Nebraska Law Review

Volume 67 | Issue 2 Article 8

1988

Inverse Condemnation and Compensatory Relief for Temporary Regulatory Takings: *First English Evangelical Lutheran Church v. Los Angeles County*, 107 S. Ct. 2378 (1987)

Joseph C. Vitek
University of Nebraska College of Law, jcvitek@ymail.com

Note

Inverse Condemnation and Compensatory Relief for Temporary Regulatory Takings

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

TABLE OF CONTENTS

I. INTRODUCTION

The fifth amendment to the United States Constitution, in pertinent part, provides that "private property [shall not] be taken for public use, without just compensation."[1] The Supreme Court has consistently held regulations which are so onerous as to deprive an owner of all beneficial use of his property amount to a taking within the language of the fifth amendment.[2] The Court has also concluded that when government has only temporarily exercised its right to use private property, compensation is constitutionally required for the

1. U.S. CONST. amend V.
2. *See, e.g.*, Bowen v. Gilliard, 107 S. Ct. 3008 (1987); Hodel v. Irving, 107 S. Ct. 2076 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987);

time of the government's interference.[3] However, the Court left undecided "whether abandonment by the government requires payment for the period of time during which regulations deny a landowner all use of his land."[4]

The Court confronted this question in *First English Evangelical Lutheran Church v. Los Angeles County*.[5] In this case, the Court, in a decision authored by Chief Justice Rehnquist, concluded that when the governmental entity's actions have effected a taking of all beneficial use of private 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."[6] Thus, the Court in *First English Church* allowed a landowner whose property was affected by a zoning ordinance to maintain a cause of action for monetary damages in inverse condemnation even though the regulation was only temporary. According to the Court, invalidation of the ordinance, unaccompanied by compensation, is a constitutionally infirm remedy.

This Note will examine the Supreme Court's holding on this controversial issue. First, the Note will discuss the prior judicial decisions concerning temporary regulatory takings and their impact upon the initial resolution of the present case. Second, the posture of First English Church's inverse condemnation claim will be examined, including a discussion of whether the claim was ripe for adjudication. This discussion will briefly contrast the pleading defects in the previous cases reviewed on the remedies question with First English Church's claim. Third, the Note will analyze the rationale underlying the Court's holding on the just compensation requirement. This analysis will begin with an examination of the striking similarity between regulatory takings and other takings. The just compensation analysis necessarily will include an examination of the reasoning, or lack thereof, for the invalidation remedy as the sole remedy for aggrieved landowners. Implicit

---

Kaiser Aetna v. United States, 444 U.S. 164 (1979); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

In determining whether governmental regulation of property constitutes a "taking," the Court has primarily relied on *ad hoc* factual inquiries into the particular circumstances of each case. Three significant factors are examined: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Id.* at 124.

In contrast, however, the Court has applied a *per se* rule of unconstitutionality in cases in which the regulation required the claimant to suffer physical occupation of a portion of his property by a third party. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982).

3. *See, e.g.*, United States v. Petty Motor Co., 327 U.S. 372 (1946).
4. First English Evangelical Lutheran Church v. Los Angeles County, 107 S. Ct. 2378, 2387 (1987).
5. 107 S. Ct. 2378 (1987).
6. *Id.* at 2389.

in this analysis will be the arguments advanced for the compensation remedy as the constitutionally prescribed remedy. Finally, the Note will examine the possible ramifications of this decision for land use planning procedure.

II. BACKGROUND CASES

Prior to *First English Church*, in cases involving inverse condemnation,[7] the California courts declared that a government entity's exercise of police power,[8] however arbitrary, could not, as a matter of federal constitutional law, constitute a taking for which compensation was required.[9] Under the rule announced in *Agins v. City of Tiburon*,[10] the proper remedy for an aggrieved landowner whose property has been affected by regulatory action is declaratory relief or, perhaps, mandamus. In the California courts' view, by maintaining an inverse condemnation claim, a landowner could force the legislature to exercise its power of eminent domain.[11] Under this formulation, compensation is not required until the challenged regulation or ordinance has been held excessive in an action for declaratory relief or in an action for a writ of mandamus, and the government has nevertheless decided to continue the regulation or ordinance in its unduly restrictive form.

The California Supreme Court's decision in *Agins*, which emphatically denied any claim seeking monetary relief for an unduly restrictive land use regulation, introduced a high degree of uncertainty into accepted takings jurisprudence. The rule in *Agins* insulates governmental entities from paying compensation to landowners whose property has been confiscated by regulatory fiat. Further, *Agins* draws

7. The term inverse condemnation refers to an action brought by a property owner to obtain just compensation when the state has taken his property but has not instituted formal condemnation proceedings. United States v. Clarke, 445 U.S. 253, 257 (1980). Inverse condemnation differs from eminent domain in that the landowner initiates the action rather than the government. The process is thus the inverse of a formal condemnation proceeding. *Id.*

8. Governmental police power is generally defined as the power to regulate human activity in order to promote public health, saftey, welfare, and morals. Berman v. Parker, 348 U.S. 26, 32 (1954).

9. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 641-42 (1981)(Brennan, J., dissenting); Agins v. City of Tiburon, 24 Cal. 3d 266, 273, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

In *Agins*, the California Supreme Court expressly disapproved Eldridge v. City of Palo Alto, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1979), a court of appeal's decision holding "a valid zoning ordinance may nevertheless operate so oppressively as to amount to a taking, thus giving an aggrieved landowner a right to damages in inverse condemnation." *Id.* at 621, 129 Cal. Rptr. at 579.

10. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

11. *Id.* at 276, 598 P.2d at 30, 157 Cal. Rptr. at 377.

into question whether any form of regulation may effect a taking within the definition of the fifth amendment.

