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Constitutional Law: Is Time Running out for the Government to Dispute Regulatory Takings - First English Evangelical Lutheran Church v. City of Los Angeles

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NOTES

CONSTITUTIONAL LAW—IS TIME RUNNING OUT FOR THE GOVERNMENT TO DISPUTE REGULATORY TAKINGS?—First English Evangelical Lutheran Church v. City of Los Angeles

INTRODUCTION

In First English Evangelical Lutheran Church v. City of Los Angeles, the United States Supreme Court decided a landmark takings issue in favor of a private landowner against the government. The Court thus continued its attempts "to relieve [the] inherent tension between police power and eminent domain" analyses. In doing so, the Court finally laid to rest "the still-persistent argument that takings and regulations should be mutually exclusive concepts, especially as they relate to land use controls." The Court extended the full complement of eminent domain causes of action and remedies to landowners suing for regulatory interference under inverse condemnation theory.

In First English, the Court recognized a new type of inverse condemnation "taking," a "temporary," "interim," or "partial" taking for which a regulator must compensate a private property owner. Until recently, judicial decisions prevented a private property owner from receiving compensation for governmental regula-

tory interference. However, in First English, the Supreme Court recognized for the first time that mere invalidation of the regulation would not restore the owner's lost use of the property and that such loss could be remedied only by money damages. The Court decided that some circumstances compel the regulator to compensate the owner no matter how short the time period in which the government deprived the owner of property use.

However, in its eagerness to address the "temporariness" aspect of regulatory takings, the Court injected a new element into the controversy: the litigational time factor. The effect of this element on regulators will be swift and severe. In its efforts to curb abuses of regulator power, the Court gave private developers and owners a tool so powerful that the rationality of the eminent domain decision is overshadowed by potential problems. In takings law, the more things change, the more they stay the same.

This Note will trace the evolution of regulatory "temporary" takings from its roots in traditional eminent domain law and examine the practical effects of the Court's decision on regulatory takings analysis. The analysis will specifically question what period of time during the pendency of takings litigation will constitute a "considerable" enough length of time that it becomes a factor in takings analysis and remedies. This Note will conclude that although the First English decision will increase the number of challenges to regulator actions and increase regulator liability it probably will not enhance the actual compensation amount that aggrieved landowners receive.

THE CASE

The First English Evangelical Lutheran Church owned land, occupied by several buildings, constituting a campground. The campground, Lutherglen, was used as a retreat and as a recreational area for handicapped children. A flood destroyed the buildings in 1978, and in 1979 the County of Los Angeles adopted an interim ordinance that included Lutherglen in a flood-protection area and banned further construction in the area. The ordinance prohibited any attempt by the church to rebuild Lutherglen. Within two months, the church sued the county for monetary dam-

7. This is the length of time consumed by the litigation of whether a taking occurred.
8. 107 S. Ct. at 2381.
9. Id.
10. Id.
ages for inverse condemnation on the theory that the regulation denied the church all use of its property.\textsuperscript{11}

The trial court granted the county's motion to strike the church's complaint for failure to request the proper relief for a regulatory taking, which at that time was limited to declaratory relief or a writ of mandamus.\textsuperscript{12} Because of the defective form of the pleading, the court ignored the church's allegations that it was deprived of all use of its property. The court relied on \textit{Agins v. City of Tiburon},\textsuperscript{13} which held that a landowner could not force a regulator to exercise eminent domain through inverse condemnation proceedings challenging an invalid regulatory taking.\textsuperscript{14} The church appealed to the California Court of Appeal, which affirmed the dismissal of the complaint based on the \textit{Agins} decision.\textsuperscript{15} The California Supreme Court denied the church further review of the dismissal and the church appealed to the United States Supreme Court, which granted the writ of certiorari.\textsuperscript{16}

