First English Evangelical Lutheran Church of Glendale v. County of Los Angeles: Just Compensation Or Due Process Review for Temporary Regulatory Takings.

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First English Evangelical Lutheran Church of Glendale v. County of Los Angeles: JUST COMPENSATION OR DUE PROCESS REVIEW FOR TEMPORARY REGULATORY TAKINGS.

The fifth amendment to the United States Constitution expressly prohibits the taking of private property for a public use without just compensation.\(^1\) Prior to the United States Supreme Court decision of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,\(^2\) the California Supreme Court held that the exclusive remedy for a regulatory taking is invalidation of the regulation or injunctive relief.\(^3\) Therefore, the property owner would not be compensated for the loss of use of the property until after a court determines whether the regulation is invalid.\(^4\) In *First English*, the United States Supreme Court defined a temporary regulatory taking as a taking which occurs during the period of time from the enactment of a regulation until a judicial determination that the regulation is invalid.\(^5\) The Court ruled that temporary regulatory takings are

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1. U.S. Const. amend. V. ("Nor shall private property be taken for public use without just compensation").
4. See *San Diego Gas & Electric*, 450 U.S. at 631 (Brennan, J. dissenting).
5. *First English*, 107 S. Ct. at 2384-85. Temporary takings differ from other takings in that later governmental actions may end the taking. *Id.*
compensable under the just compensation clause of the fifth amendment when such takings deprive a property owner of all reasonable use of the property. 6

Part I of this note sets forth the legal background of the regulatory taking issue. 7 Part II discusses the facts, holding, and rationale of the First English case. 8 Finally, Part III discusses the possible legal ramifications of the First English opinion. 9

I. LEGAL BACKGROUND

Governmental entities are prohibited from taking private property for a public use without providing just compensation to the property owner. 10 The due process clause of the fourteenth amendment of the United States Constitution also prohibits any State from depriving any person of property without due process of law. 11 The United States Supreme Court has not specifically decided whether a valid health, safety, or welfare regulation which satisfies the due process clause may still be a taking under the fifth amendment just compensation clause. 12

6. Id. at 2389. Therefore, a private property owner may collect monetary damages from a government entity for a regulatory taking prior to a judicial determination that the regulation is invalid. Id.
7. See infra text accompanying notes 10-121.
8. See infra text accompanying notes 121-66.
9. See infra text accompanying notes 167-203.
10. U.S. Const. amend. V. The fourteenth amendment of the United States Constitution allows the just compensation clause of the fifth amendment to be applied to the states. Chicago B. & Q. R. Co. v. Chicago, 166 U.S. 226, 241 (1897). The California Constitution similarly requires that just compensation must be awarded for property taken by the state. Cal. Const. art. I, § 19. This section states: "Private property may be taken or damaged for a public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into the court, for the owner." Id. The fifth amendment is commonly referred to as the just compensation clause. See First English, 107 S. Ct. at 2389; Shonkwiler & Moran, Land Use Litigation, § 2.05(2), 101 (1986) [hereinafter Shonkwiler & Moran]. Monetary damages can be recovered for deprivation of the use under the just compensation clause. Id. at 111.
11. U.S. Const. amend. XIV. (That amendment states in pertinent part: "Nor shall any state deprive any person of life, liberty, or property, without due process of law.") This is commonly referred to as the due process clause. See First English, 107 S. Ct. at 2389; Shonkwiler & Moran, supra note 10, at 101 (1986). Under the due process theory, the landowner's remedy is limited to invalidation of the regulation. Id. at 111. Also, regulatory taking claims may be premised upon Section 1983 of the Civil Rights Act of 1964. Id. at 112. Under section 1983, actual damages might be awarded for due process violations. Id.
A. Eminent Domain and Inverse Condemnation

Eminent domain is the power of the sovereign to institute formal judicial proceedings to acquire private property for public use without prior consent by the property owner. Formal proceedings initiated by the government are referred to as eminent domain proceedings. In an eminent domain proceeding, the government initiates a judicial action against the property owner to take the fee simple or lesser interest in the property and pays the landowner just compensation as required by the fifth amendment. When the government has not initiated formal eminent domain proceedings to acquire private property, a landowner may bring an inverse condemnation action to obtain just compensation for the taking. An eminent domain action decided the remedy issue because of the lack of a final determination in four cases since 1980. See, e.g., MacDonald, Sommer and Frates v. Yolo County, 106 S. Ct. 2561 (1986); Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas and Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980). See also Berger & Kanner, Thoughts on the White River Junction Manifesto: A Reply to the “Gang of Five’s” Views on Just Compensation for Regulatory Takings of Property, 19 Loy. L.A.L. Rev. 685, 695 (1986) [hereinafter A Reply] (proposing that regulatory takings require just compensation); Siemon, Mandelker, & Babcock, The White River Junction Manifesto, 9 Vt. L. Rev. 193, 194 (1984) [hereinafter The Manifesto] (proposing that regulatory takings do not require just compensation).

The eminent domain power may be exercised by city, county, state, or federal agencies. See Shonkwiler & Moran, supra note 10, at 101 (1986). First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2386 (1987) (“While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings.”).

Inverse condemnation is defined as a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency. United States v. Clarke, 445 U.S. 253, 257 (1979); D. Hagman, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 328 (1971). In an inverse condemnation action, the condemnation is “inverse” because the landowner, rather than the governmental entity, institutes the proceeding. San Diego Gas & Elec. Co., 450 U.S. at 638 n.2 (Brennan, J., dissenting). A landowner is entitled to bring an action in inverse condemnation as a result of “the self-executing character” of the just compensation clause of
will not be filed when the government does not view the public use of the property as a taking. The government may, nevertheless, be liable to the landowner for just compensation if the court determines that the property was taken for a public use.

B. Zoning and Regulatory Takings

The concept of zoning arose from the common law tort of nuisance which recognized certain restrictions on the right to use land in ways which interfere with adjacent land. Courts expanded these restrictions to allow zoning to promote the general health and safety of the public. Today, zoning is used to address governmental concerns based on general welfare, aesthetics, historic preservation, planned unit communities, flood plains, and open space controls. A zoning regulation separates a municipality into categories of proposed land use to provide for the orderly development of cities. Zoning regulations are enacted pursuant to the police power of the state.
In analyzing whether a zoning regulation is a taking requiring just compensation, courts focus on two important questions: the regulation of private property so severe that the parameters of the police power are exceeded so that a taking has occurred; and if a regulatory taking has occurred, what remedies are available to the aggrieved property owner? The United States Supreme Court has not established a precise formula for determining what governmental acts constitute a taking. The Court has asserted that each case must be decided on factual grounds. The Supreme Court, however, has decided a small number of regulatory taking cases. The factual and legal contexts of these decisions are quite diverse. Today, courts generally decide when a regulation amounts to a taking by applying a variety of tests. A taking occurs if a regulation fails substantially to advance legitimate public interests. Second, a taking occurs if a regulation deprives the landowner of substantially all reasonable use of the land. Third, a taking occurs if a regulation interferes with a reasonable investment-


27. A Reply, supra note 12, at 692. See infra notes 70-121.

28. A Reply, supra note 12, at 693.


32. See Mihaly & Shute, Regulation of Land Use After the Recent Supreme Court Cases, 1 Q. & A. 2 (hereinafter Regulation of Land Use)(August 1987).