The California approach in *Agins*, however, has become increasingly isolated. Six United States Courts of Appeals,[12] the United States Court of Claims,[13] and six state supreme courts[14] have adopted the reasoning and analysis of Justice Brennan's dissent in *San Diego Gas & Electric Co. v. City of San Diego*.[15] Other jurisdictions have also reached the Brennan conclusion.[16] The Nebraska Supreme Court appears willing to consider compensatory remedies.[17]

The United States Supreme Court had an opportunity to consider the merits of the *Agins* rule in four cases prior to *First English Church*.[18] The Court, although acknowledging "the importance of the question whether a monetary remedy in inverse condemnation is constitutionally required in appropriate cases involving regulatory tak-

12. Bank of America v. Summerland County Water Dist., 767 F.2d 544, 547 (9th Cir. 1985); Nemmers v. City of Dubuque, 764 F.2d 502, 505 n.2 (8th Cir. 1985); United States v. Riverside Bayview Homes, Inc., 729 F.2d 391, 398 (6th Cir. 1984), *rev'd on other grounds*, 474 U.S. 121 (1985); Barbian v. Panagis, 694 F.2d 476, 482 n.5 (7th Cir. 1982); Fountain v. Metropolitan Atlanta Rapid Transit Auth., 678 F.2d 1038, 1043 (11th Cir. 1982); Hernandez v. Lafayette, 643 F.2d 1188, 1199-1200 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

13. Jentgen v. United States, 657 F.2d 1210, 1212 (Cl. Ct. 1981).

14. Corrigan v. City of Scottsdale, 149 Ariz. 538, 541, 720 P.2d 513, 516 (1986); Pratt v. State, 309 N.W.2d 767, 774 (Minn. 1981); Burrows v. City of Keene, 121 N.H. 590, 599, 432 A.2d 15, 20 (1981); Rippley v. City of Lincoln, 330 N.W.2d 505, 510 (N.D. 1983); Annicelli v. Town of S. Kingstown, 463 A.2d 133, 140 (R.I. 1983); Zinn v. State, 112 Wis. 2d 417, 428-29, 334 N.W.2d 67, 72-73 (1983).

15. 450 U.S. 621, 657 (1981)(Brennan, J., dissenting). "[O]nce a court finds that the police power regulation has effected a taking, the government entity must pay just compensation for the period commencing on the date the regulation first effected the taking, and ending on the date the government entity chooses to rescind or otherwise amend the regulation." *Id.* at 658.

16. Hermanson v. Board of County Comm'rs, 595 P.2d 694 (Colo. Ct. App. 1979); Clifton v. Berry, 244 Ga. 78, 259 S.E.2d 35 (1979); Harris Trust & Sav. Bank v. Duggan, 95 Ill. 2d 516, 449 N.E.2d 69 (1983); Osborn v. City of Cedar Rapids, 324 N.W.2d 471 (Iowa 1982); Ventures in Property I v. City of Wichita, 225 Kan. 698, 594 P.2d 671 (1979); Hamilton v. Conservation Comm'n, 12 Mass. App. Ct. 359, 425 N.E.2d 358 (1981); Knight v. City of Billings, 197 Mont. 165, 642 P.2d 141 (1982); Village of Willoughby Hills v. Corrigan, 29 Ohio St. 2d 39, 278 N.E.2d 658 (1972), *cert. denied*, 409 U.S. 919 (1972); Suess Builders Co. v. City of Beaverton, 294 Or. 254, 656 P.2d 306 (1982); City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978).

17. State v. Mayhew Prods. Corp., 204 Neb. 266, 281 N.W.2d 783 (1979). In *Mcyhew*, a state statute prohibited placement of advertising signs along any interstate highway without prior written permission from the Department of Roads. The court stated that an aggrieved sign owner may lawfully require payment of just compensation for the removal of advertising signs erected prior to the statute in a suit for inverse condemnation. *Id.* at 269, 281 N.W.2d at 785.

18. MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980).

ings,"[19] declined the invitation to conclusively decide the issue.[20] Thus, the inconsistent state approaches and the lack of any definitive federal approach inevitably have led to tensions between jurisdictions and further have impinged upon the constitutionally protected rights of landowners.[21]

III. FACTS OF *FIRST ENGLISH CHURCH*

The United States Supreme Court decided *First English Evangelical Lutheran Church v. Los Angeles County*[22] against this backdrop. The case is somewhat atypical of challenges to land use regulations because the case does not involve a large developer corporation. Nearly thirty years ago, First English Evangelical Lutheran Church of Glendale purchased a twenty-one acre tract of land in the Los Angeles National Forest along the banks of the Middle Fork, just outside of Los Angeles, California. The Middle Fork is the natural drainage channel for a watershed owned by the National Forest Service. Over half of First English Church's parcel was flat land with improvements, including a dining hall, two bunkhouses, a caretaker's lodge, an outdoor chapel, and a footbridge across Mill Creek. On this site, First English Church operated a campground, Lutherglen, as a retreat center for parishioners and a recreational area for handicapped children of all denominations.[23]

In the summer of 1977 tragedy struck the campground. A forest

19. MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561, 2565-66 (1986).

20. Yet the Supreme Court, even in opinions in which it failed to reach the merits of *Agins*, appeared willing to require compensation for the interim period that regulation effected a taking. In *San Diego Gas*, Justice Brennan's dissent was joined by Justices Stewart, Marshall, and Powell. Justice Rehnquist, in his concurrence, stated he had "little difficulty in agreeing with much of what [was] said in the dissenting opinion" if he was satisfied the appeal was from a final order. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 633-34 (1981)(Rehnquist, J., concurring). *See also* MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561, 2569 (1986)(White, J., dissenting).

21. The constitutional aspect of land use law was in a state of chaos. For instance, the California court in *Agins* held no damages were available for regulatory takings, while the Ninth Circuit held to the contrary. Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141 (9th Cir. 1983), *cert. denied*, 464 U.S. 847 (1983). In New England, New Hampshire and Rhode Island allow compensatory relief, Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981); Annicelli v. Town of S. Kingstown, 463 A.2d 135 (R.I. 1983), but the First Circuit follows the *Agins* rule, Pamel Corp. v. Puerto Rico Highway Auth., 621 F.2d 33 (1st Cir. 1980).

The commentary is replete with inventive descriptions of the chaotic state of the law. For a brief listing of some of the terms used, see 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 n.31 (1986).

22. 107 S. Ct. 2378 (1987).

