Takings Clause Interpretation: The Tradition of Inconsistency Continues

Christopher P. Belisle

Mary Ann Hallenborg

Follow this and additional works at: https://scholarship.law.stjohns.edu/jcred

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.
SUPREME COURT RAMIFICATIONS

TAKINGS CLAUSE INTERPRETATION: THE TRADITION OF INCONSISTENCY CONTINUES

The takings clause of the fifth amendment protects private property owners in the event of confiscation of their property by the federal government by mandating that just compensation be paid. This constitutional requirement has been consistently defined as a mere limitation on the historically embedded right of a sovereign to exercise its power of eminent domain. Originally,
the government's obligation to pay just compensation was interpreted as applying only to the actual appropriation of property.\footnote{3} Through subsequent interpretation, the "takings clause" has evolved to require just compensation for infringements on property which amount to far less than actual confiscation.\footnote{4}

It has long been accepted that an individual's private property rights, while safeguarded by the fifth and fourteenth amendments, may be limited by the lawful exercise of state police power for the advancement of the public health, safety, morals or the general welfare.\footnote{5} Property regulations and restrictions imposed
Takings Clause Interpretation

under the auspices of the police power are presumed constitutionally valid, provided such provisions are neither arbitrary nor unreasonable and bear a rational relationship to the government’s

State police power refers to the legislative powers of the states derived from the tenth amendment which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." U.S. Const. amend. X. See R. Epstein, supra note 2, at 107 (although police power is not expressly part of the Constitution, it refers to states’ right to delegate power to cities and counties); R. Roettinger, The Supreme Court and State Police Power: A Study in Federalism 10 (1962) (police power is state’s general power of legislation).

The police power is an expansive concept which is co-extensive with social necessity and molded by modern exigencies. See, e.g., Noble State Bank v. Haskell, 219 U.S. 104 (1911) (police power "may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong preponderant opinion to be greatly and immediately necessary to the public welfare"); Lochner v. New York, 198 U.S. 45, 54 (1904) (Supreme Court has recognized and upheld broad use of police power and has been "guided by the rules of a very liberal nature"); Plessey v. Ferguson, 163 U.S. 537, 550 (1895) (police power may act with reference to established usages, customs and traditions of the people to promote their comfort), over’d on other grounds, 547 U.S. 483 (1954); Louisville & Nashville R.R. v. Kentucky, 161 U.S. 677, 701 (1896) (legislative control may be exerted under police power to that which is "contrary to public policy or inimical to the public interests"). See also 6 E. McQuillin, supra note 4, at 443-44 (police power is flexible and must meet the changing and shifting conditions which arise through increased population and the "complex commercial and social relations of the people"); B. Schwartz, supra note 4, at 43 ("[W]hat was a century ago regarded as an improper exercise of the police power may now . . . be recognized as legitimate"); 1 E. Yokley, Zoning Law & Practice § 3-2, at 52-53 (1978) (police power must be elastic and change and shift with society). One commentator has characterized the police power as a "growth industry" in America today as a result of government’s expansive role in an increasingly complex society. Stoebuck, Police Power, Takings, and Due Process, 37 Wash. & Lee L. Rev. 1057, 1062 (1980).

While broad in nature, the police power is not unlimited in scope. See R. Epstein, supra note 2, at 109. "The police power cannot be interpreted as an unrestricted grant of state power to act in the public interest, for then the exception will overwhelm the clause." Id. The police power necessarily has its limits and "must stop when it encounters the prohibitions of the Constitution." Eubank v. City of Richmond, 226 U.S. 137, 143 (1912).

Agins v. City of Tiburon, 447 U.S. 255, 261 (1980) (zoning ordinances are facially constitutional); Bibb v. Navajo Freight Lines, 359 U.S. 520, 529 (1959) (state’s exercise of its police power entitled to presumption of validity when challenged under due process and commerce clauses); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (laws and regulations which find their justification in some aspect of police power asserted for public welfare presumed constitutional); Mugler v. Kansas, 123 U.S. 623, 661 (1887) (every presumption which favors validity of a statute must be indulged). See also 1 E. Yokley, supra note 5, § 3-23, at 153 (zoning ordinances presumed valid).

See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (constitutionality of zoning regulations should be presumed until it is shown that "the provisions are clearly arbitrary and unreasonable"); Chicago, Burlington & Quincy R.R. v. Illinois ex rel. Drainage Comm’rs, 200 U.S. 561, 593 (1906) (validity of a regulation depends, in part, upon whether its character is "arbitrary, or unreasonable beyond the necessities of the case"); Lochner v. New York, 198 U.S. 45, 56 (1905) (exercise may not be an unreasonable, unnecessary, or arbitrary interference with the right of the individual to his personal property or liberty). See also 6 E. McQuillin, supra note 4, § 24.09, at 435 (due process clauses of federal and state constitutions "delimiting the exercise of the police power, pro-
purpose of promoting legitimate state interests. Although the effect of a given statute or regulation may impair the value of an individual's property or even curtail its permissible use, the lawful exercise of the police power is not compensable. In some cases, however, the Supreme Court has held that a regulation promulgated under the guise of a state's police power was unlawful and required just compensation.

* See, e.g., Penn Cent. Transp. Co. v. City of New York, 458 U.S. 104, 138 (1988) (since regulations imposed by Landmark Commission were substantially related to promotion of general welfare, there was no taking); Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928) (restriction imposed on private property must bear "substantial relation" to public health, safety, morals, or general welfare); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394-95 (1926) (zoning ordinance which restricted property to residential use was constitutional because it was rationally related to municipality's purpose of promoting health and safety). See also Brown, Due Process of Law, Police Power and The Supreme Court, 40 Harv. L. Rev. 943, 1052 (1927) (courts have tested the legitimacy of a given statute by examining the real and substantial relation between the statute and the objects of that power); Stoebuck, supra note 5, at 1057-58 (government powers are limited in that government may only perform acts that advance public interest).

* Chicago, Burlington & Quincy R.R. v. Illinois ex rel. Drainage Comm'rs, 200 U.S. 561, 593 (1906). Justice Harlan, writing for the majority, stated that "compensation has never been a condition of [the police power's] exercise, even when attended with inconvenience or peculiar loss, as each member of a community is presumed to be benefited by that which promotes the general welfare." Id. The legislature is empowered to make police regulations which interfere with the full enjoyment of private property without compensation. Id. at 594. See Mugler v. Kansas, 125 U.S. 623, 668 (1887) (lawful state regulation may be enforced without compensation for diminution in value resulting from a prohibitory enactment). See also 1 R. Anderson, American Law of Zoning 85 (2d ed. 1968) (regulations promulgated by police power are a "less expensive remedy" than the exercise of eminent domain which requires compensation).

It is said that the state's power to regulate private property so as to attain the greatest public good is justified under a "social contract" theory. See 6 E. McQuillen, supra note 4, at 443-44. The police power is incident to the social order and is an attribute of our society that pre-dates and survives the Constitution. 1 E. Yokley, supra note 5, at 33. See also R. Roeztinger, supra note 5, at 15 (police power is a "system of internal regulation" which seeks to preserve public order). The social contract or "utilitarian property theory" would not require compensation in cases of social action aimed at redistribution of resources which may result in diminution of reasonable investment-backed expectations. Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1213 (1967).

