" as to how the regulations affect the plaintiff's land and so the courts have no basis for evaluating the taking claim. One year later, in *McDonald, Sommer & Frates v. Yolo County*,[94] the Court again invoked the ripeness rule, avoiding once more any resolution of the compensation issue.

VI. First English Revisited

The Court finally disposed of the compensation issue with its holding in the *First English* case, following to a large degree Brennan's dissent in *San Diego Gas*. The Court found not only that damages are available for regulatory takings, but that due to the self-executing nature of the fifth amendment, compensation is mandatory once a taking is found. The Court not only found that

93. 473 U.S. 172 (1985). For a thorough discussion of this case *see* Smith, *The Hamilton Bank Decision: Regulatory Inverse Condemnation Claims Encounter Some New Obstacles*, 29 J. Urb. & Contemp. L. 3 (1985).

94. 477 U.S. 340 (1986).

invalidation was an inadequate remedy, but by overruling the California court's holding in *Agins*, it clearly rejected the notion that a taking cannot be found prior to a determination that the regulation in question exceeds constitutional limits. The California court in *Agins* had found that the power to take property for public purposes rests solely in the legislative body and requires a legislative intent to take. When the legislature enacts a regulation, its intent clearly is not to take property. Only when the legislature chooses to enforce a regulation after it has been found to be constitutionally invalid can it be said there is an intent to take. At that point, according to the California court, damages under the fifth amendment begin to accrue.

The Court in *First English* focused on the affected landowner rather than on the intent of the legislature to determine when a taking begins and indicated that compensation must be paid for the period beginning at the time the offending regulation effected a taking and ending when the government chooses to rescind or otherwise amend the regulation.[95] From the landowner's point of view, a regulation effects a taking when it is enacted or otherwise becomes effective. The government, then, is liable for those losses suffered prior to a judicial determination that the regulation, presumably adopted in good faith, is in effect a taking.

On the other hand, the Court implied that the government would not be liable for losses suffered due to "normal delays in obtaining building permits, zoning changes, variances, and the like."[96] As was noted above,[97] the Court appears to have said that the government will be held harmless for damages resulting from delays in processes over which it does have control, but will be held liable for those resulting from delays in adjudication, a process over which it has no control. Furthermore, the holdings in *Hamilton Bank* and *McDonald* will only lengthen the delays in the judicial process by requiring an aggrieved landowner to pursue every other possible avenue of relief before proceeding with a claim under the fifth amendment. This result seems particularly

95. This language is actually taken from Brennan's dissent in *San Diego Gas & Electric*, 450 U.S. at 653. The opinion in *First English* does not define the period for which compensation must be paid. Nevertheless, because Rehnquist in effect adopted Brennan's dissenting opinion in *San Diego Gas & Electric*, it seems safe to assume that this is how the Court would define the period of the temporary taking.

96. *First English*, 482 U.S. at 321.

97. *See supra* text accompanying notes 32-33.

unfair since the governing bodies have received no guidance from the Court as to when their regulations may be found to amount to takings, and thus how to avoid liability.

Justice Stevens noted the problems created by the majority when it distinguished these two types of delays, and suggested that delays in the process of litigation should be considered "just as 'normal' as an administrative [delay]. . . ."[98] This is essentially the position taken by the California court in *Agins*, which therefore concluded that invalidation was an adequate remedy, since prior to such a judicial determination a taking cannot be found to have occurred. Once a regulation is declared invalid, the government may then choose either to leave it in force and pay permanent damages (essentially an exercise of eminent domain) or to repeal the regulation. If the government chooses to pay damages, then the landowner is fully compensated for any losses suffered. If it repeals the regulation, then the landowner is in the same position she would have been had she sought and been granted a variance except that it may have taken longer to obtain the judicial relief after exhausting administrative remedies. It is the losses suffered during this additional delay that the Court now holds are compensable.

Surely the 'property' lost by the landowner pending an administrative decision to grant a variance is no different in kind from that lost pending a judicial determination of taking. The only thing distinguishing these two landowners is the *quantum* of their loss. But, once a taking has been found, the courts *must* award compensation, however great or small the loss.[99] How, then, can this unequal treatment be justified?

VII. Constitutional Rights as Property

First, one must ask if a landowner denied administrative relief, who then obtains a judgment that the government's regulation amounts to a takings, has been deprived of something that the landowner who is granted administrative relief has not. As we began to see in the discussion of "takings criteria" above, there seems to be little, if anything, distinguishing the various "takings" tests from the traditional test for substantive due process. If the tests are substantially identical, then we can say that the land-

98. *First English*, 482 U.S. at 334-35 (Stevens, J., dissenting).