23. *Id.* at 2381.

fire denuded the hills upstream from Lutherglen. The fire destroyed approximately 3,860 acres of the watershed area and created a serious flood hazard. A severe storm dropped eleven inches of rain in the watershed area and caused flooding in February 1978. The runoff from the storm overflowed the banks of Mill Creek, flooding Lutherglen and completely obliterating the campground's buildings.[24]

In response to flooding in the canyon, Los Angeles County adopted Interim Ordinance No. 11,855 in January 1979.[25] The ordinance 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."[26] The ordinance included the flat areas on either side of Mill Creek on which Lutherglen had previously stood. Several years later, after more study, the county made this prohibition permanent.[27]

Shortly after the ordinance was enacted, First English Church filed suit in a California trial court against the county and the Los Angeles County Flood Control District. First English Church alleged, *inter alia*, that the ordinance denied First English Church all use of Lutherglen and sought damages in inverse condemnation for the alleged deprivation.[28] In a decision based squarely on *Agins*, the trial court granted the county's motion to strike the allegation that First English Church had been denied all use of Lutherglen, holding "when an ordinance, even a non-zoning ordinance, deprives a person of the total use of his lands, his challenge to the ordinance is by way of declaratory relief or possibly mandamus."[29] Since First English Church alleged a regulatory taking and sought only damages, the allegation was deemed entirely immaterial and irrelevant and was summarily dismissed.[30] Subsequently, First English Church appealed to the United States Supreme Court, alleging the rule in *Agins* violated the fifth and fourteenth amendments.[31]

---

24. *Id.*
25. *Id.*
26. Los Angeles County, Cal., Ordinance 11,855 (Jan., 1979).
27. LOS ANGELES COUNTY, CAL., CODE 22.44.220, 22.44.230 (1979); Los Angeles County, Cal., Ordinance 12,413 (Jan., 1979).
28. The first claim alleged the defendants were liable for dangerous conditions on their upstream properties that contributed to the flooding of Lutherglen and that denied appellants all use of their land. The second claim sought to recover from the flood district in inverse condemnation and in tort for cloud seeding during the storm that flooded Lutherglen. The sole claim preserved on appeal, however, was the inverse condemnation claim. First English Evangelical Lutheran Church v. Los Angeles County, 107 S. Ct. 2378, 2382 (1987).
29. *Id.*
30. The Supreme Court of California denied review. *Id.* at 2383.
31. This Note, however, will focus entirely on the fifth amendment violation.

The United States Supreme Court, in a 6-3 decision,[32] held that, on the facts of the case, the California courts had decided the compensation question inconsistently with the requirements of the fifth amendment. The Chief Justice's opinion reasoned that temporary deprivations of use, if sufficiently exacting as to effect a taking, "are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[33] Thus, the Court held that an aggrieved landowner may recover damages for a regulatory taking even though the taking is only temporary.

IV. ANALYSIS

A. Ripeness for Review

In order to analyze the Court's holding in *First English Church*, the plaintiff's inverse condemnation claim must be examined. The central issue for this inquiry is whether the question of remedies was, in fact, squarely presented.

In four previous cases, the Supreme Court was unable to reach the remedies issue because defects in the pleadings left preliminary questions unresolved or because the appeal was not from a final judgment.[34] Examination of these cases provides useful contrast to highlight the sufficiency of the pleadings in *First English Church*.

First, in *Agins v. City of Tiburon*,[35] the appellant acquired five acres of unimproved land for residential development. The city enacted two ordinances modifying existing zoning requirements, downzoning appellant's property, thereby restricting building to between one and five residential units on the tract of land. The appellants, however, never sought city approval for development of their land. The Court affirmed the holding of the California Supreme Court, stating the land use laws, on their face, did not take the landowner's property without just compensation.[36] The Court concluded the uses permitted on paper were facially reasonable, advancing legitimate state interests. Additionally, the owner was not denied all economically viable use of his land, although it was unclear what uses would eventually be permitted.[37]

In *Williamson County Regional Planning Commission v. Hamil-*

32. Chief Justice Rehnquist delivered the opinion of the Court; Justices Brennan, White, Marshall, Powell, and Scalia joined in the opinion. Justice Stevens wrote a dissenting opinion, in which Justices Blackmun and O'Connor joined.
33. First English Evangelical Lutheran Church v. Los Angeles County, 107 S. Ct. 2378, 2388 (1987).
34. *See supra* note 18 and accompanying text.
35. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980).
36. Agins v. City of Tiburon, 447 U.S. 255, 259 (1980).
37. *Id.* at 261-62.

ton Bank,[38] an owner of a tract of land being developed as a residential subdivision sued the planning commission, alleging application of various zoning laws and regulations to the owner's property amounted to a taking of that property. The Court held that the respondent's claim was not ripe because the owner had not obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property nor utilized the procedures Tennessee provided for obtaining just compensation.[39] The Court noted the respondent had submitted a plat for development of its property, passing beyond the *Agins* threshold. However, the respondent failed to seek variances that might have been granted to make the subdivision viable, notwithstanding the commission's finding that the plat submitted did not comply with the zoning ordinance and subdivision regulations.[40]

Similarly, in *MacDonald, Sommer & Frates v. Yolo County*,[41] a landowner who submitted a tentative subdivision map to the planning commission which subdivided part of the subject property into 159 single-family and multi-family residential lots brought suit seeking declaratory and monetary relief in inverse condemnation. The California Supreme Court affirmed the lower court's demurrer.[42] The Court was unable to reach the merits of the remedies question absent a final and authoritative determination by the planning commission as to how it would apply the regulations at issue to the property in question. The Court could not determine whether a taking had occurred or whether the county failed to pay just compensation.[43]

In *San Diego Gas & Electric Co. v. City of San Diego*,[44] the utility acquired a 412 acre parcel of land as a possible site for a nuclear power plant. The utility sued in inverse condemnation for just compensation when the city downzoned 214 acres of the tract from either an industrial use or an agricultural holding category to an open space designation. The trial court awarded damages but dismissed the mandamus claim and the California Court of Appeal affirmed.[45] The California Supreme Court, however, vacated the Court of Appeal's decision and retransferred the case to the Court of Appeal for reconsideration in light of the intervening decision in *Agins*.[46] On appeal, after subse-

38. 473 U.S. 172 (1985).
39. *Id.* at 186.
40. *Id.* at 187-88.
41. 106 S. Ct. 2561 (1986).
42. *Id.* at 2563.
43. *Id.* at 2568-69.
44. 450 U.S. 621 (1981).
45. *Id.* at 626-27. A jury trial on the question of damages resulted in a judgment for the utility company for over three million dollars. *Id.* at 627.
46. *Id.* at 628. The Court of Appeal on retransfer reversed the judgment of the trial court, relying on *Agins'* holding that a landowner could not recover compensation through inverse condemnation and holding that factual disputes precluded declaratory relief. *Id.* at 629-30.

quent proceedings, the Court concluded, while the Court of Appeal decided monetary compensation was not an appropriate remedy, it was unclear whether any other remedy was available because it had not been decided whether any taking occurred. Thus, the Court held that the appeal was not from a final order and the Court lacked jurisdiction.[47]

These four cases uniformly reflect the Court's insistence on a determinative answer concerning the nature and extent of permitted development before adjudicating the constitutionality of limiting recovery to invalidation of the offending regulation. In the handful of cases decided this decade, pleading defects left unresolved the questions of finality—whether the regulation is a taking or whether the appeal is from a final order.