The Supreme Court reversed and remanded the case to the lower courts, holding that monetary damages is a proper form of relief for an invalid regulatory taking. The Court recognized that, even if the regulator rescinded the regulation, no other form of relief could remedy the prior injury to the private owner.\textsuperscript{17} The Court held that regulatory interference with an owner's use of his property to the extent that the owner had no use of the property at all constituted a compensable injury regardless of the duration of the interference.\textsuperscript{18} The Court termed such egregious regulatory interference a temporary taking because the duration of the taking ended when the regulator decided not to exercise eminent domain.\textsuperscript{19} The Court defined the "temporary taking" as the owner's total loss of use of the property for the time span between the reg-

\textsuperscript{11} \textit{Id.} at 2382. The church also sued the county in tort for negligent cloud seeding. The church contended that the flooding of Lutherglen resulted in part from the government's overzealous efforts to provide rain runoff for its water supply.

\textsuperscript{12} \textit{Id.} at 2383.

\textsuperscript{13} 447 U.S. 255 (1980).

\textsuperscript{14} \textit{First English}, 107 S. Ct. at 2381.

\textsuperscript{15} \textit{Id.} At the time that the California Supreme Court denied a hearing, the interference with the property was approximately seven years old. When the Supreme Court decided the case, the interference was approximately nine years old. \textit{Id.} at 2388.

\textsuperscript{16} \textit{Id.} at 2383.

\textsuperscript{17} \textit{Id.} at 2389.

\textsuperscript{18} \textit{Id.} at 2388.

\textsuperscript{19} \textit{Id.} at 2387.
ulator’s interference with the owner’s use and a court’s invalidation of the regulation pursuant to the owner’s challenge.20

To reach the remedy issue, the Court assumed without holding that the regulation “took” all use of the land from the owner “for a considerable period of years”21 and that the deprivation of use of the land during “this period of years”22 constituted a compensable taking. For application of the new “temporary” cause of action and the new remedy, the Court remanded the case to the lower court to determine whether the government actually denied the church the total use of its property.

The Court also held that the government was free to elect to end the “taking” by traditional actions subsequent to the court’s adjudication, such as repealing or amending the regulation.23 However, these actions would not reduce the government’s liability for the period of time encompassed by the “‘temporary’ regulatory taking.”24

The Court ended its decision with a cryptic statement in which it distinguished between different types of litigational delay in “takings” suits. The Court described the first period of time as permissible “normal delays” in the regulator’s decision-making process for granting “building permits, changes in zoning ordinances, variances and the like.”25 The owner should expect no compensation for these delays, even though the owner had no use of the land during the delay.26 The second period of time, unnamed and undefined, presumably would contribute to the court’s finding that the regulator’s actions worked a taking of the owner’s property.

BACKGROUND

Understanding the new cause of action and the new remedy created in the First English decision requires an understanding of the development of eminent domain27 law. The fifth amendment

20. Id. at 2383.
21. Id. at 2389.
22. Id. at 2384.
23. Id. at 2389.
24. Id. at 2381.
25. Id. at 2389.
26. Id. “We limit our holding to the facts presented . . . quite different questions [from] normal delays . . . which are not before us.”
27. For a history of the term “eminent domain,” see Bauman, supra note 3, at 50-51. The eminent domain power is employed by federal, state, and local governments, public utilities, and some specialized local governmental agencies, such
requires that government shall not abridge certain rights of citizens; "nor shall private property be taken for public use without just compensation."\(^{28}\) Originally, only the government could act to condemn property and compensate owners through the process known as eminent domain. However, because of the "self-executing"\(^{29}\) nature of the fifth amendment, courts allowed landowners to bring suits in inverse condemnation\(^{30}\) to accomplish informally the guarantee that government failed to provide formally — compensation for land taken.\(^{31}\)

The first recognized basis for eminent domain and inverse condemnation actions was a taking by physical interference.\(^{32}\) However, courts gradually interpreted these two actions to encompass other governmental conduct, such as nonphysical interferences with owner rights.\(^{33}\) Justice Holmes first advanced the notion that regulatory interferences with owner rights could constitute a taking in his 1922 opinion in *Pennsylvania Coal Co. v. Mahon*.\(^{34}\)

Setting the pattern for future Supreme Court "nondecisions"\(^{35}\) in

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28. U. S. Const. amend. V. The fifth amendment governs state actions through the fourteenth amendment. Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226, 236 (1897). "Compensation clauses are included in all state constitutions except North Carolina’s, whose courts have added such a provision by interpretation." Bauman, supra note 3, at 19 n.7.