* See, e.g., Agins v. City of Tiburon, 447 U.S. 255, 262-63 (1980) (ordinance may not extinguish a fundamental attribute of ownership); Kaiser Aetna v. United States, 444 U.S. 164, 178 (1979) (government's attempt to create a public right of access interfered with the landowner's "reasonable investment-backed expectations" and amounted to a taking); Chicago, Burlington & Quincy R.R. v. Illinois ex rel. Drainage Comm'rs, 200 U.S. 561, 593 (1905) (judiciary will invalidate legislation that substantially interferes with or injures the protection of individual rights); 6 E. McQuillen, supra note 4, at 437 (police power is "the governmental competency to conserve, not impair, private rights"). See also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). Justice Holmes, writing for the Court, stated
Takings Clause Interpretation

The Supreme Court has recently decided three cases which challenged local land use regulations as violative of the takings clause. Two of the three cases, *Keystone Bituminous Coal Association v. DeBenedictis* and *Nollan v. California Coastal Commission,* dealt with the issue of whether a taking had occurred. In the third, *First English Evangelical Lutheran Church v. County of Los Angeles,* the Court did not address the issue of whether a county ordinance worked a taking of a church's property, but instead determined the time from which compensation should be calculated in the event a taking is found to have occurred.

This Article will discuss the law of takings by distinguishing cases which involve the physical invasion of property from those which concern the prohibition of disfavored uses of property. With *Keystone* and *Nollan* being the most recent Supreme Court cases to deal with these two aspects of the takings issue, this Article will attempt to set forth the law of takings as it stands today. Finally, the Supreme Court's holding in *First English* will be analyzed, and the current risks facing municipalities that wish to pass zoning regulations will be discussed.

I. HISTORICAL OVERVIEW OF TAKINGS

A. Physical Invasion Theory

Early cases which have discussed the takings clause have found a taking only where a physical invasion had occurred. This ap-
The approach to takings claims was adequate during the nineteenth century, but became limited in the early 1900's due to the enactment of land use zoning regulations. The case of *Pumpelly v. Green Bay Co.* is an example of the Court's requirement of just compensation as a remedy for a physical invasion.

In *Pumpelly*, under authority of a state statute, a dam was built on a lake adjacent to the plaintiff's property. As a result of the construction, the lake overflowed onto the plaintiff's property, and he sought compensation. The Court dismissed the defendant's argument that the property had not been appropriated, and concluded that the physical invasion of the plaintiff's property constituted a taking which required just compensation.

See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). "Building zone laws are of modern origin. They began in this country about twenty-five years ago." *Id.* at 386. Justice Sutherland, writing for the majority, reasoned that the need for increased land use and zoning restrictions was due to "the great increase and concentration of population..." and the problems arising therefrom. *Id.* at 386-87. *See also* 1 P. ROHAN, *ZONING AND LAND USE CONTROLS* § 1.02[2], at 1-8 (1987) (discussion of the first attempts at comprehensive zoning regulations).

Cf *Lawton v. Steele*, 152 U.S. 133 (1894). In *Lawton*, the appellant's nets had been confiscated pursuant to a New York statute which prohibited fishing in Henderson Bay and Lake Ontario. *Id.* at 134-35. The Court...
Takings Clause Interpretation

More than a half century after Pumpelly was decided, the need for air transportation created a new type of physical invasion. In United States v. Causby,21 the respondent's property was in the flight path of planes landing at a military airport.22 As a result of the low altitude overflights, the respondent's property had become commercially useless, and virtually uninhabitable.23 The Court held that although the respondent did not make use of the airspace above his home, the physical invasion of that space in such a manner as to limit the owner's use and exploitation of his property amounted to a taking.24 Through analogy, the Court held that a superadjacent use of property which did not touch the land itself was a taking.25

A physical invasion may take the form of an actual invasion onto private property, low flights over the property, or even ac-

1held that since the value of the nets was only 15 dollars each, the destruction of property of such a "trifling value" in order to effectuate a valid statute did not require just compensation. Id. at 141.

The Court has clarified the analysis of physical invasions in determining whether a taking has occurred by noting that the character of the invasion, rather than the amount of damage resulting from it is the deciding factor. United States v. Cress, 243 U.S. 316, 328 (1917).

21 228 U.S. 256 (1916).

22 Id. at 258. The property was approximately one-half mile from the runway of the airport. Id. Military aircraft landing at the airport passed directly over the respondent's property 83 feet above the ground. Id.

23 Id. at 259. Causby, who operated a chicken farm on his property, claimed that due to the noise of airplanes flying overhead and the glare of their lights at night, a large number of his chickens had been killed by flying into the walls in fright. Id. He further claimed that the family had been deprived of sleep. Id.

24 Id. at 265. Although the overflights had not completely destroyed the respondent's use and enjoyment of his property, the Court equated the flights over the property to an elevated railway which had no structural supports on the property, but the tracks of which were suspended above the property at the same altitude as the overflights. Id. at 264-65. See Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487, 490-91 (1965) (there is a protected property right in airspace above land).

25 See, e.g., Griggs v. Allegheny, 369 U.S. 84, 88-90 (1962) (low overflights approaching airport which were within 30 feet of petitioner's residence constituted a taking); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329 (1922) (repeated firing of artillery over appellant's land by a coastal artillery base could warrant a finding of a taking); 2 Nichols, supra note 2, § 6.21[2], at 6-138 to -139 (direct overflight superadjacent to property which directly affects the owner's enjoyment is an actual invasion); P. Rohan, supra note 21, § 1.05[2][h], at 1-95 to -95 (analysis of the validity of airport zoning). But see Peabody v. United States, 251 U.S. 530, 537-40 (1913) (firing of two shots over appellant's property by a government military installation was not so intrusive as to constitute a taking). But cf. United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) (statute which prohibited mining of coal was not considered a taking due to the need for mining equipment and laborers during wartime).
cess easements to private bodies of water provided by an imposition of a navigational servitude to allow access to public waterways.\(^{29}\) *Kaiser Aetna v. United States*\(^{27}\) involved the imposition of an access easement on what was previously a closed body of water. The petitioners had developed land around a privately owned pond, and had provided access to the ocean from the pond.\(^{28}\) The government maintained that the development of access to the ocean had given the pond the status of a navigable waterway, and therefore required the petitioners to allow public access to their man-made inlet.\(^{30}\) The Court noted that the improvements had not resulted in making the pond a navigable waterway,\(^{30}\) and refused to allow the government to impose a navigational servitude without payment of just compensation.\(^{31}\) Although commentators have had differing views on the value of the *Kaiser Aetna* decision,
Takings Clause Interpretation

and the rationale of its holding, it seems apparent that the Court followed the long-standing doctrine that physical invasions of private property create an obligation of just compensation under the Constitution.

In contrast to the aforementioned cases in which a physical invasion resulted in a tangible effect on the property owner's use and enjoyment of his land, is the case of Loretto v. Teleprompter Manhattan CATV Corp. In Loretto, a state statute prohibited landlords from interfering with cable television installations. The appellant had discovered cable television wires and equipment attached to a building which she had recently purchased, and brought an action requesting just compensation. The Court enunciated a per se rule which would require just compensation for a "permanent physical occupation" of property. The per se...
rule set forth in Loretto was an attempt by the Court to clarify the takings issue, but in fact resulted in no more than adding confusion to the already muddled list of precedents. 30

The most recent Supreme Court pronouncement regarding the physical invasion aspect of takings occurred in Nollan v. California Coastal Commission. 40 In this case, an application was made to a state regulatory agency for a permit to replace a bungalow on oceanfront property with a larger home. 41 Over the Nollans' objections, the agency granted the permit subject to the condition that the owners allow the public lateral access across their property. 42 Ultimately, the condition to the permit was held to be constitutional by the California Court of Appeal, and the Supreme Court of California denied a petition for review. 43 The petitioners then sought review by the United States Supreme Court, which

response to changing social problems with rigid per se rules. Id. at 442-43 (Blackmun, J., dissenting). Justice Blackmun provided the information that the actual wire and equipment in question consisted of 36 feet of one-half inch thick cable which was strung down the side of the appellant's building, and two metal boxes which were four inch cubes attached to the top of the structure. Id. at 443 (Blackmun, J., dissenting).