33. See Nectow v. Cambridge, 277 U.S. 183, 188 (1928).

Fourth, a taking occurs when a regulation results in permanent physical occupation of private property. 3

The United States Supreme Court has not decided whether regulations which have a valid safety purpose may constitute a taking. 37

Under a safety purpose exception, regulations which would be a taking under either of the four tests articulated above would not be a taking if enacted for the health, morals, or safety of the public. 38

Another Supreme Court decision, however, states that safety regulations may not be exempt from the taking analysis. 39 This issue is extremely important in the land use area because zoning regulations are often enacted to promote the public welfare or safety. 40

In *Mugler v. Kansas*, 41 an alcoholic beverage retailer challenged the validity of a 1884 Kansas statute which prohibited the sale of

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35. Penn. Central Transp. Co. v. City of New York, 438 U.S. 104, 138 n.36 (1978). A landowner is not justified in expecting that the zoning on property will remain constant and is not protected from changes in zoning laws. *Id.* at 140. Unfortunately, the courts have decided more cases defining what does not constitute such expectations. *Regulation of Land Use* supra note 32, at 3.

36. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428 (1982). See Nollan v. California Coastal Comm’n, 107 S. Ct. 3141 (1987) (the latest holding by the United States Supreme Court on when a taking occurs). See also *The Manifesto*, supra note 12, at 194 n.9 (suggesting that the regulatory taking activities can be grouped into the following six categories: (1) The physical invasion cases, such as flowage and navigation easements, and regulations which have the effect of producing a physical invasion; (2) instances in which government is contemplating acquisition, has said so, and had engaged in other inequitable conduct designed to depress the acquisition price; (3) cases in which regulation prevents any reasonable economic use (for example, zoning land for a park or public use, including cases in which government contemplated acquisition, but abandoned acquisition and substituted severely restrictive regulation); (4) the designation of land for future acquisition unaccompanied by inequitable conduct on the part of government; (5) cases in which the regulation has substantially diminished the value of land; and (6) moratoria cases, which involve a prohibition of all use for a limited period of time).

37. *See Mugler v. Kansas*, 123 U.S. 623 (1887); Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922); Keystone Bituminous Coal Ass’n v. Benedictus, 107 S. Ct. 1232 (1987); *Shonkwiler & Moran*, supra note 10, at 101. Arguments in support of one or another theory of relief in regulatory taking claims frequently are supported by citations to the Court’s earlier decisions. *Id.* If the safety exception to takings exists, a court could decide that the most grievous effects on private property values are justifiable if the public need for the regulation is sufficiently dire. Callies, *Takings Clause-Take Three*, A.B.A. J. 54 (Nov. 1, 1987).


40. *See Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 397 (1926) (police power zoning prohibitions upon the use and enjoyment of the land did not have to satisfy the requirements of the traditional common law tort of nuisance, but could merely be a proper use in the wrong place); *California Condemnation Practice*, supra note 20, at 224.

41. 123 U.S. 623 (1887). The Court, in an opinion by Justice Harlan, upheld the validity of a statute prohibiting the sale of alcoholic beverages under the due process clause of the fourteenth amendment. *Id.* at 668-69.
alcoholic beverages. The retailer argued that the statute destroyed his business and was, therefore, a taking which required just compensation. The United States Supreme Court disagreed, and held that the statute was a valid exercise of the police power. The Court reasoned that the exercise of police power is fundamentally different from the exercise of eminent domain; valid regulations which prohibit the use of the land in ways which are injurious to the "health, morals, or safety" of the community cannot be a taking. Instead, the regulation was merely a declaration by the state that such prohibited use is against the public interest. The Court found, therefore, that valid safety regulations are reviewed not by the just compensation clause, but by the due process clause.

The Mugler decision has since been cited to support the due process theory of constitutional taking analysis. Under this analysis, the power of eminent domain and the police power are discrete and mutually exclusive. The due process clause restrains the State's exercise of the police power while the just compensation clause restrains the government's exercise of the power of eminent domain. In applying this analysis, courts first determine if the regulation is enacted pursuant to the police power or the power of eminent

42. Id. at 649.
43. Id.
44. Id. at 668-69.
45. Id.
46. Id.
47. Id. Justice Harlan stated:
[s]uch legislation does not disturb the owner of the control or use of his property for lawful purposes, nor restricts his right to dispose of it, but is only a declaration by the state that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests.
Id.
48. Id. at 668. The Court found, therefore, that valid safety regulations are reviewed by the due process clause and not the just compensation clause. Id. at 669.
49. SHONKWILER & MORAN, supra note 10, at 98 (discussing later application of the Mugler holding). In the early 20th Century, the Mugler decision was followed in upholding prohibitions of noxious uses. See SHONKWILER & MORAN, supra note 10, § 2.05(2).1-3. See e.g., Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); Reinman v. City of Little Rock, 237 U.S. 171 (1915). In Hadacheck v. Sebastian, 239 U.S. 394 (1915), the Supreme Court described the police power as "one of the most essential powers of government; one that is the least limitable." Id. at 410.
50. SHONKWILER & MORAN, supra note 10, at 98. See The Manifesto, supra note 12, at 205.
51. SHONKWILER & MORAN, supra note 10, at 98.
domain. If the police power is being utilized, the regulation must be substantially related to the public health, morals, welfare, or safety to be constitutional. If the regulation is found to be within the power of eminent domain, a taking analysis is conducted.

The *Mugler* analysis and the safety regulation exception to takings were reviewed in the United States Supreme Court decision of *Pennsylvania Coal Company v. Mahon*. In *Pennsylvania Coal*, the state enacted a statute forbidding the mining of coal so as to cause subsidence of a surface structure. The Pennsylvania Coal Company challenged the statute as being an unconstitutional taking of the right to mine coal in a commercially feasible manner. The United States Supreme Court agreed. The Court recognized that the statute was a valid exercise of the State's police power. Also, an exercise of the police power may necessarily entail some diminution in property value. However, the Court found that if the diminution reached a certain magnitude, a taking will result. The Court held that while

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52. *Id.* at 98-99. One commentator states:

The test most commonly applied by the courts is whether regulation is designed to procure a public benefit, in which case it is an exercise of the eminent domain power, or whether it is designed to prevent the use of property in a manner that is detrimental or harmful to the public interest, in which case it is an exercise of the police power. *Id.* at 99. This test fails, however, in that nearly all public benefits can be described as the prevention of public harms. *Id.*

53. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). The Supreme Court used the due process clause to invalidate a zoning ordinance that prohibited the plaintiff from using his property for commercial purposes in a residential zone. *Id.* This case was decided during the era of substantive due process review. *Shonkwiler & Moran*, supra note 10, at 104 n.40.

54. *Id.*

55. 260 U.S. 393 (1922). The Pennsylvania Supreme Court upheld the regulation as a valid exercise of the police power despite the loss of a commercially feasible way to mine coal to coal companies. *Id.* at 412. See *Shonkwiler & Moran*, supra note 10, at 103.


57. *Id.* at 412.

58. *Id.* at 414.