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

owner who obtains a favorable judgment on the question of "taking," has been deprived of her right to substantive due process under the fourteenth amendment. Is the same not true of the landowner who does obtain administrative relief?

One cannot say that a government act violates the due process clause, or any other constitutional standard, until the government has acted. According to *Hamilton Bank*, the government's action is not complete "until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulation at issue to the particular land in question."[100] To further support this position, Justice Stevens, in his concurring opinion, went on to say:

> The Due Process Clause of the Fourteenth Amendment requires a State to employ fair procedures in the administration and enforcement of all kinds of regulations. It does not, however, impose the utopian requirement that enforcement action may not impose any cost upon the citizen unless the government's position is completely vindicated. We must presume that regulatory bodies . . . 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 by-product of every such dispute as a "taking" of private property.[101]

Thus, unless one claims that the process of obtaining administrative relief itself is unfair, one cannot claim to have been deprived of any constitutional rights until the process is complete. Therefore, the landowner who successfully pursues an administrative remedy cannot claim to have been deprived of her right to substantive due process.

Now we can distinguish the loss suffered by the landowner who must pursue a judicial remedy from that of the landowner who obtains administrative relief, and thus justify the decision in *First English* to compensate the former but not the latter. But the compensation must be for the loss of a constitutional right, not for the loss of the use of land. As we have already noted, the lost land use interests of each are indistinguishable in kind. And since the

100. Hamilton Bank, 473 U.S. at 191.
101. *Id.* at 205.

remedy mandated by *First English* is compensation under the fifth amendment for the taking of property, it appears that the Court has created a property interest in the constitutional right to substantive due process.

While damages for the deprivation of constitutional rights may be available under § 1983,[102] the remedy is not automatic and many potential defendants enjoy some form of immunity, particularly when they are acting in good faith.[103] If, however, compensable property interests are created in constitutional rights, not only is government liability automatic, due to the "self-executing character of the constitutional provision with respect to compensation . . .,"[104] but good faith becomes irrelevant. The financial impact on municipalities could be devastating. As Justice Stevens suggests in his dissent in *First English*, cautious local officials may simply decline to regulate, "even perhaps in the health and safety area", rather than risk taking any action that may later be found to amount to a taking and hence result in financial liability.[105]

Whether the property taken is an interest in land, a contract right, or a constitutional right, the fifth amendment requires, in addition to the payment of just compensation, that the property be taken "for public use." Even when the government initiates a condemnation action and is ready to pay just compensation, it cannot take property for purposes which are not sufficiently public. As the Court has often said, the fifth amendment is "designed to bar Government from forcing some people alone to bear *public* burdens which, in all fairness and justice, should be borne by the

102. 42 U.S.C. § 1983 (1982) states:

> 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 injured in an action at law, suit in equity, or other proper proceeding for redress.

For a further discussion of the applicability of § 1983 to regulatory takings, *see* TAKINGS, SECTION 1983 AND LAND USE DISPUTES (Freilich & Carlisle, eds. 1988); Bley, *Use of the Civil Rights Act to Recover Damages for Undue Interference with the Use of Land*, 1985 INST. ON PLAN., ZONING & EMINENT DOMAIN, ch. 7; Johnson, *Compensation for Invalid Land-Use Regulations*, 15 GA. L. REV. 559 (1981).

103. *See generally* MANDELKER, LAND USE LAW §§ 8.25-8.36.

104. *First English*, 482 U.S. at 315 (quoting United States v. Clarke, 445 U.S. 253, 257 (1980)).

105. *Id.* at 340-41 (Stevens, J., dissenting).

public as a whole."[106] Surely the deprivation of a constitutional right cannot be considered a *public* burden which, "in all fairness and justice," should be automatically borne by the public as a whole.

An award of compensation under the fifth amendment necessarily implies that the underlying government action is otherwise legitimate. The *First English* opinion indicated that regulations which amount to takings would be valid but for the lack of just compensation paid. Yet, quite often the purposes sought to be achieved by way of governmental regulation could not be achieved even by an outright exercise of the government's power of eminent domain.[107] One must wonder whether, "in all fairness and justice," the public as a whole should bear the burden of paying for losses suffered as the result of regulations declared unconstitutional for want of legitimate public purpose.

This interpretation of *First English* is clearly contrary to Rehnquist's statement in the opinion itself that the fifth amendment "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."[108] The Court is obviously avoiding the question of how the courts are to determine when a regulation amounts to a taking. Nevertheless, it seems clear that a regulation's validity is not to be tested under the fifth amendment. A regulation must, therefore, first pass muster under the fourteenth amendment's requirements of procedural and substantive due process before compensation for a taking becomes an issue. As we've already noted, however, the very facts which have led the courts to characterize a regulation as a taking should likewise support a finding of invalidity for want of due process.