30 See, e.g., Mulligan, Loretto v. Teleprompter Manhattan CATV Corporation: Another Excursion into the Takings Dilemma, 17 URB. LAW. 109, 126-34 (1985) (discussion of the issues left unresolved by Loretto, such as whether a balancing test may be used in such a case, whether legislative determination should be taken into account, and the continuation of confusion after the decision); Casenote, New Per Se Taking Rule Short Circuits Cable Television Installations in New York: Loretto v. Teleprompter Manhattan CATV Corporation, 25 B.C.L. REV. 459, 479-95 (1984) (inflexible rule of Loretto is inconsistent with previous cases, and not adaptable to issues arising in modern urban settings).


41 Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3143 (1987). See Nollan v. California Coastal Comm'n, 177 Cal. App. 3d 719, 721, 223 Cal. Rptr. 28, 29 (1986). The bungalow which had fallen into disrepair was a one-story, 521 square foot "substandard" beach house, and was to be replaced with a two-story, 1,674 square foot residence consisting of three bedrooms and an attached two car garage. Id.

42 Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3143-44 (1987). A lateral beach access is one which runs parallel to the shoreline as opposed to a roadway access which runs from the nearest shore to the nearest roadway. Knox, CAL. R.E.L. & PRACTICE § 513.25, at 258-59 (Supp. Aug. 1987).


While the case was being appealed from a Superior Court opinion which removed the condition from the permit, the Nollans tore down the bungalow and built the planned residence on the property. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3144 (1987).
Takings Clause Interpretation

noted probable jurisdiction.44

In reversing the holding of the California Court of Appeal, the Supreme Court, in a five to four decision, held that the condition imposed by the state agency resulted in a taking.45 Justice Scalia, writing for the majority, equated the condition attached to the permit to the facts present in Loretto.46 While relying on existing precedents which have held that "permanent physical occupations" constitute takings, the majority proposed the use of a "nexus" test, which requires a very close relationship between the permit condition imposed and the problem to be remedied, for determining the validity of the condition.47 Considering the facts in Nollan in light of the "nexus" test, the majority held that the requirement imposed did not satisfy this test.48 Although some commentators have claimed that this case altered the law of tak-

44 107 S. Ct. 312 (1986).

45 Nollan, 107 S. Ct. at 5145 (1987). The characterization of a public easement across the owner's property as a "'mere restriction on its use'" was inconsistent with the ordinary meaning of the term. Id. (citation omitted). The Court noted that eminent domain principles require just compensation for the imposition of such an easement. Id.

46 Id. The Court analogized the easement, by virtue of which "individuals [were] given a permanent and continuous right to pass to and fro," to the permanent physical occupation which had occurred in Loretto. Id. Although no individual had a right to station himself permanently on the easement, unlike the cable equipment affixed to the building in Loretto, the fact that the property could be continuously traversed made the easement a permanent physical occupation, and therefore a taking. Id.

47 Id. at 5148. The Court stated that the condition must serve the same purpose as the governmental ban on building in order for the regulation to be valid. Id. If the condition failed to serve that purpose, the refusal to grant the permit absent the condition would be "an out-and-out plan of extortion." Id. (quoting J.E.D. Assoc., Inc. v. Town of Atkinson, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)).

Justice Scalia's test set forth in Nollan imposed a requirement of a "nexus" between the condition to a building permit, and the predicted problem which the construction would create. Nollan 107 S. Ct. at 5149. Although the test requires a very close relationship between the condition and the problem, the Court failed to elaborate on the "characteristics of the required 'nexus.'" Best, The Supreme Court Becomes Serious About Takings Law: Nollan Sets New Rules for Exactions, 10 ZONING & PLAN. L. REP. 153, 155-55 (1987).

48 Nollan, 107 S. Ct. at 5149. The Commission claimed that the Nollans' proposed house would interfere with the public's access to the beach by creating a psychological barrier to people driving down the road parallel to the coast. Id. at 5148-49. The Court found it to be completely illogical that in order to remedy the "psychological barrier" the Nollans would be required to allow people who were already on an adjacent public beach to walk across their property. Id. at 5149.

Justice Scalia noted a peculiarity in the physical invasion analysis in his statement that a condition requiring the Nollans to provide drivers with a viewing spot on their property in order to remedy the psychological barrier to the beach would not have been a taking despite the fact that it would result in a physical invasion. Id.
ings, it can be viewed merely as an affirmation of the existing case law.

B. Nuisance Theory

Soon after the adoption of the fourteenth amendment, state nuisance abatement statutes were challenged before the Supreme Court as violative of the takings clause. Most notable of these challenges came in *Mugler v. Kansas* which questioned the validity of a state statute prohibiting the manufacture and sale of alcohol. Relying on *Pumpelly v. Green Bay Co.*, the plaintiff brewery owners argued that since the statute all but destroyed the value of their businesses, there was a physical invasion of the property which required compensation. The Court sustained the statute,

---

49 See, e.g., Merrill, *Takings Clause Re-Emerges, But No Clear Pattern Seen*, Nat'l L.J., Aug. 17, 1987, at S-8, col. 2 (Nollan limited power of state and local government to impose conditions on property developments when restrictions were unrelated to harm posed by development); Morris, *Supreme Court Land Use Decisions Uncertain in Defining a “Taking,”* Nat'l L.J., Sept. 7, 1987, at 20, col. 1 (Nollan set new standard which was limited by subsequent holdings).

50 See Sax, *Nollan No Bombshell: Property Rights in the Supreme Court*, 3 CAL. WATERFRONT AGE 6, 6 (1987), reprinted in 1987 INST. ON PLAN. ZONING & EMINENT DOMAIN, 1156, 1156. Professor Sax noted that the Nollan decision “did little more than to reaffirm the standard rules of land law that have long governed the country, and to bring California back in line with the mainstream legal doctrine.” Id.

51 See *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 80-81 (1872). In deciding whether a Louisiana statute which provided that livestock and slaughterhouses be limited to certain proscribed areas comported with the fourteenth amendment, the Court held that the restraint imposed on the free exercise of the livestock and butcher trade was not an actionable deprivation of property. Id. Relying on the writings of Chancellor Kent, Justice Miller wrote that it is the obligation of the legislature, acting under its police power, to interdict “unwholesome trades, slaughterhouses and operations offensive to the senses.” Id. at 62. Under the interpretation of the fourteenth amendment provided in the *Slaughter House* opinion, “states were left all but as free to regulate the rights of property and person as they had been before the Civil War.” B. Schwartz, *supra* note 4, at 92. In *The License Cases*, Chief Justice Taney upheld the state’s prohibition of liquor which was predicated on the view that spirits were morally injurious to its citizens. See also *The License Cases*, 46 U.S. (5 How.) 504, 577 (1847). In a concurring opinion Justice McLean noted that the “acknowledged police power of a state extends often to the destruction of property” in the abatement of a nuisance. Id. at 589.

52 123 U.S. 623 (1887).

53 Id. at 653-58. Mugler and co-defendant Ziebold & Hagelin owned established breweries and had been engaged in the manufacture and sale of beer for several years. Id. Both were indicted for operating without a permit and unlawfully selling intoxicants. Id.

54 80 U.S. (13 Wall.) 166 (1871). See *supra* notes 18-20 and accompanying text (discussion of Pumpelly decision).

55 Mugler, 123 U.S. at 669.
Takings Clause Interpretation

distinguishing the legitimacy of a regulation which prohibits a public nuisance from a regulation resulting in a physical invasion of private property. Moreover, the state was held to possess the power to declare that any property maintained or operated for the illegal manufacture or sale of liquor constituted a nuisance to be abated by confiscation and if necessary, destruction of property for the protection of the public.

In succeeding cases, the Supreme Court continued to uphold land use regulations which retroactively prohibited profitable uses of property, on grounds that their continued existence would be injurious to the public health and safety. In Pennsylvania Coal Co.