59. *Id.*

60. *Id.* at 413. The coal company previously alienated the surface rights to the property, retaining only the mining rights. *Id.* at 399. The State admitted that the application of the statute destroyed the economic value of the mining rights of the company. *Id.*

61. *Id.* at 413. For a majority of the Court, the issue was whether the police power can be stretched so far as to require just compensation. *Id.* The inquiry of the Court was not confined to the issue of physical appropriation, but extended to the effect of the regulation on the economic use of the property. "While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. In interpreting this language, one court found that "taking" was only used metaphorically, and not in the context of the fifth amendment. Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 594, 385 N.Y.S.2d 5, 9, 350 N.E.2d 381, 385 (1976) (arguing that *Pennsylvania Coal* was decided under the due process clause and not the just compensation clause). *Cf. A Reply*, supra note 10, at 726 n.185 (arguing that the analysis in *Fred F. French of Pennsylvania Coal* is clearly erroneous).
property may be regulated to a certain extent, valid safety regulations which “go too far” will be compensable takings.62 The statute which promoted a valid safety purpose was a taking when the regulation prevented the economic use of the property.63 For constitutional purposes, to make it commercially impractical to mine coal has the same effect as the government taking, appropriating, or destroying the property.64 The Court held that the statute could not be constitutional if there was no compensation to the Company for the property rights taken.65

Pennsylvania Coal has since been applied to support the just compensation theory of constitutional takings analysis.66 Under this theory, both the power of eminent domain and the police power are part of a continuum of governmental authority permitting the state to act in furtherance of legitimate goals.67 Even valid safety regulations which reach a certain magnitude will be compensable takings under this analysis.68 However, the United States Supreme Court has failed to more clearly define the extent of any safety regulation exception to the taking analysis.69

62. Pennsylvania Coal, 260 U.S. at 414. The opinion concluded that the statute could not be sustained as a valid police power exercise even though a valid public purpose existed. When the regulation worked to prevent economic use of the property, the regulation could only be sustained if the state compensated the landowner. Id. Compare The Manifesto, supra note 12, at 208-14 (arguing that Justice Holmes did not use takings in the just compensation context); with A Reply, supra note 12, at 713, 725-28 (arguing that Justice Holmes used the term taking in the just compensation context) and Keystone Bituminous Coal Ass’n v. DeBenedictis, 107 S. Ct. 1357 (1987) (distinguishing and upholding a regulation factually similar to the regulation invalidated in Pennsylvania Coal).

64. Id. (“What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impractical to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.”).
66. SHONKOWLER & MORAN, supra note 10, at 98.
67. Id. See A Reply, supra note 5, at 687. See also L. TRIBE, AMERICAN CONSTITUTIONAL LAW 460 (1978) (explaining that there is in fact no practical difference between physically seizing property and preventing the use of that property:

Thus a clear case is one that intuitively seems like a taking in the layman’s sense of that term: a physical takeover of a distinct entity, with an accompanying transfer of the legal powers of enjoyment and exclusion that are typically associated with rights of property. Moreover, forcing someone to stop doing something with his property—telling him “you can keep it, but you can’t use it”—is indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else. Thus, a “taking” occurs in this ordinary sense when government controls a person’s use of property so tightly that, although some uses remain to the owner, the property’s value has been virtually destroyed. . . .).

68. A Reply, supra note 12, at 677. This theory would hold that a taking “is a taking, is a taking.” Id.
69. SHONKOWLER & MORAN, supra note 10, at 98.
There are three possible remedies available to deprived landowners following a regulatory taking.\(^7\) First, when a regulatory taking occurs, the landowner may recover monetary damages as just compensation for the taking.\(^7\) Next, the landowner may seek declaratory action.\(^7\) The constitutional prohibition against uncompensated takings is satisfied when the offending regulation is declared invalid.\(^7\) Finally, the landowner may seek just compensation and invalidation.\(^7\)

C. Judicial History

In *Agins v. City of Tiburon*,\(^7\) the landowner, whose property was zoned to limit development to one house per acre on a five acre parcel, was denied an action in inverse condemnation.\(^7\) The California Supreme Court held that judicial invalidation of the governmental regulation served as an adequate remedy for a regulatory taking.\(^7\) The court held that, aside from an action declaring the regulation constitutionally invalid, a landowner could not bring an inverse condemnation action for a governmental zoning regulation.\(^7\) The California Supreme Court in *Agins* reasoned that a zoning regulation is a legitimate exercise of state police power.\(^7\) In applying the due process theory,\(^8\) the court held the proper remedy for a regulatory taking is limited to either declaratory relief or administrative mandamus.\(^8\) Under either of these remedies, the constitutional validity of the legislation is reviewed.\(^8\)

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\(^7\) See *A Reply*, supra note 12, at 695.


\(^7\) See *A Reply*, supra note 12, at 695.

\(^7\) *Id.* Legal authority is available to support virtually any of these solutions. *Id.* See, e.g., *Mugler v. Kansas*, 123 U.S. 623 (1887); *Pennsylvania Coal v. Mahon*, 227 U.S. 183 (1928); *Keystone Bituminous Coal Ass’n v. Benedictus*, 107 S. Ct. 1234 (1987).

\(^7\) 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), aff’d on other grounds, 447 U.S. 255 (1980).

\(^7\) Id. at 271, 598 P.2d at 28, 157 Cal. Rptr. at 377.

\(^7\) Id. at 278, 598 P.2d at 32, 157 Cal. Rptr. at 379.

\(^7\) Id. at 273, 598 P.2d at 28, 157 Cal. Rptr. at 379.

\(^7\) Id. at 274, 598 P.2d at 30, 157 Cal. Rptr. at 376 (stating that *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922) is erroneously cited as authority that regulations may constitute a compensable taking).

\(^7\) See infra text accompanying notes 49-54.

\(^7\) *Agins*, 24 Cal. 3d at 275, 598 P.2d at 30, 157 Cal. Rptr. at 377 (following *Euclid v.*
The Agins court stated that just compensation is required only during the period in which the government enforces the regulation following a judicial finding that the regulation resulted in a taking.\textsuperscript{83} The court reasoned that allowing damages for regulatory takings creates a chilling effect upon the exercise of the state's police powers due to the constant threat of litigation.\textsuperscript{84} The cost of litigation, and possible just compensation liability, financially inhibits the government from enacting future legislation necessary for proper land use management.\textsuperscript{85} The California Supreme Court in Agins further held that a government regulation is unconstitutional if the effect is to deprive the landowner of substantially all reasonable use of the landowner's property.\textsuperscript{86} Since this regulation did not deprive the landowner of substantially all reasonable use of his land, the court did not declare the regulation invalid.\textsuperscript{87} The United States Supreme Court granted review.\textsuperscript{88}

In Agins v. City of Tiburon,\textsuperscript{89} the United States Supreme Court did not determine whether the remedies granted by the California Supreme Court in Agins violated the fifth amendment of the United States Constitution.\textsuperscript{90} The Supreme Court instead found that zoning which limited development to one house per acre on a five acre parcel did not amount to a taking.\textsuperscript{91} Although development was limited, the regulation neither prevented the best use of the land, extinguished a fundamental attribute of ownership, nor denied pursuit

\textit{Ambler Realty Co.}, 272 U.S. 365 (1926). Administrative mandamus is a declaratory remedy whereby the only issue litigated is the constitutionality of the regulation; damages are not awarded in an administrative mandamus action. Id.