VIII. LOWER COURTS' INTERPRETATIONS OF FIRST ENGLISH

However we as commentators may interpret the *First English* decision, the true test of its meaning lies with the lower courts' decisions following it. In his *First English* dissent, Justice Stevens was certain that the majority's decision would generate an explosion of unproductive litigation which would "undoubtedly have a sig-

106. *Id.* at 318-19 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)) (emphasis added).

107. Arguably, *Nollan* fits this description.

108. *First English*, 482 U.S. at 315.

nificant adverse impact on the land-use regulatory process."[109] With the potential for large damage awards against regulating authorities,[110] many have predicted that a high court decision favoring inverse condemnation actions for excessive regulation would have disastrous effects on land use planning, environmental protection, growth control, and historic preservation.[111]

It was not at all clear how broadly applicable the Court's opinion was intended to be in light of Rehnquist's limited holding (i.e., a challenge to a regulation as depriving the owners of *all reasonable use*).[112] Any doubt as to the Court's intentions was removed only weeks later when it decided the *Nollan* case. The owners in that case were not claiming a deprivation of all reasonable use, only that the commission's exaction was not reasonably necessary to its purpose. The Court, nevertheless, found a taking and remanded the case for a determination of the compensation due.[113] Looking at the two cases together, it seems clear that the Court intended compensation to be mandatory whenever a regulation is found, for whatever reason, to exceed constitutional bounds. Thus, the fears expressed by Stevens and others seemed well founded. Fortunately, most of their predictions have not played out, at least not as of yet.

Since June of 1987, when *First English* and *Nollan* were decided, a total of 111 state and federal cases dealing with land use regulatory takings have been reported.[114] While this is not an insignifi-

109. *Id.* at 322 (Stevens, J., dissenting).

110. The day after the decision was published, the *New York Times* quoted the spokesman for a group of property owners as saying the decision "means the state owes us hundreds of millions of dollars, perhaps more than a billion." N.Y. Times, June 10, 1987, at A1, col. 6.

111. Justice Stevens punctuated his dissenting opinion in *First English* by expressing his fear that "much important regulation will never be enacted, even perhaps in the health and safety area." *First English*, 482 U.S. at 340-41. *See also* Freilich, *Solving the "Taking" Equation: Making the Whole Equal the Sum of Its Parts*, 15 URB. 447 (1983); Geraci & Nabozny-Younger, *Damages for a Temporary Regulatory Taking: First English Evangelical Lutheran Church v. County of Los Angeles*, 24 CAL. W.L. REV. 33 (1988); Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approachs*, 39 HASTINGS L.J. 335 (1988); Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980).

112. *First English*, 482 U.S. at 321.

113. The Nollans ultimately settled with the California Coastal Commission for the payment of their attorney's fees. (Phone conversation with Asst. Atty General Andrea Sheridan Ordin on February 15, 1989)

114. Lexis search of all cases, state and federal, retrieved as of October 1, 1989, using "regulat! w/15 tak! w/15 compensat! or damages" and pulling all cases citing to either *First English* or *Nollan*.

cant number of cases, it hardly represents an explosion of litigation. Surprisingly few of the cases were brought under the fifth amendment for just compensation; fifty-two were brought for declaratory judgment, twenty-eight were brought for damages under § 1983, and only thirty-one were brought in inverse condemnation. Of these cases, sixty-two were decided on their merits; the others were either dismissed on various procedural grounds or remanded to determine if a taking had occurred. Takings were found in only fourteen of the sixty-two cases decided on their merits: five federal cases and nine state cases. Among these fourteen cases, damages under the fifth amendment were awarded in only two cases: one federal and one state.

The first of the two cases in which damages were awarded under the fifth amendment, *Yuba Natural Resources, Inc. v. United States*,[115] involved a title dispute between the plaintiff and the government as to mining rights under land owned by the government. The plaintiff, Yuba, had been mining under the property since the turn of the century. In 1976, Yuba received a letter from the Army Corps of Engineers claiming that the mineral rights belonged to the government and that Yuba was prohibited from taking the minerals from the land. Yuba then brought a quiet title action, which it later won in 1981. It then brought this action for compensation for the six-year taking of its right to mine. The court found that the government had temporarily taken the plaintiff's mining rights and awarded compensation measured by plaintiff's lost profits. The fact that the government claimed title to the property involved certainly takes this case out of the mainstream of regulatory takings cases. The government's exercise of dominion over the mining rights brings the case into the category of true condemnations where awarding compensation has never been at issue.