---

66 Id. at 671-72. The Court distinguished statutes which “attempt to deprive persons who come within its provisions of property . . . without due process of law” from those statutes which are enacted “[to abate] a common nuisance.” Id. at 671.

67 Id. at 661-63. Section 15 of the statute in question required that the sheriff “shut up and abate such place” where liquor was manufactured or sold by “taking possession thereof and destroying all intoxicating liquors found therein together with all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining said nuisance . . . .” Id. at 670.

Denial of compensation on the ground that the adversely affected interest was not really a property right protected by the fourteenth amendment was incident to Mugler v. Kansas and continues to be common in the case law. See Sax, Takings and the Police Power, 74 YALE L.J. 96, 51 (1964). This “no-compensation because no-property” approach permitted legislatures to prohibit by statute enterprises which fell into popular disfavor notwithstanding the disastrous consequences to the affected owners. Id. at 52. See also Stoebuck, supra note 8, at 1061 (Mugler v. Kansas stands for “noxious use” test of taking which holds that regulation on land which controls some evil or noxious use which landowner is making of land, cannot amount to taking).

68 See Hadacheck v. Sebastian, 239 U.S. 394, 405, 409-10 (1915). In Hadacheck, a landowner constructed and operated a brick manufacturing facility on land containing clay worth $800,000 for brickmaking purposes. Id. at 405. The clay was worth only $60,000 if used for any other purpose. Id. At the time of purchase, Hadacheck’s land was in a remote location outside the City of Los Angeles. Id. at 404-05. The city enacted an ordinance making it unlawful to operate a brick manufacturing establishment within the city’s limits, which then had been extended to include the petitioner’s property. Id. The Supreme Court sustained the ordinance despite the fact that Hadacheck was compelled to abandon his business and deprived of the use of his property. Id. at 413-14. Hadacheck and most early cases involved ordinances which excluded noxious uses from designated areas, and these were upheld when they “required anything less than destruction of the entire interest of the landowner.” See 1 R. ANDERSON, supra note 9, at 85-85. See also Reinman v. City of Little Rock, 237 U.S. 171, 177-78 (1914). In Reinman, a municipal ordinance made the continued existence of a livery stable a nuisance, although it had been situated in the same location for a number of years. Id. Despite the fact that relocation of the stables to a permissible location would be costly, the Supreme Court held that the declaration of the business as a nuisance was in fact and in law a proper exercise of the police power. Id. at 176. The Court, in dicta, warned however, that if a future regulation on business was unreasonable, arbitrary or discriminatory, such a regulation would infringe upon rights guaranteed by the fourteenth amendment and be deemed invalid. Id. at 177.
however, Justice Holmes, writing for the majority, departed from the prevailing view by considering not only the legitimacy of the exercise of police power, but also the economic impact of a statute on the property owner.

*Pennsylvania Coal* involved a dispute over a state statute which prohibited the mining of coal in such a manner as to cause subsidence of structures. Since the operation of the statute made the mining of coal by the plaintiffs impracticable, the statute was held by the Court to be an unconstitutional taking of the company's property and contract rights to mine. Justice Holmes noted that the statute effectively destroyed the subsurface mining rights which the company had reserved by contract, thereby transferring them to surface property owners without compensation and in vi-

In *Miller v. Schoene*, the Court upheld a state order which required an owner to remove a large number of ornamental red cedar trees growing on his property as a means of preventing the communication to nearby apple orchards of a plant disease with which the red cedars were infected. *Miller v. Schoene*, 276 U.S. 272, 277-78 (1928). The cutting of the trees took place pursuant to a state statute (Cedar Rust Act of Virginia) and the owner of the cedars was not compensated. *Id.* The Court, in upholding the state order, reasoned that the value of the apple orchards, the state's principal agricultural pursuit, far outweighed the value of the cedars which, infected with the fungus, were a nuisance which required abatement for the protection of the state's fiscal welfare. *Id.* at 279.

A modern case which followed and revitalized the nuisance theory of takings was *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), in which the Supreme Court upheld limitations upon the right of the landowner to excavate sand and gravel below the waterline, even though the restriction prohibited the most beneficial use of the property. *Id.* at 591-92. The Court ruled that the landowner failed to sustain its burden of showing that the ordinance was an unreasonable exercise of the police power. *Id.* at 596.

Pennsylvania Coal marked the first indication of judicial concern for economic loss in land-use regulation and was the source for the "diminution in value rule." D. Mandelker, *Environment and Equity: A Regulatory Challenge* 45 (1981).

*Pennsylvania Coal*, 260 U.S. at 412-13. Pennsylvania's Kohler Act forbade the mining of coal in such a way as to cause subsidence damage of enumerated structures including private residences. *Id.* The statute was enacted after the coal company deeded surface land rights to the Mahons, subject to a waiver of subsidence damage claims, but retained mining rights to the sub-surface estate. *Id.* The state recognized both a surface estate and a subsurface estate in land, and the two estates were not required to be owned by the same person. Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1249-50 (1987). Under the Kohler Act, if the surface estate and the mineral rights were jointly owned, the owner of the mineral estate could cause subsidence to the surface estate, however, if the two were separately owned, the owner of the sub-surface estate could not mine the mineral estate in such a way as to cause subsidence to the surface estate of the owner's property. *Id.*

Takings Clause Interpretation

...ation of the fourteenth amendment. Pennsylvania Coal left an indelible mark on the law of takings by abandoning the strict nuisance view set forth in Mugler v. Kansas and examining the extent of the diminution of value on the land regulated. By the early 1900's, it became clear that nuisance suits were inadequate remedies for the promotion of social goals, and that a more systematic approach was required. Rapid population growth necessitated the development of zoning regulations aimed at the con...

---

83 Id. at 415-16. In the dissent, Justice Brandeis argued that every exercise of the police power necessarily results in "an abridgment by the state of rights in private property without making compensation," and that any restriction imposed to protect the public health, safety, or morals is not a taking. Id. at 417 (Brandeis, J., dissenting). Brandeis reiterated the prevailing view that an exercise of the police power which prohibited a noxious use of property for the protection of the public could never be a taking. Id. at 418 (citing Mugler v. Kansas, 123 U.S. 623, 668-69 (1887) and Hadacheck v. Sebastian, 239 U.S. 394, 411-12 (1915)).

84 Pennsylvania Coal, 260 U.S. at 415. In what has become a takings maxim, Justice Holmes noted that "[t]he general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." Id. "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Id. Justice Holmes further noted that the takings analysis is a "question of degree and cannot be disposed of by general propositions." Id. See R. Epstein, supra note 2, at 102 (since Mahon, the dominant line of opinion has been that regulations are "outside the scope of eminent domain unless taken 'too far' ").

The "too far" test of regulatory takings has dominated subsequent case law opinions. See, e.g., Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3156 (1987) (Brennan, J., dissenting). See Stoebuck, supra note 8, at 1069, 1081 ("the 'too far' test reduces the takings question to a matter of degree and a mixed question of law and fact, much like a test of reasonableness").

85 See D. Mandelker, supra note 60, at 45. Following the economic loss theory enunciated in Pennsylvania Coal, many courts have applied the "diminution in value test" in analyzing the validity of land use controls, such as zoning. Id. Under this rule, a court will not generally find a taking unless property value losses are substantial. Id. See also Sax, supra note 57, at 41 (degree of economic harm a "critical factor" in the diminution theory); Note, Development in the Law of Zoning, 91 HARV. L. REV. 1427, 1477-78 (1978) (classic expression of diminution of value test was set forth in Pennsylvania Coal, which reflected an important shift in the concept of limits of police power away from noxiousness of property use to economic impact on the landowner). Cf. Rose, Mahon Reconstructed: Why the Takings Issue Is Still A Muddle, 57 S. CAL. L. REV. 561, 566 (1984) (test fails to inform us as to "how much diminution of value is too much").