82. See SHONKOWLER & MORAN, supra note 10, at 111.
83. \textit{Agins}, 24 Cal. 3d at 276, 598 P.2d at 31, 157 Cal. Rptr. at 377.
84. Id. at 276, 598 P.2d at 30, 157 Cal. Rptr. at 377. The need for preserving a degree of freedom in land-use planning, and the need to inhibit the financial force which inheres in the inverse condemnation remedy suggests that invalidation, and not compensation, is the proper relief for a regulatory taking. Id. at 276-77, 598 P.2d at 31, 157 Cal. Rptr. at 378.
85. Id. at 276-77, 598 P.2d at 31, 157 Cal. Rptr. at 378. Another commentator stated: "this threat of unanticipated financial liability will intimidate legislative bodies and will discourage the implementation of strict or innovative planning measures in favor of measures which are less stringent, more traditional, and fiscally safe."

86. \textit{Agins}, 24 Cal. 3d at 277, 598 P.2d at 31, 157 Cal. Rptr. at 378. The court also accepted the general proposition that whether a regulation is excessive in any particular situation involves question of degree, turning on the individual facts of each case. Id.
87. Id.
89. 447 U.S. 255 (1980).
90. \textit{Agins}, 447 U.S. at 263.
91. Id.
of reasonable investment-backed expectations.\textsuperscript{92} Because there was no taking, the Court did not need to reach the issue of remedies.\textsuperscript{93} The Court left unanswered the question of whether a state may limit the remedies available to landowners deprived of property rights to declaratory relief and administrative mandamus.\textsuperscript{94}

In the subsequent case of \textit{San Diego Gas and Electric v. City of San Diego},\textsuperscript{95} the California Court of Appeals held that an owner of property which has been down-zoned from industrial to open space was not allowed to pursue a taking claim.\textsuperscript{96} Instead, the plaintiff could only pursue declaratory relief or administrative mandamus.\textsuperscript{97} The California Supreme Court denied review, but the United States Supreme Court granted certiorari.\textsuperscript{98} A majority of the Court held that because the California courts did not reach a final decision as to whether a taking had occurred, the Court lacked jurisdiction to decide the proper remedy for regulatory takings.\textsuperscript{99} In the five to four opinion, Justice Rehnquist concurred with the majority that the Court lacked jurisdiction because there was not a final determination of the taking issue.\textsuperscript{100} Justice Rehnquist, however, joined the dissenting justices in finding that just compensation, rather than invalidation, was the constitutionally required remedy for regulatory takings.\textsuperscript{101} In theory, therefore, five justices apparently supported Justice Brennan's opinion that an inverse condemnation remedy is appropriate for regulatory takings.\textsuperscript{102}

In his dissent in \textit{San Deigo Gas and Electric Co.}, Justice Brennan found that the California courts had reached a final judgment regarding the taking issue.\textsuperscript{103} The final judgment existed since California courts would never allow a taking claim prior to the invali-

\textsuperscript{92} \textit{Id.} at 262.
\textsuperscript{93} \textit{Id.} at 263 (because no taking has occurred, the Court did not consider whether a state may limit the remedies available to a person whose land had been taken without just compensation).
\textsuperscript{94} \textit{Id.}
\textsuperscript{96} \textit{Id.} at 629-30. The company bought land for a future power plant, and the city down-zoned the property to open space. San Diego Gas and Electric brought an inverse condemnation action claiming the city had taken its land arguing that just compensation must be paid under the fifth amendment. The California Court of Appeals rejected this argument. \textit{Id.}
\textsuperscript{97} \textit{Id.} at 628.
\textsuperscript{98} \textit{Id.} at 630.
\textsuperscript{99} \textit{Id.}
\textsuperscript{100} \textit{Id.} at 633 (1981) (Rehnquist, J., concurring).
\textsuperscript{101} \textit{Id.} at 633-34 (Rehnquist, J., concurring).
\textsuperscript{102} \textit{The Manifesto, supra note 12, at 196.}
\textsuperscript{103} \textit{San Diego Gas & Elec.}, 450 U.S. at 642 (Brennan, J., dissenting).
vation of the regulation.104 Thus, the Court was entitled to assume a taking existed to review the remedy issue.105 Justice Brennan also found that the state's exercise of police power may effectuate takings under the just compensation clause.106 Because of the self-executing character of the fifth amendment with respect to compensation, Justice Brennan found invalidation without compensation would be an improper remedy.107 Contrary to the holding of the California courts in Agins, the fifth amendment requires just compensation be paid to the San Diego Gas & Electric Company for the period of the taking.108 According to Justice Brennan, once a police power regulation has effected a taking, the government entity must pay just compensation for this taking.109 Under Justice Brennan's view, the government must pay just compensation for the period during which the regulation effectuated a taking.110

Following San Diego Gas and Electric, commentators and courts disagreed as to the proper remedy for regulatory takings.111 While California courts continued to apply the established law of Agins,112 the Ninth Circuit Court of Appeals adopted Justice Brennan's dissent in San Diego Gas and Electric.113 In the only two subsequent regu-

104. Id. at 647.
105. Id. at 648.
106. Id. (recognizing that United States Supreme Court precedent clearly allows takings to occur where the government is exercising police powers).
107. Id. at 654. Self-executing constitutional provisions are constitutional provisions which are immediately effective without the necessity of ancillary legislation. BLACK'S LAW DICTIONARY 1220 (5th ed. 1979). A self-executing provision supplies sufficient rule by which a right given may be enjoyed, or a duty imposed may be enforced. Id. A provision is not self-executing when principles are merely stated without providing rules to give the rules the force of law. Id. In Justice Brennan's opinion, the fifth amendment is self-executing, and therefore compensation must be awarded for any taking, including takings by formal eminent domain proceedings, occupancy, physical invasion or regulation. San Diego Gas & Elec., 450 U.S. at 654 (Brennan, J., dissenting). Since the fifth amendment is self-executing, property owners have a constitutional right to bring an inverse condemnation action for just compensation whenever a taking occurs. Id. See United States v. Clarke, 445 U.S. 253, 257 (1979); 6 P. NICHOLS, EMINENT DOMAIN § 25.41 (3d rev. ed. 1972).
109. Id.
110. Id.
111. The Manifesto, supra note 12, at 196 (arguing that the dissent in San Diego Gas & Elec. improperly states takings law); A Reply, supra note 12, at 687 (arguing that the dissent in San Diego Gas & Elec. correctly states the Supreme Court's views on takings law). See infra text accompanying notes 112-13.
112. See Aptos Seascape Corp. v. County of Santa Cruz, 138 Cal. App. 3d 484, 621 P.2d 197, 188 Cal. Rptr. 191. See also The Manifesto, supra note 12, at 194 (noting that too much authority is being placed on a dissenting opinion which now is only supported by three members of the present Court).
113. See Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141, 1148 (9th Cir.), cert denied, 464 U.S. 847 (1983); In re Air Crash in Bali, 684 F.2d 1301, 1311 n.7 (9th Cir. 1982).
Commentators agreeing with the California Supreme Court decision in *Agins* argue that compensation for regulatory takings should never be available. The government would be afforded greater latitude in enacting zoning regulations if just compensation is not required for regulatory takings. The government will not have to refrain from adopting and executing regulations necessary to properly plan and direct municipal growth because of the potential for high cost in litigating the constitutionality of a regulation and in compensating property owners for regulatory takings.

Other commentators favor the just compensation requirement for regulatory takings as proposed by the dissent in *San Diego Gas and Electric*. Just compensation liability would penalize unconstitutional decision-making in land use planning. Municipalities would be encouraged to enact regulations which would not deprive property owners of constitutional protections. Finally, private property owners would not be forced to bear the financial burden resulting from an inability to use their property during the period the regulation was in effect.