33. See, e.g., United States v. Causby, 328 U.S. 256 (1946) (Government airplane flights over a chicken farm interfered with the private owner’s rights.) 3 Nichols § 8.1[4], p. 8-43.

34. 260 U.S. 393 (1922).

35. The Supreme Court repeatedly has offered guidelines to interpret whether a taking occurred without actually holding that a taking occurred. See
regulatory takings cases, Justice Holmes stated that "if regulation goes too far it will be recognized as a taking..." The concept of a "taking" is central to compensation according to the constitutional requirement, and its lack of definition creates the bulk of problems in analysis of the validity of regulations. In Pennsylvania Coal Co., the Court advanced the theory of regulatory takings without indicating how far the normally noncompensable regulation must go before impermissibly crossing into the compensable taking category. Unfortunately, it is not possible to say that one knows a taking when one sees it.

The custom of judicial deference to state regulation in the form of "police power" regulatory exercises complicates the simplicity of Justice Holmes' statement. Until the First English decision, courts created a dichotomy of analysis of governmental action based on whether the government's conduct was under the rubric of "eminent domain" or "police powers," reserving almost absolute protection for police powers. In 1926, the Court diluted Justice Holmes' new concept of a regulatory taking in Village of Euclid v. Ambler Realty Corp. The Court held that zoning and other land-use regulations are permissible and noncompensable exercises of police powers. As a natural result of this protection, regulators expanded the use of police powers to accomplish many goals in land-use management by zoning. Such expansion creates

Pennell v. City of San Jose, 108 S. Ct. 849 (1988) (Considering a rent control ordinance, the Court most recently rejected a takings argument, stating that the constitutionality of laws should not be decided unless an actual factual setting makes such a decision necessary).


37. For an excellent overview of takings analyses policy theories see Bauman, supra note 3, at 20-44. See also Kratovil, supra note 2, at 593 n.38.

38. Comment, Land Use Control Through Municipal Delay: The Case for an Eminent Domain Remedy, 11 The Urban Lawyer 311, 315 n.17 (Spring, 1979).


40. 1 Nichols § 1.42, p. 1-133; Kratovil, supra note 2, at 592. Police powers could not constitute a taking of land. To solve the problem of finding a taking, the courts would hold that the governmental action was outside the exercise of permissible police powers and not a police power exercise at all.

41. 272 U.S. 365 (1926).

42. Id. at 397.
the potential for abuses which the courts must address. "And as the 'police power' is adapted for more and more increasingly complex applications, the police power/eminent domain dichotomy becomes less useful and more anachronistic."

The judicial and legislative branches did not always strictly separate police power regulation from eminent domain compensation. At one time, courts recognized the concept of "compensatory zoning," but it fell into disfavor after the Supreme Court's decision supporting noncompensatory zoning in Euclid v. Ambler. In "compensatory zoning" the government voluntarily and automatically compensated private landowners for police power zoning provisions that affected private land.

Property owners did not use efficiently the inverse condemnation remedy to challenge land-use regulations until the 1970s. The majority of attempts by private owners to stop government regulations by the inverse condemnation remedy have been in zoning and in landmark designation. Within this context, the courts rebuffed the first attempts to secure compensation for regulatory takings, allowing only declaratory relief.

Traditionally, the Court judged allegedly nonregulatory takings by the effect of the governmental conduct on the property owner rather than by the method of conduct. It perceived that some governmental conduct affected private property interests prior to the government's formal eminent domain conduct. From out of this judicial perception grew a body of law holding that the landowner could bring suit in inverse condemnation to recover for the government's conduct prior to its decision to take the land.