Nevertheless, the Pennsylvania Coal decision has been credited with the first "balancing test" for takings when it was written that government action may be sustained where it secures the "average reciprocity of advantage" of all interested parties. Pennsylvania Coal, 260 U.S. at 415.

86 See Note, supra note 65, at 1427, 1433. Nuisance actions were generally too expensive a recourse for many individuals injured by neighboring property and were available only to the more litigious, affluent classes. Id. Due to the ad hoc nature of nuisance suits, social goals such as urban growth limitations and environmental control were not met. Id.
trol of building heights and the segregation of incompatible uses of property. The constitutionality of a comprehensive zoning plan was first challenged before the Supreme Court in *Village of Euclid v. Ambler Realty Co.*

In *Euclid*, the owner of a tract of land sought an injunction to restrain the enforcement of a municipality’s zoning ordinance alleging that the local law violated the fourteenth amendment. The land in question was acquired and held by a realty company for industrial use and development. The ordinance in question restricted use of most of the tract to residential development, thereby substantially reducing the value of the land. In finding the zoning plan constitutional, the Court expressed the need to broaden the permissible exercise of the police power to keep pace with the growing complexity of civilization. Inspired by *Euclid,*

---

67 See, e.g., Welch v. Swasey, 214 U.S. 91, 103-04 (1909) (statute which provided for a lower height limitation on buildings in designated parts of the city was challenged as an unreasonable exercise of the police power which the Court held was reasonable and justified by fire protection concerns of the city). See generally 4 E. Yorkey, supra note 5, at 136 (early zoning cases which challenged regulations regarding height of buildings were generally upheld as a proper exercise of the police power).

68 See D. Mandelker, Land Use Law 1-3 (1982). In 1916, New York City became the first municipality to adopt a comprehensive zoning plan which assigned land uses to zoning districts throughout the city. *Id.* The purpose of the plan was to separate incompatible uses of land by segregating the municipality into a number of zones, with the major classifications separating residential, commercial, and industrial uses. *Id.* The author noted that “[c]ourts now recognize the division of a municipality into zoning districts . . . as an acceptable police power.” *Id.* at 3.

New York’s comprehensive zoning plan was upheld by the New York Court of Appeals in 1920. Lincoln Trust Co. v. Williams Bldg. Corp., 229 N.Y. 318, 318-19, 128 N.E. 209, 210 (1920). In addition to New York, Wisconsin also held a zoning ordinance reasonable and valid. State *ex rel.* Carter v. Harper, 182 Wis. 148, 157, 196 N.W. 451, 454 (1923). See generally 1 R. Anderson, supra note 9, at 88 (in the decade following the adoption of the New York City zoning ordinance, more than a dozen state courts reviewed their constitutionality with mixed results).

69 272 U.S. 365, 397 (1926). *Euclid* is considered the seminal zoning decision upholding the constitutionality of comprehensive zoning. D. Mandelker, supra note 68, at 27. See also 6 P. Roman, supra note 16, at §§ 44-1 to -2 (since *Euclid*, zoning has become an accepted and legitimate tool for land use management).

70 *Euclid*, 272 U.S. at 379-82. The zoning plan divided the village into districts designated by use (commercial, agricultural, industrial, residential, etc.), specified minimum lot areas for construction, maximum building heights, and permissible signage. *Id.* at 384.

71 *Id.* The land in question had a market value of ten thousand dollars per acre. *Id.*

72 *Id.* The Company argued that the ordinance “reduced and destroyed” the value of the land, then worth only twenty-five hundred dollars per acre, and constituted a cloud on title. *Id.* at 385.

73 *Id.* at 392. Justice Sutherland, writing for the Court, pointed to the “increasing den-
Takings Clause Interpretation

municipalities extended the scope of their regulatory activities beyond mere nuisance abatement and land use zoning to include an array of aesthetic objectives. Courts, in response to new statutory enactments, enlarged the meaning of "public welfare" to accommodate the promotion of more refined social needs. In light of the expanding definition of public welfare, the Supreme Court, in *Penn Central Transportation Co. v. City of New York*, examined whether programs aimed at the preservation of architectural landmarks could impose regulations on the use and maintenance of privately owned buildings without effecting a taking.

The New York Landmarks Preservation Commission designated Grand Central Terminal a "landmark" in recognition of its

...
distinguished Beaux-Arts architectural design. Subsequently, the building’s owner applied to the Commission for approval to construct an office tower atop its existing railroad terminal. The Commission rejected the proposal and the owner filed suit, seeking injunctive relief on the basis that the Commission’s disapproval constituted an uncompensated taking and a deprivation of property without due process. Affirming the decision of the New York Court of Appeals, the United States Supreme Court held there was no compensable taking. The Court noted that the Commission’s acts were “reasonably related” to the implementation of a comprehensive plan to preserve historic and aesthetically

79 Penn Central, 438 U.S. at 166 n.16. The property was designated a landmark in 1967 over the objections of its owner, Penn Central, but no judicial review of the Board of Estimate’s affirmation of the designation was sought. Id.

80 Id. at 116-17. Penn Central had entered into a multi-million dollar lease agreement with a British co-venturer to construct a 53-55 story office building in an effort to enhance its financial position. Id. Both the lessor, Penn Central, and lessee submitted two architectural plans for the office tower to the Commission. Id.

81 Id. at 118. The Commission found that the addition of a modern 55 story office tower above the 1916 terminal was “an aesthetic joke” as “the Tower would overwhelm the Terminal by its sheer mass... reducing the Landmark itself to the status of a curiosity.” Id.

82 Id. at 119. The New York Supreme Court granted an injunction barring the Landmarks Law from impeding the construction. Id. Upon the Commission’s appeal, the Appellate Division of the New York Supreme Court reversed. Penn Cent. v. City of New York, 50 App. Div. 2d 265, 275, 377 N.Y.S.2d 20, 29-30 (1st Dep’t 1975). The New York Court of Appeals affirmed, reasoning that there could be no taking without a complete transfer of control from the railroad to the city. 42 N.Y.2d 324, 329, 366 N.E.2d 1271, 1274, 397 N.Y.S.2d 914, 922 (1977).

83 Penn Central, 438 U.S. at 138. The owner argued that unlike the landowners in the classic nuisance abatement cases of Hadacheck, Miller and Goldblatt, its proposed office tower would not be noxious, but rather beneficial to the general public. Id. at 133-34 n.30. The Court cast aside Penn Central’s distinction, asserting that the nuisance abatement regulations in those cases were sustained because the restrictions were reasonably related to the promotion of the public good, and not sustained for the purpose of punishing a wrongdoer. Id. See Marcus, The Grand Slam Grand Central Terminal Decision: A Euclid for Landmarks, Favorable Notice for TDR and a Resolution of the Regulatory Taking Impasse, 7 Ecology L.Q. 731, 742 (1978). In rejecting the Pennsylvania Coal view that only a noxious use prevention could support a prohibition of the most beneficial use of the property without resulting in a taking, the Court analogized the purpose of the Landmark Law with that of the long sanctioned objectives of Euclidean zoning. Id. Despite Justice Brennan’s assertion that the nuisance abatement regulations were not sustained to punish wrongdoers, commentators view the rationale of the nuisance cases as remedying an evil or noxious use of property. See, e.g., R. Epstein, supra note 2, at 112 (a public nuisance is a wrong against individuals, each of whom suffers compensable harms, which the state controls by regulations to vindicate individual rights).