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See also *A Reply*, supra note 12, at 686 (listing jurisdictions which have adopted Justice Brennan's analysis in *San Diego Gas & Elec.*). As of 1986, Justice Brennan's dissent in *San Diego Gas & Elec.* was adopted by six federal courts of appeals. *Id.*

114. See MacDonald, Sommer, & Frates v. Yolo County, 106 S. Ct. 2561 (1986) (The United States Supreme Court held the remedy issue for regulatory takings was not ripe for review); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985). Title 28 of the United States Code section 1257 states: "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court." 28 U.S.C. § 1257. See also *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 633 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 263 (1980).


116. *Id.*


118. *See A Reply*, supra note 12, at 684.

119. See *San Diego Gas & Elec.*, 450 U.S. at 662 n.26 (Brennan, J., dissenting). One commentator states:

Under California's system, government agencies know they have nothing to lose by issuing use-stultifying regulations. Under no circumstances will California courts do more than order the offender to stop. And even that minimal relief is rarely forthcoming. Indeed, one searches the reports of California Supreme Court cases in vain for any recent decision which invalidates a confiscatory zoning ordinance. . . . [T]he last such case, *Hamer v. Town of Ross*, 59 Cal. 2d 776, 382 P.2d 375, 31 Cal. Rptr. 335 (1963), was decided more than two decades ago.

120. *San Diego Gas & Elec.*, 450 U.S. at 662 n.26 (Brennan, J., dissenting).
results in a taking of the property until the regulation is declared invalid.121

II. THE CASE

A. The Facts

In 1957, First English Evangelical Lutheran Church of Glendale (The Church) purchased "Lutherglen," a 21-acre parcel of land in a river canyon in the Angeles National Forest.122 The Church operated the site as a retreat center and a recreational area for handicapped children.123 In February of 1978, a creek adjoining the property flooded, destroying the Lutherglen buildings and killing ten people.124 In response to the dangerous condition of the canyon, the County of Los Angeles adopted an interim ordinance in January, 1979, which prohibited the rebuilding of any structures at Lutherglen.125 The Church filed a complaint for damages in the Los Angeles County Superior Court alleging that the interim ordinance denied the Church of all reasonable use of the Lutherglen Property.126 The superior

121. Id. at 656 n.22. Justice Brennan quoted the advice of a prominent California city attorney to his colleagues as follows:

If all else fails, merely amend the regulation and start over again.
If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra "goodies" contained in the recent [California] Supreme Court case of Selby v. City of San Buenaventura, 10 Cal. 3d 110, appears to allow the city to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again. See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war.
Good Luck.

Id. (emphasis in the original)(citing Longtin, Avoiding and Defending Constitutional Attacks on Land Use Regulation (including inverse condemnation), 38 NIMLO. L. REV. 192-93 (1975)). Property owners may suffer severe harm during the invalidation process, including: foreclosure, the property owner may die during the interim, developing expenses may become too excessive, and real estate taxes continue to be demanded. A Reply, supra note 12, at 744-45.

123. Id. at 2381.
124. Id.
125. Id. COUNTY OF LOS ANGELES INTERIM ORDINANCE No. 11,855 states in pertinent part: "[a] person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon..." Id. at 2381-82.
126. Id. at 2382. The complaint contained two claims. First, the Church alleged that defendants were liable to the Church for creating a dangerous condition upstream from the properties and that the ordinance denied the Church all use of their property. The second claim sought recovery in inverse condemnation because of cloudseeding undertaken by the County. Id.
court rejected the claim and ruled that monetary damage is not the proper remedy for a taking which results from the interim ordinance, relying on the California rule in Agins v. City of Tiburon.127

The California court of appeals affirmed the decision of the Superior Court.128 Relying on Agins, the appellate court held that the Church could not bring an action in inverse condemnation to obtain monetary relief since the alleged taking resulted from governmental regulation.129 Without deciding whether a taking existed, the appellate court ruled that a determination of whether a taking occurred was premature since there had been no judicial finding that the regulation was invalid.130 The California Supreme Court denied review.131 The Church petitioned the United States Supreme Court for review to determine if the California courts had unconstitutionally denied an inverse condemnation remedy pursuant to the rule in Agins v. City of Tiburon.132

B. The Opinion

Without deciding whether a taking occurred in the facts of First English, the Court reached the remedy issue and enumerated three

127. Id. The Superior Court of Los Angeles granted defendants motion to strike the portions of the complaint alleging that the county ordinance denied all use of Lutherglen because of the California Supreme Court decision of 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). Id. The trial court also granted defendant's motion for judgment on the pleadings on the second cause of action based on cloud seeding. The Court rejected plaintiffs' inverse condemnation claim and at the close of plaintiffs' evidence at trial, granted a nonsuit on behalf of defendants, dismissing the entire complaint. Id. at 2383 n.2. The portions of the Church complaint rejected by the trial court stated:

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On January 11, 1979, the County adopted Ordinance No. 11,855, which provides:
Section 1. A person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be located within the outer boundary lines of the interim flood protection located in the Mill Creek Canyon vicinity of Hidden Springs, on Map No. 63 ML 52, attached hereto as though fully set forth."

217
Lutherglen is within the flood protection area created by Ordinance No. 11,855.

218
Ordinance No. 11,855 denies First Church all use of Lutherglen.

Id. at 2390 (Stevens, J., dissenting). The California Code of Civil Procedure allows the court to "strike out any irrelevant, false, or improper matter inserted in any pleading." CAL. CIV. PROC. CODE § 436 (West Supp. 1987).

128. First English, 106 S. Ct. at 2383.

129. Id. at 2383 (stating that the appellate court felt obligated to follow Agins because the United States Supreme Court had "not yet ruled on whether a state may constitutionally limit the remedy for a taking to nonmonetary relief." Id.

130. Id. (according to Agins, a taking occurs only if the government chooses to enforce a regulation that has been declared invalid due to the excessive use of police power by the state).

131. Id.

132. Id. at 2833. In Agins, the California Supreme Court held that the fifth amendment does not require compensation as a remedy for temporary regulatory takings. Id.
new rules to guide states in land use planning. First, valid state regulation of property requires payment of just compensation if the regulation results in a taking of private property. The Court noted that the just compensation clause does not prohibit the taking of private property; rather, the clause mandates the payment of just compensation to the deprived landowner as a condition to the exercise of governmental power. The Court stated that the fifth amendment is not designed to limit governmental interference with property rights, but instead secures compensation in the event otherwise proper interference amounts to a taking. In analyzing the proper remedy, the Supreme Court in First English assumed that a temporary building moratorium constituted a taking. Although the moratorium was a valid exercise of governmental power, the Church would be entitled to just compensation if on remand the trial court determined that the regulation denied all reasonable use of the property.