43. Bauman, supra note 3, at 53.
46. Bauman, supra note 3, at 45.
47. Agins, 447 U.S. 255.
48. See Pennsvanlia Coal Co. v. Mahon, 260 U.S. 393 (1922) (no taking occurred). See also 3 NICHOLS § 8.1[4][a], p. 8-53. But see Benenson v. United States, 548 F.2d 939 (Cl. Ct. 1977) (government inaction constituted a taking.)
49. 3 NICHOLS § 8.1[4][a], p. 8-53; Johnson, supra note 5, at 584.
50. Bauman, supra note 3, at 25.
The prior conduct itself could work a taking of private land by action or inaction. This implied taking is known as a de facto taking, in contrast to the government's intentional de jure taking. Courts pronounced a de facto taking when governmental conduct implied that the government's intent was to hold the land in "limbo" until it decided whether to actually take the land. The underlying policy was the obvious unfairness to landowners deprived of the use or value of their property for lengthy periods of time after which the government either abandoned or refused to institute eminent domain proceedings. One of the factors courts considered in assessing de facto takings was the conduct of the government and its role in delaying proceedings to avoid compensation, to devalue property, or merely to decide whether to institute eminent domain action. Although the government's bad faith is an element of this analysis, courts have held that govern-


53. San Diego, 450 U.S. at 653.


55. Comment, supra note 44, at 327.


58. See generally, Annotation, Plotting or Planning in Anticipation of Improvements as Taking or Damaging of Property Affected, 37 A.L.R.3d 127 (1971).

59. Comment, supra note 44, at 318. See, e.g., Drakes Bay Land Co. v. United States, 424 F.2d 574, 586 (Cl. Ct. 1970), in which the government's conduct in refusing to condemn a private developer's land was held to be a taking after a delay of approximately six years.

60. Because the measure of compensation that the government must pay the owner in an eminent domain suit is the fair market value of the property just prior to the taking, the government's advantage in reducing the market value is obvious. United States v. Miller, 317 U.S. 369, 373-74 (1943). "In general there is room for the doctrine that the government cannot use the threat of eminent domain to drive down established market prices." Reservation Eleven Assoc. v. District of Columbia, 420 F.2d 153, 157 (1969) (the announcement of government plans do not rise to the level of de facto interference).

61. Kanner, supra note 51, at 769: "[S]ome of the most effective municipal responses involve no action at all. Inordinate delay in the municipal decision-making process is one such response." See also United States v. Dickinson, 331
ments in fact took property during the process of deciding in good faith whether to exercise eminent domain proceedings.62

Judicial decisions have granted the sovereign some breathing room for its decision-making eminent domain process, characterized as “normal delay”63 or “preliminary activities.”64 The delay in the decision-making process becomes a factor in the issue of whether a taking occurred if a court holds that the delay was “oppressive.”65 The sovereign’s unreasonable delay is an abuse of the decision-making process for which the sovereign must compensate the property owner,66 just as the government’s exercise of police power affecting private property must be reasonable.67

U.S. at 748.

62. “[Justice] Stevens’ presumption [in concurring with the majority opinion in San Diego] that governments act in good faith in establishing such regulations, however, is unrealistic in light of Justice Brennan’s depiction of what actually takes place in the real world of land use regulation. Nothing in the Constitution requires the Court to be guided by a myth that experience has exploded.” Kratovil, supra note 2, at 600 (footnote omitted). See also Kanner, supra note 51, at 769; Kratovil, supra note 2, at 591-592, 27 AM.JUR.2D Eminent Domain § 461, p. 381.