First English Church's claim, however, was held properly presented and ripe for adjudication on the merits. The county never challenged the sufficiency of First English Church's claim that the ordinance precluded all use of Lutherglen. The county's argument in support of its motion to strike the allegations focused exclusively on the materiality and relevancy of the allegations as pleaded. In affirming the decision to strike the compensation component of the complaint, "the Court of Appeal assumed that the complaint 'sought damages for the uncompensated *taking* of all use of Lutherglen by County Ordinance No. 11,855.' "[48] The court below relied solely on the proposition set forth in *Agins*; the remedy for a taking is limited to declaratory (nonmonetary) relief. Thus, even if the facts as pleaded were true,[49] the Court of Appeal concluded the allegations were entirely immaterial and irrelevant. The rejection of First English Church's claim did not rest on the falsity of the allegation.[50] Therefore, the disposition of the case on these grounds isolated the remedial question for the Court's consideration.[51]

The dissent by Justice Stevens, however, argued that the Court "reached out to address an issue not actually presented in [the] case,"[52] stating the complaint at most assumed, *arguendo*, a constitutional violation had been alleged.[53] The dissent pointed out that the

47. *Id.* at 633; *see also* 28 U.S.C. § 1257 (1982).
48. First English Evangelical Lutheran Church v. Los Angeles County, 107 S. Ct. 2378, 2384 (1987).
49. First English Church's complaint alleged the facts, rather than legal theories, as required by California civil practice. Brief for Appellant at 2 n.3, First English Evangelical Lutheran Church v. Los Angles County, 107 S. Ct. 2378 (1987)(No. 85-1199).
50. First English Evangelical Lutheran Church v. Los Angeles County, 107 S. Ct. 2378, 2384 (1987).
51. *Id.*
52. *Id.* at 2390 (Stevens, J., dissenting).
53. *Id.* at 2391.

Court had the authority to decide the case by holding the complaint did not allege a taking under the United States Constitution, thus avoiding the novel constitutional issue.[54]

The dissent discounted the fact that the California courts relied solely on the *Agins* rationale. The county never alleged the insufficiency of the allegations. Rather, the county assumed such facts were immaterial and irrelevant under *Agins* and could never support an inverse condemnation claim. Thus, the posture of the case preserved the issue of remedial damages on appeal. Since the Court of Appeal assumed a taking occurred because of the flood plain ordinance, the Court was able to finally address the merits of *Agins*—whether compensation for a temporary regulatory taking is constitutionally required under the fifth amendment.[55]

B. The Just Compensation Requirement

Because *First English Church* was ripe for adjudication, the Court finally reached the merits of the *Agins* rule, a rule which had evaded the Court's review for seven years.[56] In order to better understand the Court's analysis of the just compensation requirement for unlawful takings of private property through good faith regulation, several aspects of the Court's treatment of regulatory takings and the just compensation clause must be examined. First, the regulatory takings cases will be analyzed, focusing on the cases' similarity to the physical occupation cases. This analysis will include the requirements for a regulatory taking, the similarity of regulatory takings and the other takings, and the similarity of permanent and temporary takings. Second, the nature and scope of the constitutional proscription requiring just compensation for takings of property will be examined. In this constitutional analysis, the general limitation placed upon government will be highlighted, and the Court's constitutional treatment of state legislation which favors compensation will be discussed. Next, policy considerations supporting compensation will be outlined. Finally, the invalidation remedy and the rationales espoused in *Agins* and its progeny will be critiqued.

1. Physical Occupation, Regulatory, and Temporary Takings

Current takings jurisprudence divides the cases into one of two types: the physical occupation cases, and the regulatory cases. In physical occupation cases, the state physically intrudes upon private prop-

54. *Id.*

55. *See supra* note 1 and accompanying text. The fifth amendment is made applicable to the states by the fourteenth amendment. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980).

56. *See supra* note 18 and accompanying text.

erty either through a direct trespass or by authorizing others to do the prohibited acts. The Court has consistently held such takings compensable.[57] Regulatory takings, on the other hand, refer to any taking of private property through governmental regulation, either by legislative or administrative bodies.[58] The Court has been more reluctant to find that a governmental regulation constitutes a compensable taking.[59]

Despite the different approaches to physical and regulatory takings, the term "taken," as defined by the Supreme Court, seems to apply to both types equally. For instance, in *United States v. General Motors Corp.*,[60] the Court defined the term "taken" as follows:

> [T]he term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.[61]

As "taken" is defined, there is a remarkable similarity between physical occupation cases and regulatory takings.

The leading case addressing regulatory takings is *Pennsylvania Coal Co. v. Mahon*.[62] In *Mahon*, a coal company sold the surface rights to particular parcels of land but expressly reserved the right to extract all the coal beneath the surface. Subsequent to this conveyance, the Pennsylannia legislature enacted the Kohler Act, prohibiting any mining that caused subsidence of any house, unless the house was owned by the owner of the underlying coal and was more than 150 feet from another's improved property. Because the Act made it commercially impracticable to mine the coal, thereby essentially destroying rights the claimant reserved from the surface owner, the Court held the Act constitutionally invalid as effecting a taking without just compensation.[63] Thus, the Court recognized that regulatory takings are compensable in the same manner as physical takings if the regulation goes so far as to deny the owner all economic use of the property. In reaching that decision, the Court stated: "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."[64] Determining whether a taking has occurred is "a question of degree—and therefore cannot

57. *See* United States v. Causby, 328 U.S. 256 (1946).
58. 1 P. NICHOLS, NICHOLS' ON LAW OF EMINENT DOMAIN ¶ 1.42 (3d ed. 1985).
59. *See, e.g.*, Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).
60. 323 U.S. 373 (1945).
61. *Id.* at 378 (footnote omitted).
62. 260 U.S. 393 (1922).
63. *Id.* at 414-15.
64. *Id.* at 415.