Second, the Court held that the just compensation clause is self-executing. The right to recover just compensation is not limited to

133. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378 (1987). Chief Justice Rehnquist wrote the majority opinion joined by Justices Brennan, White, Marshall, Powell, and Scalia. Id. The Court noted that jurisdiction properly existed under title 28 of the United States Code section 1257 because the trial court assumed a taking existed in striking the Church allegations pursuant to Agins. Id. at 2384. While prior concerns regarding ripeness prevented earlier review of the remedy issue, those concerns were not present in First English. Id. at 2384. The remedy issue was not reviewed earlier because factual disputes existed as to whether a taking had occurred. See Agins v. City of Tiburon, 447 U.S. 255 (1980). Nor was the remedy issue ripe when factual disputes might lead to the conclusion that a taking had not occurred. See MacDonald, Sommer, & Frates v. Yolo County, 106 S. Ct. 2561 (1986); Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981). First English, however, properly presented the remedy issue because the California courts denied inverse condemnation without challenging whether the facts of First English were insufficient to constitute a taking or would not constitute a taking under the safety regulation exception to takings. First English, 107 S. Ct. at 2384. Since the remedy issue was presented without factual dispute as to whether a taking occurred, the Court held the case ripe for review. Id. at 2384. See California State University Real Estate and Land Use Institute, The World After Recent U.S. Supreme Court Decisions: Land Use, Private Property, Public Rights, Conference Handbook, 18 (Nov. 21, 1987) [hereinafter Conference] (discussing the three new land use rules promulgated in First English) (copy on file at the Pacific Law Journal).

134. First English, 106 S. Ct. at 2386.

135. Id. at 2385.

136. Id. at 2385-86. Governmental action that effects a taking of private property necessarily implicates the constitutional obligation to pay just compensation. Armstrong v. United States, 364 U.S. 40, 49 (1960).

137. A moratorium is a land use regulation whereby changes of the property are prohibited for a specified period. BLACK'S LAW DICTIONARY 910 (5th ed. 1979).


139. Id.

140. Id. at 2386. See supra text accompanying note 107.
situations in which the government institutes condemnation proceedings, enacts statutory compensation remedies, or directly promises to provide the property owner with just compensation.\textsuperscript{141} Instead, the right to just compensation is required by the Constitution whenever a taking occurs.\textsuperscript{142} This constitutional right is protected by allowing inverse condemnation actions when the government has not taken the property by eminent domain.\textsuperscript{143} Because of the self-executing nature of the fifth amendment, the Court held that the California rule, articulated in \textit{Agins}, unconstitutionally denied the Church an inverse condemnation remedy.\textsuperscript{144} Thus, the Supreme Court in \textit{First English} implicitly overruled the California Court’s decision in \textit{Agins v. City of Tiburon}.\textsuperscript{145}

Finally, the \textit{First English} Court held that the constitutional requirement of compensation for permanent takings also applies to temporary regulatory takings.\textsuperscript{146} The Court defined temporary regulatory takings as takings that occur prior to a judicial determination that a statute is invalid.\textsuperscript{147} The Court first recognized that just compensation has always been required for temporary physical takings.\textsuperscript{148} Both temporary regulatory takings and temporary physical takings may be stopped by later governmental action.\textsuperscript{149} Since the government must compensate the property owner for the time the temporary physical taking is in effect, the government must also compensate for temporary regulatory takings.\textsuperscript{150} In addition, tempo-

\textsuperscript{141} \textit{First English}, 106 S. Ct. at 2386.
\textsuperscript{142} \textit{Id}.
\textsuperscript{143} \textit{Id.} at 2386-87.
\textsuperscript{144} \textit{Id.} at 2387. In \textit{Agins}, the California Supreme Court denied inverse condemnation actions prior to the invalidation of the challenged regulation. \textit{Id}.
\textsuperscript{145} \textit{Id. See The Limits of Land Use Regulation: Hearing on the Effects of U.S. Supreme Court’s First Lutheran and Nollan Decisions on California’s Local Governments Before the Senate Comm. on Local Government, 13 (1987) [hereinafter Hearing] (copy on file at the Pacific Law Journal); CONFERENCE, supra note 133, at 18.
\textsuperscript{146} \textit{First English}, 107 S. Ct. at 2389 (stating “We merely hold that where the government’s activities have already worked a taking of all use of the property, no subsequent action by the government can relieve it of the duty to provide compensation for the period which the taking was effective.”).
\textsuperscript{147} \textit{Id.} at 2388-89.
\textsuperscript{148} \textit{Id.} at 2387. \textit{See United States v. Dow, 357 U.S. 17 (1958) (compensating the property owner after the United States had entered into physical possession and began laying pipe through the tract); Kimball Laundry Co. v. United States, 338 U.S. 1 (owner of a laundry plant compensated after the United States Army had taken possession of the facilities for the duration of World War II); United States v. Petty Motor Co., 327 U.S. 372 (1946) (owner compensated for lease acquired by condemnation by the United States); United States v. General Motors Corp., 323 U.S. 65 (1945) (owner compensated for the government acquired portion of a leased building).}
\textsuperscript{149} \textit{First English}, 107 S. Ct. at 2387.
\textsuperscript{150} \textit{Id.} at 2388.
rary takings which deny all reasonable use of the property are not
distinguishable from permanent takings for the period in which the
taking occurs.151 Prior to First English, most courts agreed that
permanent takings require just compensation.152 The California su-
perior court in First English assumed that the temporary moratorium
denied the Church all reasonable use of the property for three years.153
Since just compensation has been paid for physical takings of shorter
periods, the Court held that just compensation is the constitutionally
required remedy for the temporary regulatory taking in First Eng-
lish.154 The Supreme Court remanded the issue of whether a taking
had actually occurred to the trial court.155

C. The Dissent

In the dissent, Justice Stevens found four flaws in the analysis of
the majority.156 First, the taking issue was not ripe for review because
the issue of whether a taking existed had never been decided by the
trial court.157 Second, temporary regulatory takings require different
treatment under the just compensation clause than permanent tak-
ings.158 Third, the majority incorrectly assumed that California would
never grant monetary relief for temporary regulatory takings.159 Fi-

151. Id.
152. Id.
153. Id.
154. Id. at 2388-89 (stating: “We limit our holding to the facts presented, and of course
do not deal with the quite different questions in the case of normal delays in obtaining building
permits, changes in zoning ordinances, and the like which are not before us.”).
155. Id. at 2381. The Court reversed the judgment of the California Court of Appeals,
and remanded the case for further proceedings consistent with the opinion. Id. Because of the
final decision of the California courts, the United States Supreme Court did not independently
decide if the facts constituted a taking. Id. at 2384-85 n.7. The Supreme Court did not
determine the effects of the later enacted permanent ordinance upon plaintiffs' use of their
property. Id. The Court held they were not obligated to review the permanent ordinance
because it was not mentioned in the complaint or in the the decisions of the California courts.
Id. The County of Los Angeles adopted the successor to the interim ordinance in 1981, which
stated:

a person shall not use, erect, construct, move onto, or alter, modify, enlarge or
reconstruct any building or structure within the jurisdiction of a flood protection
district except . . . accessory building and structure that will not substanitally impede
the flow of water, including sewer, gas, electrical, and water systems, approved by
the county engineer . . . automobile parking facilities incidental to a lawfully estab-
lished use . . . and flood control structures approved by the chief engineer for the
Los Angeles County Flood Control District.