The Court similarly rejected Penn Central’s attempt to analogize the facts to the physical invasion case of United States v. Causby. Penn Central, 438 U.S. at 104. See supra notes 21-25 and accompanying text (discussion and analysis of Causby).
Takings Clause Interpretation

significant structures.\(^{84}\) In addition, the owner was found not to have suffered any diminution of its primary investment-backed expectations.\(^{85}\) The *Penn Central* case is significant for its approval of aesthetic regulatory activity, the scope of which permitted a city agency to place restrictions on the development of individual parcels of historic property in furtherance of aesthetic preservation considerations.\(^{86}\)

Recently, in *Keystone Bituminous Coal Association v. DeBenedictis*,\(^{87}\) the Supreme Court revisited the coal mines of Pennsylvania. Like *Pennsylvania Coal Co. v. Mahon*, *Keystone* presented a constitutional challenge to a state statute that required coal mining companies to take precautionary measures to prevent surface subsidence damage during and after mining operations.\(^{88}\) The petitioners repre-

---

\(^{84}\) *Penn Central*, 438 U.S. at 133-34 n.30. The Court stated, "the restrictions were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit . . . ." *Id.*

\(^{85}\) *Id.* at 136. The Court found that the New York City law did not prevent Penn Central from profiting or obtaining a reasonable return on its investment. *Id.* Moreover, the Court noted that Penn Central could use the developmental air rights at eight other building parcels it owned in the vicinity to mitigate any financial burdens resulting from the landmark status. *Id.* at 137.

\(^{86}\) See, e.g., Marcus, *supra* note 83, at 731, 750 (decision has invigorated municipal efforts to preserve aesthetic, historical, and cultural landmarks at a minimum cost to the taxpayers). See also D. Mandelker, *supra* note 60, at 44 (decision reflects the view that land use regulation which "implements subjective environmental values is constitutional").

Justice Brennan also acknowledged that in over 100 years of takings review, the Supreme Court had failed to enunciate a "set formula" for determining when a taking occurs. *Penn Central*, 438 U.S. at 124. "This Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Id.* The takings analysis then is an "ad hoc, factual inquiry which depends largely upon the particular circumstances of the case." *Id.* (citing United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958)). See Berman v. Parker, 348 U.S. 26, 32 (1954) (each takings case must "turn on its own facts").

The consequence of this *ad hoc* approach to the takings issue has been labeled by one commentator as a 'crazy quilt pattern' of Supreme Court doctrine. Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 Sup. Ct. Rev. 65, 63 (1962). See Note, *supra* note 65, at 1464 (decisional law on the takings clause has been "hopelessly confused"). See also Wright, *Exclusionary Land Use Controls and the Takings Issue*, 8 Hastings Const. L.Q. 545, 563 (1983) (legal scholars are in search of a "set of rules which will lend precision to a process which is doomed to imprecision by the state of the law").


\(^{88}\) *Id.* at 1237. Before the statute was passed, coal companies were able to obtain waivers for subsidence damage from surface owners. *Id.* Such waivers permitted the maximum extraction of minable coal. *Id.* See Note, *Keystone Bituminous Coal Association v. DeBenedictis: A Regulatory Taking?* 89 W. Va. L. Rev. 803, 808 (1987). As a result of the statute and
sented mining companies which had purchased sub-surface mineral estates from surface owners, subject to waivers for any damage caused to the surface as a result of mining activity. The petitioners argued that the mere enactment of the state legislation constituted a violation of the takings clause of the Constitution, pursuant to the Court’s interpretation of that clause in Pennsylvania Coal Co. v. Mahon. In its opinion, the Court distinguished Pennsylvania Coal from the facts in Keystone by first contrasting the state statute involved in each. The Court, in a five to four deci-
Takings Clause Interpretation

sion, ruled that the statute was a legitimate exercise of the police power, and as there was no economic deprivation suffered by the owners of the mineral estate, there was no taking.93

Both the majority and the dissent, while differing on whether the coal mining activity should be labeled a public nuisance, recognized that an "exception" to the takings guarantee exists when government seeks to prevent a misuse or illegal use.94 This nuisance exception, first declared in Mugler v. Kansas,95 has subsequently been narrowed, and now applies only when there is less than total destruction of all profitable use of the subject property.96

Despite the fact that there has been no "bright line" leading the way to a regulatory taking determination, two doctrines have emerged from the case law which continue to be applied in the takings analysis. The first is the physical invasion theory which states that all exercises of the police power which result in a permanent physical occupation of private property are takings.97 This doctrine was most recently applied in Nollan v. California Coastal Commission, where it was held that the Commission’s easement

U.S. 225, 260 (1980)). Since the Association had advanced no claim of commercial impracticability or loss of profits on the mining of coal, the statute was upheld as constitutional. Keystone, 107 S. Ct. at 1250-51.

93 Keystone, 107 S. Ct. at 1246, 1251. The contracts clause challenge was similarly laid to rest. Id. at 1251-55. The Court agreed that the statute impaired the contractual relationship between the coal companies and the surface owners, but found that the police power objective and public interest were strong enough to overcome the private agreements between the parties. Id. at 1252.

The dissent found the facts under review and the Act in question "strikingly similar" to those in Pennsylvania Coal. Id. at 1253 (Rehnquist, J., dissenting). The dissent argued that in distinguishing the Kohler Act from the Subsidence Act, the majority undermined the authority of Justice Holmes’ opinion in Pennsylvania Coal and called into question the holding which “for 55 years [had] been the foundation of ‘our regulatory takings jurisprudence.’” Id. at 1255-54 (Rehnquist, J., dissenting). Moreover, the dissent found that the Subsidence Act was “not the type of regulation that our precedents have held to be within the ‘nuisance exception’ to the takings analysis.” Id. at 1256 (Rehnquist, J., dissenting).


95 123 U.S. 623 (1887).

96 Compare Mugler, 123 U.S. at 668-69 (nuisance abatement legislation never amounts to a taking if its sole object is to protect the welfare of the society) with Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414-15 (1922) (nuisance prohibitions which destroy all viable use of property constitute takings) and Keystone, 107 S. Ct. at 1250 (statute which regulates a public nuisance will be upheld absent claim by property owner of commercial impracticability or loss of profits).

97 See supra notes 34-38 and accompanying text (discussion of modern physical invasion theory).
condition requiring the Nollans to allow the public to pass on a portion of private beach was tantamount to a physical occupation of the property and thus a taking.\textsuperscript{98} Conversely, the nuisance doctrine has operated as an exception to the fifth amendment takings clause guarantee, and maintains that an exercise of the police power aimed at the abatement of a noxious use of property is never a taking, unless the property owner's rights are completely destroyed.\textsuperscript{99} 

*Keystone* exemplified the continued vitality of this common-law doctrine.\textsuperscript{100}

The application of these doctrines has not been consistent however. The takings question has always been approached on an *ad hoc* basis, and the Supreme Court has been reluctant to formulate any guidelines or tests for determining the constitutionality of a regulation.\textsuperscript{101} Commentators have suggested any number of "taking tests" which the courts have either rejected or have implemented in a random fashion.\textsuperscript{102} It is submitted that this unstructured approach to the takings question has been further compounded by the recent decision in *First English Evangelical Lutheran Church v. County of Los Angeles*.\textsuperscript{103}

\textsuperscript{98} 107 S. Ct. 3141, 3145 (1987).

\textsuperscript{99} See supra notes 94-96 and accompanying text (discussion of nuisance theory).

\textsuperscript{100} 107 S. Ct. 1232 (1987).

\textsuperscript{101} See supra note 86 (discussion of confused state of case law on takings). Attempts by the Court to clarify the law in this area have led in many circumstances to added confusion. See, e.g., Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3148-50 (1987) (after finding that a physical occupation which constituted an uncompensated taking had taken place, the Court went on to develop the "nexus" test); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (Court drew a distinction between a temporary physical invasion and a permanent physical occupation).