be disposed of by general propositions."[65] The *Mahon* Court flatly rejected the possibility that police power regulations could never be cognizable under the fifth amendment.[66]

Under *Mahon*, in conjunction with recent case law,[67] police power restrictions, such as zoning ordinances and other land use regulations, may be so onerous as to destroy the possession, use, or disposition of property as effectively as formal condemnation or physical invasion of the property.[68] It "matter[s] little whether . . . [the property owner's] 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 [the property]."[69]

In *First English Church*, the Court recognized the similarity of regulatory takings to physical occupation cases and held that a temporary taking is compensable under the just compensation clause. The Court relied heavily upon a series of cases arising out of extraordinary events in World War II. In those cases, various agencies of the federal government temporarily confiscated and occupied the plaintiffs' properties. In each of the cases, the Court reviewed the proper compensation for the temporary physical occupation of the property for governmental purposes. In reaching its decision on the amount of compensation due the landowners, the Court stated its fundamental precept: the owners are entitled under the fifth amendment to compensation for the limited, finite period that the government deprived them of their property.[70]

The temporal nature of the taking is not really at issue. The just compensation clause includes no qualification requiring the government to compensate landowners whose property is taken for a public use if such property is confiscated permanently, as opposed to temporarily. Due to the absence of any temporal qualification in the fifth amendment, there can be no constitutional basis for denying an owner compensation for the temporary taking of his property. The temporary nature of the taking does not defeat the takings claim, nor does it

65. *Id.* at 416.

66. *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 650 n.16 (1981)(Brennan, J., dissenting).

67. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 83 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979); Andrus v. Allard, 444 U.S. 51, 65-66 (1979); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

68. *E.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)(the regulation destroyed one of the most essential "sticks in the bundle" of property rights—the right to exclude others).

69. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652 (1981)(Brennan, J., dissenting).

70. *See* Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); *see also* United States v. Petty Motor Co., 327 U.S. 372 (1946).

make the taking any more constitutional.[71] In prior decisions, the Court acknowledged that when government temporarily took use of a building, land, or equipment, the takings clause is triggered and the Court must then determine the appropriate measure of just compensation.[72] In current takings jurisprudence, compensation is designed to restore the aggrieved landowner to the position he would have been in but for the confiscation.[73]

2. *Nature and Scope of the Constitutional Proscription*

The fifth amendment provides, in pertinent part, "private property [shall not] be taken for a public use, without just compensation."[74] Current takings jurisprudence is predicated upon the belief that government may take private property but must condition the act upon the payment of just compensation. Thus, the proscription in the just compensation clause is not against taking property; rather, the clause prohibits taking property without compensating the owner for the loss.

When an action for the taking of private property has been initiated, either by eminent domain or inverse condemnation proceedings,

---

71. There is no hierarchy among incidents, no degrees of ownership. There is a partial taking of property if possession is removed, and use and disposition remain; if use is removed, and possession and disposition remain; or if disposition is removed, and use and possession remain. Nor is there a requirement that the loss of the incident be total; partial losses of single incidents may determine the measure of damages but may not negate the taking.

R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 62 (1985).

72. Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).

73. Olson v. United States, 292 U.S. 246 (1934). "In principle the ideal situation is to leave the individual owner in a position of indifference between the taking by the government and retention of the property." R. EPSTEIN, *supra* note 71, at 182. After all, the clause was designed to bar the government from forcing some individuals to bear burdens that, in all fairness, should be borne by the public as a whole. Armstrong v. United States, 364 U.S. 40, 49 (1960). *See also* Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U.L. REV. 165 (1974); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 HARV. L. REV. 1165, 1171-72, 1226 (1967).

State and lower federal courts may find substantial guidance in the rules for valuation in temporary physical takings in those cases which determine the proper measure of monetary relief for future revocation or amendment of regulations. *E.g.*, Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).

Generally, when the government condemns the property of a private party, the just compensation clause does not require payment of replacement cost rather than fair market value, which prevents the owner from receiving a windfall. United States v. Fifty Acres of Land, 469 U.S. 24, 29 (1984); United States v. 564.54 Acres of Land, 441 U.S. 506, 516-17 (1979). Thus, some of the more conjectural claims for damages by owners whose property has been taken by regulation will similiarly be disallowed due to quantification problems in valuation.

74. U.S. CONST. amend. V.

"the landowner has already suffered a constitutional violation, and the 'self-executing character of the constitutional provision with respect to compensation' is triggered."[75] A principled reading of the clause reveals that once a taking for public use has occurred compensation is constitutionally required. The Court has consistently observed that the just compensation requirement is not precatory. Although arising in various factual and jurisdictional circumstances, the Court's decisions recognize that it is the Constitution itself that dictates the remedy for any interference with private property which constitutes a taking.[76] In *Jacobs v. United States*,[77] the petitioner brought an action to recover compensation when a governmental dam project caused intermittent overflows onto his land, resulting in the creation of a servitude. The Court stated:

> The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment.[78]

Since *Jacobs*, the Court has frequently noted that, in the event of a taking, compensation is grounded in the Constitution itself and not dependent upon the proceeding.[79] The fundamental question in fifth amendment takings cases, after all, is how to fairly distribute the economic costs involved.

Moreover, the Court has consistently held a legislative act is presumed constitutional, not void. The Court has interpreted legislation which would be unconstitutional if it did not provide compensation as requiring compensation. This construction upholds, rather than invalidates, the legislation.[80]

The landmark case for this proposition is *Hurley v. Kincaid*.[81] In *Hurley*, the Court reversed an injunction against a threatened uncompensated taking of property. Justice Brandeis' reasoning coupled the consitutional preference for upholding legislation with the traditional precepts of equity.[82] The sole defect in the government's scheme was its failure to compensate, yet compensation could be procured in an

75. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 654 (1981)(Brennan, J., dissenting).
76. *Id.* at 655 n.21 (Brennan, J., dissenting)(quoting United States v. Dickinson, 331 U.S. 745, 748 (1947)).
77. 290 U.S. 13 (1933).
78. *Id.* at 16.
79. *E.g.*, Kirby Forest Indus. v. United States, 467 U.S. 1, 5 (1984).
80. Brief for Appellant at 20, First English Evangelical Lutheran Church v. Los Angeles County, 107 S. Ct. 2378 (1987)(No. 85-1199).
81. 285 U.S. 95 (1932).
82. *See also* Kanner, *Inverse Condemnation Remedies in an Era of Uncertainity*, 1980 Inst. on Planning, Zoning & Eminent Domain 177, 197-206.

action at law. Injunctive relief was unavailable because an adequate and complete legal remedy existed to cure the taking and the legislation could be upheld if the Court inferred a provision to compensate.