First English, 107 S. Ct. at 2392 n.6 (Stevens, J., dissenting).
156. First English, 107 S. Ct. at 2390 (Stevens, J., dissenting).
157. Id.
158. Id.
159. Id.
nally, the due process clause, and not the just compensation clause, limits land use regulations.\textsuperscript{160}

Justice Stevens concluded that the county ordinance was a valid health and safety regulation designed to protect against flooding and damage during an interim study.\textsuperscript{161} The building moratorium created an interim period to determine whether future building at Lutherglen would be safe.\textsuperscript{162} Since the ordinance was a valid exercise of the state's police power to provide for public health and safety, the dissent found that the facts of \textit{First English} failed to present a taking which requires monetary compensation.\textsuperscript{163}

Justice Stevens criticizes the majority’s argument that monetary damages should be awarded for any land use regulation which denies all reasonable use of property.\textsuperscript{164} According to Justice Stevens, the due process clause, and not the just compensation clause, protects the property owner from improperly motivated, unfairly conducted, or unnecessarily protracted governmental decision making.\textsuperscript{165} Finally, Justice Stevens predicted that the decision in \textit{First English} will have a chilling effect upon the good faith planning efforts of local zoning officials by encouraging a “litigation explosion” in which property owners will seek damages for alleged regulatory takings.\textsuperscript{166}

III. LEGAL RAMIFICATIONS

The United States Supreme Court in \textit{First English} held that where governmental activity has worked a taking of property, no subsequent

\textsuperscript{160} Id. Justices Blackmun and O’Connor joined the dissent in finding that the taking was not ripe for review, and that the majority incorrectly analyzed California law. Id. at 2389. See \textit{supra} text accompanying notes 157 and 159.

\textsuperscript{161} \textit{First English}, 107 S. Ct. at 2392.

\textsuperscript{162} Id.

\textsuperscript{163} Id. at 2392-93.

\textsuperscript{164} Id. at 2393. Justice Stevens argues that regulatory takings differ from physical invasions. Id. Physical takings are easily identifiable and rarely occur. Id. Virtually all physical invasions are deemed a taking. Id. Regulatory takings often require economic analysis to identify. Id. Regulatory takings are also not deemed compensable unless the adverse effects upon the property also destroy a major portion of the value of the property. Id. Justice Stevens argues that land planners need not be held to the same knowledge of the Constitution as policemen are required. Id. at 2399 n.17. The United States Supreme Court, he argues, recognizes that objective rules to assess when a regulation becomes a taking cannot be established. Property owners, and not the government should bear this burden. Id.

\textsuperscript{165} Id. at 2399.

\textsuperscript{166} Id. at 2399-400. Arguments of “chilling” future activity have been discredited in the past. See \textit{A Reply}, \textit{supra} note 12, at 749 n.292; \textit{Bacich v. Board of Control}, 23 Cal. 2d 343, 366, 144 P.2d 818, 832 (1943) (Traynor, C.J., dissenting) (dissenting from the court’s holding that compensating property owners would prevent construction of more freeways; California at the time had only one eight mile freeway).
action by the government can relieve it of the duty to provide compensation for the period during which the taking occurred. The Court defined two new rules in land use regulation. Temporary regulations may constitute compensable takings, and in any period in which a taking occurs, the government will be liable to the property owner for just compensation.

The United States Supreme Court has implicitly overruled the California Supreme Court's decision in Agins v. City of Tiburon. Consequently, a property owner will not have to wait until a regulation is invalidated to bring an inverse condemnation action. Further, a landowner must be compensated for the period prior to a judicial determination that the regulation is invalid. The fifth amendment is self-executing and therefore the right to bring an action in inverse condemnation is granted by the Constitution and not from legislative enactments. Limitations upon inverse condemnation are unconstitutional limits upon the fifth amendment. Since landowners may now be compensated for the period prior to a judicial determination that a regulation is invalid, the Supreme Court in First English has shifted the loss of use for regulatory takings from private property owners to government. This shift may chill the enactment
of future governmental land use regulations as planners may fear that a court will later find that a taking has occurred and require just compensation be paid to a landowner. 177 Furthermore, property owners may attack a greater number of land use regulations as uncompensated takings in hopes of receiving just compensation as provided by the fifth amendment. 178

The Court did not describe a method by which to calculate just compensation awards. 179 The First English Court cites United States v. Causby 180 which held that the loss to the landowner, not the gain to the government must be used to measure damages. 181 Damages, however, might be calculated according to traditional practices in eminent domain proceedings. 182 For example, interim damages in inverse condemnation proceedings are often determined by using the fair rental value of the property interest taken for the period the taking occurred. 183 Finally, by choosing to seek damages instead of attempting to have a regulation invalidated, a property owner could be viewed as failing to avoid or mitigate damages, thereby precluding a full recovery. 184

The Court in First English never decided the taking issue. 185 In holding that temporary regulatory takings require just compensation, the Court merely assumed that a taking existed rather than separately deciding if a taking occurred. 186 The Court’s approach, however, is consistent with prior cases where the remedy issue was not reached because the Court held the taking issue was not ripe for review. 187

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177. Hearing, supra note 145, at 13; Conference, supra note 145, at 18.
178. Hearing, supra note 145, at 13; Conference, supra note 145, at 18.
182. Hearing, supra note 145, at 179.
183. Id.
184. Hearing, supra note 145, at 5. At common law, there is a requirement that injured parties mitigate their damages. See Albers v. Los Angeles, 62 Cal. 2d 250, 397 P.2d 129, 42 Cal. Rptr. 89 (1965). The court holds that a condemnee has a duty to take all reasonable measures to minimize losses, and is entitled to recover for expenses incurred in a good faith attempt to mitigate damages. Id. Failure to mitigate will preclude recovery for any losses which the injured party could have avoided through reasonable action. Id.
187. In prior decisions, the Court refused to assume that a taking had occurred to reach the remedy issue. See MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986);
In *First English*, the remedy issue is ripe for review because the trial court denied the inverse condemnation remedy as a matter of law prior to a judicial determination that the regulation was invalid.\(^{188}\) Since a taking was assumed in *First English*, it is unclear whether a regulatory taking exists under the facts of the case.\(^{189}\) The Court also did not decide whether delays in obtaining permits, changes in zoning ordinances, and variances results in a temporary taking.\(^{190}\) Case by case determinations of these and other temporary situations will need to be decided in the future.\(^{191}\)

By remanding the taking issue, the lower court will also have to decide if the County is insulated from just compensation under the safety regulation exception to takings as stated in *Mugler v. Kansas*.\(^{192}\) To date, the United States Supreme Court has not decided whether safety regulations are absolutely immune from a taking analysis, or whether at some point, safety regulations "go too far" as stated in *Pennsylvania Coal v. Mahon*, becoming compensable.\(^{193}\) Most commentators believe that the building moratorium in *First English* is a valid exercise of the state's police power to enact safety regulations.\(^{194}\) By finding the remedy issue not ripe for review, and by not utilizing the safety regulation exception to find otherwise, the Court may be implying that safety regulations can result in compensable takings.\(^{195}\)

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\(^{188}\) *First English*, 107 S. Ct. at 2384.

\(^{189}\) *Id.* at 2384. The Court stated that "We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property..." *Id.*

\(^{190}\) *Id.* at 2389 (opinion did not decide if compensation is required for normal delays in obtaining building permits, changes in zoning ordinances, variances and other similar governmental activity).

\(^{191}\) *Id.; Conference, supra* note 145, at 17 (shorter deprivations of use will probably be analyzed on their own facts, including the impact of the regulation on the property owner).