\textsuperscript{102} See, e.g., Dunham, supra note 86, at 63 (in every situation, landowner should be compensated for diminution of value resulting from state regulation); Michelman, supra note 9, at 1250 (compensation due only when there is a physical occupation or a nearly total destruction of "some . . . value"); Stoebuck, supra note 5, at 1062-65 (regulation effects a taking if its objective is directed at "benefitting a governmental entity in the use of land which that entity holds incidents of ownership"); Note, *Taking Without Compensation Through Compulsory Dedications - New Horizons for California Land Use Law: Associated Home Builders v. City of Walnut Creek*, 5 Loy. L.A.L. Rev. 218, 222 (1972) (economic harm to landowner balanced against public necessity). See also Sax, supra note 57, at 63. Professor Sax's approach would allow the state to regulate land in its role as arbiter of disputes, but if the regulation enhanced the state's resource position in its enterprise capacity, the state would be required by the Constitution to pay compensation. Id.

\textsuperscript{103} 107 S. Ct. 2378 (1987).
Takings Clause Interpretation

II. RAMIFICATIONS OF THE *First English* DECISION

The amorphous definition of a taking may place an unfair burden on municipalities and zoning boards which must now compensate a property owner for a temporary taking under the holding in *First English*.\(^\text{104}\) In that case, the Supreme Court invalidated a seven year old state supreme court ruling that just compensation was not a possible remedy for a temporary regulatory taking.\(^\text{105}\)

In *First English*, the appellant had purchased land on the bank of a creek in Los Angeles, upon which was operated a camp for handicapped children.\(^\text{106}\) After a flood destroyed all of the buildings on the campground, the county passed an ordinance which prohibited construction in an "interim flood area,"\(^\text{107}\) in which the appellant's property was located.\(^\text{108}\) The appellant filed a complaint alleging that it had been denied all use of its property, and sought damages due to an unconstitutional taking.\(^\text{109}\)

The California Court of Appeal affirmed the decision of the Superior Court of California rejecting the appellant's cause of action for damages.\(^\text{110}\) Both state courts followed existing precedent and held that the only available remedy for alleged temporary regulatory takings was either declaratory relief or mandamus.\(^\text{111}\) The church appealed to the United States Supreme Court after being

\(^{104}\) *Id.*

\(^{105}\) *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). This case held that the use of inverse condemnation seeking money damages was not a remedy for temporary regulatory takings. *Id.* at 278, 598 P.2d at 32, 157 Cal. Rptr. at 379.

\(^{106}\) *First English*, 107 S. Ct. at 2381. The church had run the camp, Lutherglen, on a twelve acre plot of land in the natural drainage area of Angeles National Forest. *Id.*

\(^{107}\) Los Angeles County, Cal., Ordinance 11,855 (Jan. 11, 1979). The ordinance provided that no "person shall . . . 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." *Id.* It went on to state that its immediate effectuation was necessary due to the urgency of the situation and the danger to public health and safety. *Id.*

\(^{108}\) *First English*, 107 S. Ct. at 2382.

\(^{109}\) *Id.*

\(^{110}\) *Id.*

\(^{111}\) *Id.* at 2382-83. See *Agins v. City of Tiburon*, 24 Cal. 3d 266, 275, 598 P.2d 25, 29-30, 157 Cal. Rptr. 372, 376-77 (1979). Due to increased development in cities, and the need for municipalities' freedom to zone as they see fit, the court viewed the awarding of money damages in inverse condemnation actions as "an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged." *Id.*
denied review by the Supreme Court of California.\(^{118}\) In a six to three decision written by Chief Justice Rehnquist, the Supreme Court held that an action by government which acts as a taking of property requires just compensation even if it is of a temporary nature.\(^{118}\)

The Court avoided deciding the issue of whether a taking had occurred by relying on a literal reading of the California Court of Appeal's rejection of the appellant's claim.\(^{114}\) Therefore, the only issue addressed was whether the Agins rule limiting the remedies for a temporary taking was consistent with the just compensation requirement of the fifth and fourteenth amendments.\(^{115}\) The Court found that it was not.\(^{116}\)

The holding in First English was foreshadowed by Justice Brennan's dissent in San Diego Gas & Electric Co. v. City of San Diego,\(^{117}\) and more recently by several other inverse condemnation cases.\(^{118}\)

\(^{118}\) First English, 107 S. Ct. at 2383.

\(^{116}\) Id. at 2389. "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." Id.

\(^{114}\) Id. at 2382-85. Since the California Court of Appeal had rejected the appellant's claim because it was "one seeking 'damages for the uncompensated taking of all use of Lutherglen' " the majority found that it did not have to decide whether in fact a taking had occurred. Id.

\(^{115}\) Id. at 2385. The appellees objected to the reasoning used to arrive at the issue for review, but the Court rejected their suggestions and left the question of whether the ordinance had actually worked a taking open for remand. Id. at 2384-85.

\(^{117}\) 450 U.S. 621, 636 (1981). In this case, the Court was faced with an inverse condemnation claim made by a company which had bought land on which to construct a nuclear power plant, but the land had been re-zoned as open space. Id. at 624-25. The California courts used the Agins rule to strike down the company's claim without deciding whether a taking had occurred. Id. at 631-32. The Supreme Court claimed that it lacked jurisdiction to decide the constitutional issue of whether compensation was required since no final decision was made in the state court of whether the zoning worked a taking. Id. at 633. In his dissent, Justice Brennan viewed the state court holding as final, and came to the conclusion that if a "court finds that a police power regulation has effected a 'taking,' the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation." Id. at 658 (Brennan, J., dissenting).

\(^{118}\) See MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986) (California court's dismissal of claim on the basis of the Agins rule was not final since the issue of whether a taking had occurred had not been decided); Id. at 2573 n.4 (White, J., dissenting) (permissible to limit "liability for the taking to the interim period"); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 185-86 (1985) (Court refused to decide whether just compensation was required for a regulatory taking since no decision of whether the property had been taken was made, and the owner of the regu-
Takings Clause Interpretation

Chief Justice Rehnquist’s opinion in First English virtually followed Justice Brennan’s dissent in the earlier case. The First English opinion began with the recognition of a private right of action in eminent domain cases which is guaranteed by the fifth amendment. After reaffirming the fact that just compensation is required for a taking, the majority proceeded to rely upon Pennsylvania Coal Co. v. Mahon and Pumpelly v. Green Bay Co. to illustrate that takings may occur in the absence of condemnation proceedings. The majority then addressed the issue of whether a temporary taking brought about by regulation warranted compensation. Through analogy to temporary physical invasion cases, the Court concluded that the constitutional guarantee of just compensation applied to any temporary denial of all use of

lated property had not sought compensation through all available state procedures). See also Nemes v. City of Dubuque, 764 F.2d 502, 505 n.2 (8th Cir. 1985) (considered method proposed in San Diego Gas dissent to be persuasive); Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141, 1148 (9th Cir.) (majority of court asserts that damages are recoverable in inverse condemnation), cert. denied, 464 U.S. 947 (1983); D & R Pipeline Constr. Co. v. Green County, 630 S.W.2d 256, 257 (Mo. Ct. App. 1982) (certain lower court decisions maintain that inverse condemnation may be permitted if regulation works a taking).

Numerous commentators have recognized a trend by a plurality of the Supreme Court, and have advised against accepting such a rationale. See, e.g., Sterk, Government Liability for Unconstitutional Land Use Regulation, 60 Ind. L.J. 113, 157-58 (1985) (use of reasoning in dissent of San Diego Gas would place an unfair burden on policy makers); Williams, Smith, Siemon, Mandelker & Babcock, White River Junction Manifesto, 9 VT. L. Rev. 193, 194 (1984) (plurality’s belief that just compensation was required for constitutionally impermissible regulation is unfounded); Note, Takings Law - Is Inverse Condemnation an Appropriate Remedy for Due Process Violations? - San Diego Gas & Electric Co. v. City of San Diego, 57 Wash. L. Rev. 551, 571 (1982) (inverse condemnation proposed by minority in San Diego Gas was not a valid remedy). But see Sallet, Regulatory “Takings” and Just Compensation: The Supreme Court’s Search for a Solution Continues, 18 Urb. Law. 635, 656 (1986) (Justices Rehnquist and Powell may no longer follow Justice Brennan’s dissent).