Recently, the Court reaffirmed this line of analysis in two decisions. In *Ruckelhaus v. Monsanto Co.*,[83] the Court stated: "Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking."[84] Thus, the Court concluded that the Tucker Act was an available remedy for any uncompensated taking suffered as a result of governmental regulation.

The second recent decision is *United States v. Riverside Bayview Homes*,[85] which explained the rationale for denying injunctive relief. A unanimous Court said that the maxim against equitable relief rests on the principle that so long as compensation is available for those whose property is taken, the governmental action is not unconstitutional.[86] The Court found there was no justification to curtail the government's program if compensation would be available when a taking occurred. Thus, as a matter of consitutional consideration, the proper remedy for a *prima facie* taking is just compensation.[87]

Besides the unambiguous command of the just compensation clause requiring compensation and the Court's prior holdings that compensation is constitutionally mandated, compensation for a taking is premised upon sound public policy considerations. The long-standing policy to defer to legislative choice whenever possible is the foundation of many decisions on a host of subjects, ranging from urban redevelopment,[88] to railroad bankruptcies,[89] to the Iranian hostage crisis.[90] Because legislative entities must confront a wide variety of issues to promote public interests, only as a last resort should the courts invalidate what the legislature has decided to enact.[91] This position is predicated upon the fundamentals of our three-tiered governmental structure. The delicate balance of power would be upset if the

83. 467 U.S. 986 (1984)(disclosure of trade data for pesticides pursuant to a FIFRA provision).
84. *Id.* at 1016 (footnote omitted).
85. 474 U.S. 121 (1985).
86. *Id.* at 128.
87. This view is supported by analogy to other constitutional contexts. Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 UCLA L. REV. 711, 723 (1982). *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971)(damages remedy for a fourth amendment violation). *See also* Davis v. Passman, 442 U.S. 228 (1979)(fifth amendment for sex discrimination).
88. Berman v. Parker, 348 U.S. 26, 33 (1954).
89. Regional Rail Reorganization Act Cases, 419 U.S. 102, 134 (1974).
90. Dames & Moore v. Regan, 453 U.S. 654, 673 (1981).
91. Berger & Kanner, *supra* note 21, at 708-09.

judiciary felt free to disregard considered legislative enactments and invalidate such judgments routinely, as a matter of first resort.

If invalidation were the sole remedy for regulatory takings, inquiry would result in an all or nothing proposition. Either the government is stopped in its tracks as the representative of the community or the claimant's constitutional rights in private property are seriously jeopardized.[92] Neither choice is acceptable.

Compensatory relief, however, defers to legislative discretion by permitting the legislature to choose the path it deems best. Once a court determines a regulatory taking has occurred, the government has a range of options from which to choose. The legislature can abandon the regulation, amend the regulation, or continue the regulation and pay damages to the aggrieved landowner. Thus, compensatory relief defers to legislative discretion rather than compels legislative action.

3. Critique of the Invalidation Remedy

Invalidation as the only remedy for a regulatory taking is not only constitutionally suspect for the reasons outlined above, but the relief it purports to give is mostly illusory. In our adversarial system, the court renders its opinion after the regulation already has had the effect of taking private property and inflicting economic loss. In First English Church's situation, which is typical, the property has been restricted for a number of years, denying its owner all use of the property in the interim. The practical effect of the county's ordinance was to make Lutherglen the natural drainage channel for the watershed area upstream. Even if the court invalidated the ordinance, First English Church's real damages for the period during which the regulation was in effect are demonstrable and significant. What possible use could a campground and recreational area have been since the flood if construction of any buildings to house the participants was prohibited? The violation that First English Church suffered is not remedied when a court, after lengthy litigation, tells the government to cease and desist its unconstitutional activity. Invalidation merely discontinues the original deprivation. Although the regulation is no longer in effect, the invalidation remedy does not address economic losses suffered during the life of the regulation, even though such losses can be substantial.

Contrary to the California court's fears that an owner could force the legislature's hand, an owner under the compensation remedy only recovers compensation between the time the ordinance effected a taking and the time the ordinance is rescinded. The compensation is limited to the time during which the taking already occurred.

92. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949).

Not only does invalidation as the sole remedy do little for the aggrieved owner, the rule is prone to abuse by the government. Invalidation, after all, only directs the governmental entity to draft a new regulation; the courts do not mandate the governmental entity adopt any particular regulation in its stead. The owner is thus continually at the mercy of the regulator.[93] The regulator's ploy is to change the regulation slightly and invite future litigation under that classification. For example, if the court invalidates a regulation restricting certain property to single-family units, the owner, desirous to use the property for commercial purposes, brings suit. The entity, after an adverse judgment, will immediately rezone the property to a slightly different use and invite the owner to spend another couple of years and thousands of dollars litigating the new classification.[94] Under this system, the only effects of the invalidation decree are skyrocketing litigation costs and squandering judicial time and resources.

Few, if any, property owners can outlast the regulator because time is on the regulator's side. Eventually, the property owner will succumb to the pressure and discontinue the suit. It is amazing that a church would have the patience and economic resources to pursue its claims against the county after so many years of litigation. Frequently, the government, although it may have lost every judicial battle, emerges victorious. Such a system, brimming with unfairness, is inconsistent with general notions of fair play and substantial justice. Any disincentive to unconstitutional conduct on the part of the regulator is entirely absent and the aggrieved landowner is left without an effective remedy for the unconstitutional taking. Because it is prone to such serious abuse, the invalidation remedy offers little hope to the property owner caught in the morass of litigation, escalating costs, and deprivation of beneficial use of his property.

Despite the plethora of problems associated with the invalidation remedy, three grounds are advanced for denying compensation for regulatory takings. Proponents of the invalidation remedy allege that compensation would usurp a legislative function, bankrupt local treasuries, and inhibit necessary land use measures. Each of these concerns will be addressed, yet each, as it will be shown, lacks empirical support. Concern for governmental welfare cannot and should not overwhelm the express prohibition against uncompensated takings.