The second case in which compensation was awarded, *Dept. of Agriculture v. Mid-Florida Growers*,[116] is nearly identical in its facts to *Miller v. Schoene*,[117] where no taking was found. In this case the state destroyed the plaintiff's orange trees to prevent the spread of citrus canker. The Florida Supreme Court held that compensation was required when the state, pursuant to its police power, destroyed *healthy* trees. The case may be distinguished from

115. 821 F.2d 638 (Fed. Cir. 1987).
116. 521 So. 2d 101 (Fla. 1988), *cert. denied*, 109 S.Ct. 180 (1988).
117. 276 U.S. 272 (1928). *See supra* text accompanying note 45.

Miller in that there was proof that the plaintiff's trees did not have citrus canker, and thus their destruction could not have promoted the legitimate public purpose of preventing the spread of the disease. Furthermore, the state's action was permanent and irreversible, and thus invalidation of the regulation as applied to this plaintiff would have provided no remedy.

There were twelve other cases in which a taking was found but damages under the fifth amendment were not awarded. In three of them damages were awarded under § 1983.[118] In another the court awarded damages under the state's constitution.[119] The other eight resulted in declaratory judgments only or declaratory judgment coupled with affirmative relief.[120] These eight cases run contrary to the Supreme Court's finding that the fifth amendment *mandates* the award of just compensation whenever a taking is found. If the payment of just compensation is a "self-executing" remedy under the fifth amendment, does the fact that the plaintiff only asked for declaratory relief relieve the courts of the obligation to award compensation?

Given the difficulty of measuring damages for temporary regulatory takings,[121] it is not surprising that the courts would be reluctant to characterize any regulation as a taking. The easy way out of the *First English* mandate is simply to declare the offending regulation to be an invalid exercise of the police power and avoid the use of the term "taking" altogether. Without clear guidance as to when regulations do amount to takings, the courts have been free to do exactly that, and apparently have. Only in the most extreme cases when there is a total, irreversible deprivation

118. Herrington v. County of Sonoma, 834 F.2d 1488 (9th Cir. 1987), *cert. denied*, 109 S.Ct. 1557 (1989); Wheeler v. City of Pleasant Grove, 833 F.2d 267 (11th Cir. 1987); Front Royal & Warren Cty. Ind. Park v. Front Royal, 708 F. Supp. 1477 (W.D.Va. 1989).

119. Poirier v. Grand Bland Tp., 423 N.W.2d 351 (Mich. App. 1988).

120. Georgia Outdoor Advertising v. City of Waynesville, 690 F. Supp. 452 (W.D.N.C. 1988) (city enjoined from enforcing ordinance unless compensation paid); The Mill v. State Department of Health, 1989 Colo. App. LEXIS 234 (remanded for further proceedings in condemnation); Builders Service v. Planning & Zoning Comm'n, 545 A.2d 530 (Conn. 1988) (city given 120 days to amend ordinance); Bevan v. Township of Brandon, 440 N.W.2d 31 (Mich. App. 1989)(injunction granted and attorneys fees awarded); Seawall Associates v. City of New York, 542 N.E.2d 1059 (N.Y. 1989) (permanent injunction granted); Karches v. City of Cincinnati, 526 N.E.2d 1350 (Ohio 1988) (trial court held zoning was valid and only that issue was appealed); Allingham v. City of Seattle, 749 P.2d 160 (Wash. 1988) (no damages sought); Otte v. State, Dept. of Natural Resources, 418 N.W.2d 16 (Wis. App. 1987) (state's order to maintain a ditch set aside).

121. *See* text accompanying notes 34-35 *supra*.

of all use do the courts seem willing to characterize an excessive regulation as a taking.

IX. CONCLUSION

For fifty years following Holmes' opinion in the *Penn Coal* case the courts have struggled fruitlessly to establish clear standards for determining when excessive regulation becomes a taking. Without resolving that issue, the courts have spent the past decade wrestling with the question of whether just compensation is due in the event of a "regulatory taking." The Supreme Court's decision of *First English* has finally laid that question to rest. But in holding that compensation is mandated whenever property is taken, by whatever means, whether temporarily or permanently, the Court leaves us with the question of what property is it for which compensation is to be paid. By refusing to find takings prior to the granting of variances, zoning amendments, or other administrative remedies, one must logically conclude that the plaintiff who succeeds in an inverse condemnation action is being compensated for the deprivation of her constitutional right to substantive due process and not for the temporary loss of the use of her land. The lower courts have clearly rejected the idea of elevating a constitutional right to the status of property for fifth amendment purposes. The financial implications of accepting such an idea are indeed frightening. The effect of the *First English* decision has been to refocus the courts' energies on the task of defining "regulatory takings." The result so far has been a more conservative use of the term "taking" when the courts are reviewing excessive exercises of the police power and a more liberal use of the *Lawton* standards for substantive due process.