\(^{193}\) Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); SHONKWILER & MORAN, *Land Use Litigation*, supra note 10, at 98. The Court, however, found the facts in *First English* ripe for review because inverse condemnation was denied by the California court as a matter of law without factual dispute as to whether a taking had occurred. *First English*, 107 S. Ct. at 2384. In addition, because the California courts did not review the facts in denying the inverse condemnation remedy, the Court was not bound to individually review the facts of *First English* to determine whether a taking occurred to reach the remedy issue. *Id.; See supra text accompanying note 133*. Generally, however, the United States Supreme Court reviews the individual facts of a case to decide if a taking has occurred. *See A Reply, supra* note 12, at 693, 695.

\(^{194}\) *Hearings, supra* note 145, at 140; *Conference, supra* note 145, at 18.

\(^{195}\) *First English*, 107 S. Ct. at 2383 (finding that concerns with finality as to whether a taking occurred prevented earlier review of the proper remedy for regulatory takings).
The Court, however, did not expressly reach this conclusion.196

Upon enactment of the regulation, a just compensation remedy may be available to a private property owner. The Court, however, indicated that a taking does not necessarily occur upon such an enactment.197 Therefore, damages may arise from the date when the

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196. Id. at 2384-85; Hearing, supra note 145, at 5. The Court stated that they were not deciding "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." First English, 107 S. Ct. at 2384-85. See Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987). In Keystone, the Court recently distinguished and upheld a statute facially similar to the statute invalidated in Pennsylvania Coal. Keystone, 107 S. Ct. at 1244-47. The Court in Keystone held that due process clause as stated in Mugler v. Kansas 123 U.S. 623 (1887) was controlling, and not the just compensation clause. Keystone, 107 S. Ct. at 1245. See supra text accompanying notes 41-48. This holding would signal that the safety regulations are absolutely immune from being a taking. First English, however, may indicate that, contrary to Mugler, safety regulations can be a taking. First, Pennsylvania Coal, which appeared to be weakened after the Keystone decision, is cited by the Court as the "established doctrine" for finding that temporary regulatory takings require just compensation. First English, 107 S. Ct. at 2386; See supra text accompanying notes 56-69 (Pennsylvania Coal held that safety regulations which go too far may be a taking, and is the foundation of the just compensation theory of constitutional takings analysis, which would apply a taking analysis to all governmental activity without exception). In addition, the Court, in prior decisions, placed significance on whether a taking had occurred for jurisdictional reasons before deciding the remedy issue. See MacDonald, Sommer, & Frates v. Yolo County, 106 S. Ct. 2561 (1986) (remedy issue held not ripe for review because variances were not submitted to planning authorities after denial of an original plan); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (remedy issue held not ripe for review because the landowner did not test planning restrictions); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (remedy issue not ripe for review because lack of a final decision as to whether a taking occurred); Agins v. City of Tiburon, 447 U.S. 255 (1980) (remedy issue not ripe because the regulation limiting development of a five acre parcel to one house per acre was held not to constitute sufficient deprivation of use to be a taking). The Court in First English, however, reaches the remedy issue for regulatory takings by assuming a taking has occurred by a regulation which clearly qualifies for the safety exception. First English, 107 S. Ct. at 2383 (the three year building moratorium was enacted to study conditions on property which was flooded one year earlier, destroying all the buildings and killing ten persons); See supra text accompanying notes 122-25; Hearing, supra note 145, at 17 (noting that the Court assumed a taking existed in the First English decision, even where prior law indicated that the safety exception insulated government from a taking analysis). The Court's assumption in First English may be rationalized in one of three ways. (1) The Court, having waited to determine the results of the California rule in Agins, was now ready to hold Agins unconstitutional. (2) The Court did not use the safety exception because the County did not raise this issue at the trial level in the motion to strike. See First English, S. Ct. at 2382. (3) First English is an example of a safety regulation which goes too far and is, therefore, a taking under the Pennsylvania Coal analysis. See supra text accompanying notes 56-69. Cf. First English, 107 S. Ct. at 2391 (Stevens, J., dissenting) (suggesting that the majority interject the safety exception to hold the remedy issue not ripe for review). What the Court may be suggesting is that Pennsylvania Coal remains the law, safety regulations are not absolutely immune from takings, and where the line exists between immunity and takings will be decided at a later date.

197. First English, 107 S. Ct. at 2389 n.10. The Court recognized that as a matter of law, an illegitimate taking might not occur until the government refused to pay, but the interference that effects a taking might begin much earlier, and compensation is measured from that time.
property owner has exhausted all administrative remedies to invalidate the regulation.198

Finally, commentators are divided on whether the holding of the United States Supreme Court in *First English* will retroactively apply to land use regulations enacted prior to the decision.199 The Court in *First English* noted in its decision that since *Pennsylvania Coal*, the established rule has been that when a regulation goes too far, a taking will be recognized.200 Further, the Court stated that the Constitution has always required compensation in the event of a taking.201 Therefore, a strong argument can be made that the Court in *First English* was reiterating what regulatory takings law has always been, thus allowing retroactive application of the decision to previously enacted land use regulations.202 In the alternative, however, since *First English* is a new United States Supreme Court decision, an argument can be made that there will only be prospective application to newly enacted legislation.203

**CONCLUSION**

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, the United States Supreme Court held that a regulation which results in a temporary taking can require the payment

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198. See Williamson County Regional Planning Comm’n v. Hamilton Bank, 473 U.S. 172 (1985) (holding that federal courts should not adjudicate taking claims if state court compensation claims have not been utilized).

199. Hearing, supra note 145, at 4-5.


201. Id.

202. Id.

203. Id. at 4. On August 13, 1987, the California Senate Committee on Local Government held a hearing discussing possible legislation required after the recent Supreme Court land use decisions. Id. at 1. See Nollan v. California Coastal Comm’n, 107 S. Ct. 3141 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378 (1987); Keystone Bituminous Coal Ass’n v. Benedictous, 107 S. Ct. 1232 (1987). The committee inquired whether new legislation would be required in California in response to these decisions. Hearing, supra note 145, at 1. After hearing the testimony, the committee concluded that the California legislature should wait until the cases are applied by the California courts before enacting new legislation. Id. at 13. However, one suggested legislative enactment would shorten the statute of limitations for inverse condemnation actions for regulatory takings. Id. at 14. Since *First English* places the financial burden on the government during the period in which the constitutionality of the regulation is being litigated, a shorter statute of limitations will force private property owners to promptly litigate temporary regulatory taking claims. Id. at 4. This will also have the effect of limiting governmental liability for just compensation. Id.

At present, this appears to be the only legislative reaction in California to *First English*. 

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of just compensation. The temporary taking, however, must deny the landowner all reasonable use of the property. Thus, the fifth amendment requires the state to provide just compensation for temporary regulatory takings, as well as for temporary physical takings or permanent takings. The United States Supreme Court, however, limited *First English* to the facts presented. Further, the United States Supreme Court did not state whether a valid safety regulation may constitute a taking under the fifth amendment, as proposed by the Supreme Court in *Pennsylvania Coal Co. v. Mahon*. Rather, the Supreme Court remanded to the trial court the issues of whether a taking occurred and whether the County is insulated from liability under the safety regulation exception to takings. The Court failed to identify either how damages are to be calculated for temporary takings, or the period for which just compensation is to be provided. Even with these limitations, the United States Supreme Court may be signaling the beginning of an era in which greater emphasis will be placed upon private property rights and the Constitution will apply to more severely limit governmental regulatory activity.

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