Under the rationale in *Agins*, awarding compensation for regula-

93. Brief for Appellant at 22, First English Evangelical Lutheran Church v. Los Angeles County, 107 S. Ct. 2378 (1987)(No. 85-1199).

94. R. BABCOCK, THE ZONING GAME 13 (1966). This ploy was discussed by a former city attorney and author of a prominent text on land use regulation at the 1974 annual conference of the National Institute of Municipal Law Officers in California, the remarks were reprinted in San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 655 n.22 (1981)(Brennan, J., dissenting).

tion effecting a taking usurps the legislative function of promoting the public good, thereby compelling the legislature to transmute an excessive exercise of the police power into a lawful taking.[95] However, this argument is without support. It is questionable whether a damages remedy restricts a regulatory entity's options more severely than invalidation. Under the damages remedy, the regulating entity can analyze all the relevant considerations and weigh the appropriateness of each. The entity may decide to acquire the land outright, continue the regulation in effect and pay the landowner damages, or simply abandon the regulation altogether. No legislative function is usurped under the damages remedy. In fact, invalidation may usurp the legislative decision making process by compelling the regulating body to rescind the offending ordinance.

The second argument in support of invalidation is equally unmeritorious. The major economic objection to extending liability to regulating entities is fear that such bodies will be subject to unexpected and severe costs, disrupting essential public programs to pay the owners whose property was appropriated by regulation. Budgetary and political pressures exasperate these concerns. Thus, some courts and commentators are leery of extending liability in land use disputes where the stakes are high.[96] They fear that the additional strain on financial resources and the greater risk of liability may render many municipalities unable to provide public programs.

These dire financial predictions, however, were rejected in *Owen v. City of Independence*,[97] which extended liability to municipalities for damages caused by violations of constitutional rights, on the grounds that there was no empirical support for such predictions. Due to the exigent requirements for showing a taking under current jurisprudence, municipal liability for such conceptually defined excesses "pales in comparison to the general tort liability deemed acceptable in *Owen*."[98]

Even if the fiscal disaster of extending liability was supported by empirical evidence, such concerns are secondary in any analysis. The cost of constitutional compliance is not an acceptable basis to justify denial of constitutional rights. Can anyone support infringement on criminal rights, for example, because the cost of extending due process is increasing? Surely not. The same analysis equally is applicable to the just compensation clause. The just compensation clause, unlike

95. Agins v. City of Tiburon, 24 Cal. 3d 266, 276, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

96. The claims are often in the millions of dollars, and even in the hundreds of millions of dollars. Comment, *supra* note 87, at 724-32.

97. 445 U.S. 622, 656 (1980)(tort suit by a police chief against a municipality and its officers).

98. Comment, *supra* note 87, at 727.

many constitutional provisions, is clear in its command: private property shall not be taken for public use without just compensation. Denying compensation for pragmatic reasons is a constitutionally infirm approach.[99]

Further, the damage remedy only shifts the cost of governmental regulation from the individual owner to the public at large. Even if catastrophic judgments are possible, it only confirms the fact that individual owners have been subjected to huge uncompensated losses. In all fairness, these losses should be borne by the community which benefits from the regulation. If, however, the disproportionate impact upon the individual owner is adjudged minimal, then the community's cost of enforcing that regulation will be similarly insignificant. The cost on either side of the equation must be identical. Yet, the community's costs may be proportionately distributed among its members, while the individual owner must bear the entire cost alone. The principles of equity compel the governmental entity to award compensation to the aggrieved landowner.

Third, the proponents of invalidation as the sole remedy argue that compensation awards would "chill" local planners, rendering them ineffective. As Justice Stevens, in dissent, warned: "Cautious local officials and land use planners may avoid taking any action that might be challenged and thus give rise to a damage action. Much important regulation will never be enacted, even perhaps in the health and safety area."[100] The fear of liability, it is argued, will have far-reaching impact. These fears are further compounded by the uncertainty as to whether a regulation will effect a taking.[101] Because the Court has no set formula to decide whether a regulation crosses the threshold from a legitimate exercise of the police power to a *prima facie* taking, local planners will be fearful of enacting even the most fundamental land use regulations.

This fear of planner impotency, however, is severely misplaced and overstated. Liability should promote more rational decisions. Planners will think twice in marginal cases in which regulation interferes

99. The value of a property interest, either large or small, does not provide an appropriate yardstick for measuring the scope of the constitutional proscription. Texaco, Inc. v. Short, 454 U.S. 516, 540-41 (1982)(Brennan, J., dissenting). The sovereign has no license to take property without paying for it simply because the property is inexpensive. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436-38 (1982). The government also may not refuse to pay because the property is fairly expensive. After all, the fifth amendment "draws no distinction between grand larceny and petty larceny." Hodel v. Irving, 107 S. Ct. 2076, 2089 (1987)(Stevens, J., concurring).

100. First English Evangelical Lutheran Church v. Los Angeles County, 107 S. Ct. 2378, 2399-2400 (1987)(Stevens, J., dissenting).

101. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3163 (1987)(Stevens, J., dissenting)("Even the wisest lawyers would have to acknowledge great uncertainity about the scope of this Court's takings jurisprudence.").

with property owners' reasonable expectations. Planners in those marginal cases will tend to err on the constitutional side. This will give the planners an added incentive to make more efficient use of their resources. They will be imputed with knowing, like all officials, the bounds of their authority. As Justice Brennan noted in *San Diego Gas & Electric Co.*, "[i]f a policeman must know the Constitution, then why not a planner?"[102]

Further, the entire concept of "chilling" governmental conduct is based on an unsound rationale. Much of the planning inhibition charge is premised on substantial fiscal liability arising from a damage remedy, which, as previously discussed, is erroneous. Thus, to fear stifling planning activity is to engage in speculative reasoning, lacking empirical support. The effect of compensation will be healthy and pose a minimal fiscal threat to planners.

C. Implications for Land Use Planning

First English Church, by requiring compensation for temporary regulatory takings, raises important implications for land use planning procedures. The Court's decision should eliminate many of the abusive planning techniques previously employed by the various state and local commissions and agencies.