119 Compare First English, 107 S. Ct. at 2389 (government must “provide compensation for the period during which the taking was effective”) with San Diego Gas, 450 U.S. at 659 (Brennan, J., dissenting) (government is liable “for payment of compensation . . . for the interim during which the regulation effected a ‘taking’”).

120 First English, 107 S. Ct. at 2385-86.

121 Id.

122 Id. at 2387.

property.\textsuperscript{124}  

In his dissent, Justice Stevens opined that the majority's holding would generate excessive and unproductive litigation.\textsuperscript{125} The dissent maintained that the majority should have addressed the issue of whether a taking had in fact occurred, and suggested that if the majority had done so the question would have been answered in the negative.\textsuperscript{126} Justice Stevens further noted that the result of the Court's holding would impede the passage of needed land use regulations.\textsuperscript{127}  

The right of property owners to enjoy their property without interference is well entrenched in the law.\textsuperscript{128} It is suggested that the First English decision reaffirmed public policy considerations favoring the protection of an individual's property rights over the municipality's interest in safeguarding the public welfare.\textsuperscript{129} It is further submitted that the First English Court attempted to stem the growth of the police power by imposing economic sanctions for its misuse, without delineating the point at which a regulation effects a taking. It is suggested that as a result, the threat of financial liability is apt to restrain state and local governments from freely exercising the full measure of their regulatory authority to insure community welfare.  

CONCLUSION  

Scholars and commentators had hoped that since the Supreme
Takings Clause Interpretation

Court had slated several takings cases for review during its 1986-87 term, the Court was ready to enunciate a long awaited takings test.\(^{180}\) Notwithstanding the trilogy of takings cases reviewed in that term, the Supreme Court has yet to formulate a model to determine when regulatory action rises to the level of an uncompensated taking.\(^{181}\) The \textit{per se} taking rule for "permanent physical occupations"\(^{182}\) and the nuisance exception to the fifth amendment guarantee of just compensation\(^{183}\) are the only two consistent strands in this area of the law. It is submitted that most takings challenges do not fall within one of these two categories, and the Court has followed a tradition of inconsistency in deciding cases situated on the spectrum between these extremes. It is suggested that in close cases, the Supreme Court has at times conveniently culled and utilized the opinions of commentators to support a pre-ordained result.\(^{184}\)

It is proposed that the \textit{Nollan v. California Coastal Commission} and \textit{First English Evangelical Lutheran Church v. County of Los Angeles} decisions have the combined effect of reversing the trend to-

\(^{180}\) See, e.g., Durham, MacDonald, Sommer and Frates v. Yolo County: \textit{The Supreme Court Again Dodges The Inverse Condemnation Issue}, 9 ZONING & PLAN. L. REP. 65, 72 (1986) (takings law was in flux, author hoped to see a clarification of the law in \textit{First English}); Sallet, \textit{supra} note 118, at 651 (Supreme Court had opportunity to make the takings issue more clear in its 1987 term).

\(^{181}\) See, e.g., Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 199 n.17 (1985) (determining when a regulation goes too far has been likened to the "lawyers equivalent of the physicist's hunt for the quark") (quoting C. Harr, \textit{Land-Use Planning} 766 (3d ed. 1976)); Andrus v. Allard, 444 U.S. 51, 65 (1979) ("[r]esolution of each case ... ultimately calls as much for the exercise of judgment as for the application of logic").

\(^{182}\) See \textit{supra} note 38 and accompanying text (discussion of holding in \textit{Loretto}).

\(^{183}\) See \textit{supra} notes 93-96 and accompanying text (under nuisance exception, state or local government may regulate or restrict property rights to control public nuisance without paying compensation, provided regulation does not deprive owner of all profitable or beneficial use). The doctrine has been traced to the \textit{Slaughter House Cases} of 1872 and was most recently applied in \textit{Keystone Bituminous Coal Ass'n v. DeBenedictis}, 107 S. Ct. 1232, 1246-48 (1987).

\(^{184}\) See \textit{Loretto} v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982). The majority used an article by Professor Michelman to support the proposition that every physical invasion is an incontestable case for compensation. \textit{Id}. The dissent, however, used the same article to support the claim that physical invasion is an outmoded concept. \textit{Id.} at 447 (Blackmun, J., dissenting); \textit{Penn Cent. Transp. Co. v. City of New York}, 438 U.S. 104, 125-28 (1978). Professor Sax's 1964 article was cited to support the assertion that injury to economic rights is not property deprivation for fifth amendment purposes, and Professor Michelman's article was cited to support the assertion that a statute which furthers public policy but frustrates "distinct" economic expectations is a taking. \textit{Id}.
ward increasingly flexible exercise of the police power in land use planning and regulation. In *Nollan*, the Court drew in the reins of the police power and reduced the scope of permissible regulatory activity available to zoning and land use decision makers by imposing the "nexus" requirement. It is submitted that the *First English* decision, standing alone, is well reasoned and historically justified; but rather than grasp the opportunity to define when a regulation constitutes a taking, the *First English* Court established a rule which required monetary compensation for temporary regulatory takings. Consequently, a judicial declaration invalidating a land use regulation exposes a governmental entity to potentially debilitating economic liability. This exposure, coupled with the unsettled state of the law will have a "chilling effect" on the trend toward creative utilization of land use controls. In the absence of clarification, the great strides which have been made in ecological preservation and zoning regulation will be impaired,

186 See supra note 52 and accompanying text (discussion of "nexus" test).

186 *First English*, 107 S. Ct. at 2389. The dissent criticized the majority for addressing an issue which was not presented and then concluded that the majority had "answered that self-imposed question in a superficial and . . . dangerous way." Id. at 2390 (Stevens, J., dissenting).

187 See id. at 2394 (Stevens, J., dissenting). "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Id. (Stevens, J., dissenting) (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)). See, e.g., San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 627 (1981) (appellant received over three million dollars for a temporary taking). See also Note, Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?, 28 HASTINGS L.J. 1569, 1597-98 (1977) ("severe and unexpected financial liability" will result from such a rule); Note, supra note 118, at 567 (adverse effects on municipal budget); Morris, Supreme Court Land Use Decisions Uncertain in Defining a "Taking," Nat'l L.J., Sept. 7, 1987, at 20, col. 4 n.10 (executive director of National League of Cities claimed ruling "exposed local governments to a torrent of costly lawsuits"). But see Kass & Gerrard, Excessive Sound, Fury Over Land-Use Ruling, N.Y.L.J., June 17, 1987, at 1, col. 1 (holding is narrowly limited to total deprivation of property, therefore it is not widely applicable).

188 See Merrill, Takings Clause Re-Emerges, But No Clear Pattern Seen, Nat'l L. J., Aug. 17, 1987, at S-8, col. 3. "[I]f the rules for finding a regulatory taking are completely unpredictable, the . . . [First English decision] could have a serious 'chilling effect' on desirable" regulation. Id. See also Williams, Smith, Siemon, Mandelker & Babcock, supra note 118, at 240. The writers forewarned that if Justice Brennan's dissent in *San Diego Gas* became the majority view, municipalities would not adopt regulations which are necessary to plan their growth. Id.
Takings Clause Interpretation

and as Justice Stevens foretold, the floodgates to unproductive and unnecessary litigation will be opened.189

Christopher P. Belisle & Mary Ann Hallenborg

189 First English, 107 S. Ct. at 2389-90 (Stevens, J., dissenting). “One thing is certain. The Court’s decision today will generate a lot of litigation . . . most of it . . . unproductive.” Id. (Stevens, J., dissenting).