The most fundamental ramification on the planning process will be on the use of a general land use moratorium. Although the Court's decision did not address directly the continued validity of land use moratoria,[103] the Court strongly implicated that its use as a governmental exercise gives rise to compensation because the distinction between brief physical takings and brief planning delays is severely strained. If permissible delays (delays not subject to compensation) are limited to those types reasonably necessary to process applications, then most moratoria will fall within the purview of the Court's takings analysis for unduly restrictive regulations.[104] The reasoning for this conclusion is highlighted by comparing the dissent's three dimen-

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

103. The Court refused to consider whether "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" should be compensable takings. First English Evangelical Lutheran Church v. Los Angeles County, 107 S. Ct. 2378, 2389 (1987). Rather, the Court limited its holding to the facts presented. *Id.* The Court's failure to clarify its opinion invites conjecture. Because the Court did not distinguish a normal delay from an excessive delay, and because Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987), increases the likelihood a regulation will amount to a compensable taking, planners' temporary denial of use due to procedural delay may trigger compensation.

104. R. Best, New Constitutional Standards for Land Use Regulation: Portents of Nollan and First English Church 7 (July 22, 1987)(unpublished manuscript from the Pacific Legal Foundation).

sional test for when a regulation effects a taking[105] with the majority's opinion. This comparison will suggest which, if any, form of moratorium can survive this decision and not be held a compensable taking.[106]

Because the dissent acknowledged that "[a] temporary interference with an owner's use of his property *may* constitute a taking for which the Constitution requires that compensation be paid,"[107] both the majority and the dissent agreed the temporary operation of some regulations may be so onerous that invalidation will not mitigate the regulation's effect. The two opinions differ in the likelihood that a regulation will amount to a taking. Regulations prohibited under the dissent's three dimensional test must be more restrictive before the just compensation clause is triggered than those prohibited under the majority's view.

Thus, any land use moratoria, in order to withstand a challenge under this decision, must at least survive the dissent's more limited test for determining whether a taking has occurred. Any moratorium covering substantial amounts of property for an indefinite period in order to achieve a general planning purpose will be highly susceptible to a temporary takings claim, even under the dissent's more restrictive view.[108]

Because of possible exposure, a planning commission's use of vague, broad restrictions to achieve ill-defined public purposes without any specific time frame are seriously jeopardized under *First English Church*. This decision casts doubt on whether such abusive practices by planning commissions will be allowed. Planning commissions must become more self-disciplined to avoid the risk of liability. This decision effectively eliminates the use of general building moratoria because losses from such delays may be substantial and restoration of an allowed use will not mitigate the losses suffered during the regulation's life. In order to escape liability, the commission should alter procedures for enacting a moratorium. In the future, planners will spell out more clearly specific public purposes that can be achieved only by imposition of a restriction. The days of imposing building restrictions virtually at whim are over because damages such

105. Regulations are three dimensional; they have depth, width, and length. As for depth, regulations define the extent to which the owner may not use the property in question. With respect to width, regulations define the amount of property encompassed by the regulations. Finally, . . . regulations set forth the duration of the restrictions.

First English Evangelical Lutheran Church v. Los Angeles County, 107 S. Ct. 2378, 2394 (1987)(Stevens, J., dissenting).

106. R. Best, *supra* note 104, at 11.

107. First English Evangelical Lutheran Church v. Los Angeles County, 107 S. Ct. 2378, 2393 (1987)(Stevens, J., dissenting) (emphasis added).

108. R. Best, *supra* note 104, at 12.

restrictions inflict now are held compensable in an inverse condemnation proceeding.

The second implication for planning procedures deals with the date used in assessing the amount of damages recoverable. The Court, in a prior decision, stated that when the government physically occupies land without condemnation proceedings,"the owner has a right to bring an 'inverse condemnation' suit to recover the value of the land on the date *of the intrusion by the Government.*"[109] Extending this analysis for physical takings to regulatory takings, the Court concluded that, although an unlawful taking does not occur until the government refuses to compensate the owner, "the interference that effects a taking may begin much earlier, and compensation is measured from that time."[110] Thus, the date on which the government first interfered with the owner's property rights is the starting date for compensation. No matter "when the ultimate act occurs which consummates the taking, liability may extend to a 'much earlier' date when the interference with the use of the property first started."[111] Even though normal delays for plan approval or submission of a variance do not effectuate a *prima facie* taking independently, they will be calculated in the time for which compensation is due if the application of the regulation ultimately amounts to a taking.[112]

Planning commissions, mindful liability may extend to a much earlier date, will eliminate lengthy interim restrictions and other normal planning delays. Such abusive procedures and regulatory tools will be replaced by self restraint or, at least, more well-defined delays because, if the ultimate regulation rests upon a specified public purpose achievable only through the restriction imposed, such delays will not attach to any regulation ultimately held to be a taking. Thus, the *First English Church* rule will effectively eliminate many abusive planning techniques because the risk of liability will promote more rational decisions and use of planning commissions' resources will be enhanced.

V. CONCLUSION

Because of the striking similarity between temporary regulatory takings and temporary physical takings, the Constitution demands just compensation be paid to owners whose property is confiscated temporarily through police power regulations. A principled reading of the just compensation clause reveals that once a taking for public use has occurred, compensation is constitutionally required, and does not depend upon the proceeding initiated. The fundamental purposes of

109. Kirby Forest Indus. v. United States, 467 U.S. 1, 5 (1984).
110. First English Evangelical Lutheran Church v. Los Angeles County, 107 S. Ct. 2378, 2389 n.10 (1987).
111. R. Best, *supra* note 104, at 8.
112. *Id.* at 8-9.

the fifth amendment, after all, are to fairly distribute the economic costs involved and limit governmental flexibility.

Awarding compensation for regulations effecting a taking does not usurp a legislative function and does not bankrupt local treasuries. Compensation does not inhibit local planning because the fifth amendment is designed to limit the flexibility of governmental authorities. Although the Court is mindful of these concerns, the cost of constitutional compliance never can be an acceptable basis to justify denial of consitutional rights. Invalidation, unaccompanied by compensation, is a constitutionally infirm approach.

This decision will have positive effects on planning because many abusive planning procedures will be discontinued. The use of general land use moratoria is strongly implicated as a governmental exercise giving rise to compensation. In light of this decision, planning commissions necessarily will be more self-disciplined and think twice in the marginal cases. Not only will compensation be awarded for the life of the unduly restrictive regulation but compensation may date back to the time the government first interfered with the owner's property. This decision, because of the risk of liability, should sound the death knell for unabashed attempts by regulators to continually frustrate property owners.

Joseph C. Vitek '89