63. First English, 107 S. Ct. at 2373.

64. Id. at 267, citing Agins, 447 U. S. at 263 n.9. “Preliminary activities” encompasses the planning of the regulator prior to its formal condemnatory action and does not constitute a de facto taking. These preliminary activities, such as the public announcement of the intent to condemn land, may lessen the land value. The lessening of value, often termed “blight,” is deemed noncompensable. “[T]he mere declaration of blight and other initial steps authorizing condemnation, even if they result in a decline in property values, do not constitute a taking requiring compensation to the property owner.” Thomas W. Garland, 596 F.2d at 787, citing Danforth v. United States, 308 U.S. at 286. Accord Donohoe Construction Co., Inc. v. Montgomery City Council, 567 F.2d at 609; Foster v. City of Detroit, 405 F.2d at 141; Virgin Islands v. 50.05 Acres, 185 F. Supp. 495, 498 (D.C.V.1. 1960). For a discussion of condemnation blight as distinguished from a de facto taking, see 4 Nichols § 12.315[5], p. 12-475; Kanner, supra note 51.

65. For an example of oppressive delay that caused a taking, see Klopping v. City of Whittier, 8 Cal. App. 3d 39, 104 Cal. Rptr. 1, 500 P.2d 1345 (1972). See also Donohoe, 567 F.2d at 609 (the council did not act in an “unreasonably dilatory manner . . . although “it has made no attempt during the three-year pendency of this suit either to institute condemnation proceedings to to remove the ‘cloud of condemnation.’””) But see City of Walnut Creek v. Leadership Housing Systems, 73 Cal. App. 3d 611, 622, 140 Cal. Rptr. 690, 696 (1977); Foster, 405 F.2d 138 (10-year delay before the government abandoned condemnation proceedings worked a taking).


67. While a City Commission certainly possesses the prerogative of deciding
Courts traditionally recognized de facto takings in nonregulatory governmental actions. However, the courts rarely applied the designation to regulatory actions until the First English decision.

ANALYSIS

In First English, the Court found the perfect set of circumstances in which to extend the inverse condemnation cause of action to embrace the full theories of eminent domain. The Court had searched unsuccessfully to find a case in which it could avoid the difficult issues of whether the regulator's action constituted a taking and whether the taking sufficiently deprived the owner of property value to overcome the public health, safety, and welfare interests inherent in police power exercises. To address the durational factor in regulatory takings and the remedy for such takings, the Court from the lower courts' decisions assumed both that the regulator "took" the property and that the taking deprived the owner of all use of the property. The Court's two assumptions surmounted the practical barriers that previously had prevented the Court from modifying the mutually exclusive theories of eminent domain and police powers. The Court now could advance its position that these two entangled property law doctrines were

to defer action on such a proposal [for a building permit] over a long period of time, it must assume the attendant responsibility for the adverse effect it knows or should know its deliberate inaction will have upon the parties with whom it is dealing.

Hollywood Beach Hotel Co. v. City of Hollywood, 321 So. 2d 10, 18 (Fla. 1976) (The Florida Supreme Court did not utilize a compensation remedy, but it prevented the city from implementing a zoning change). One commentator gathers authority and postulates that the regulator's "acquisitory purpose" is a factor in determining whether a delay constituted a taking. Johnson, supra note 5, at 588-89. The measure of compensation for a de facto taking is a major diminution in value of the property during the period of the government's oppressive conduct. A "mere" diminution in property value is insufficient. Danforth, 308 U.S. at 283. Logically, a total taking results in a complete diminution in value so that "the condemnor, theoretically, pays the full market value." Kratovil, supra note 2, at 593.

68. First English, 107 S. Ct. at 2383. "Four times this decade, we have considered similar claims and have found ourselves for one reason or another unable to consider the merits of the Agins rule [no compensation for a regulatory taking]."

69. Id.

70. Id. at 2389.

71. Bauman, supra note 3, at 32.
merely the polar extremes of the same spectrum of legal analysis, a confirmation of the "unitary nature of police power and eminent domain."72

In practical terms, the Court's holding provides incentive to property owners to challenge prohibitory regulations to gain compensation despite the regulator's refusal to exercise its power of eminent domain. The new inverse condemnation cause of action and remedy benefit owners because governmental regulatory action now merits the same scrutiny and limitations as governmental eminent domain actions.

Several factors soften the apparent suddenness of the Court's holding in First English. First, prior court decisions,73 dissents,74 and commentary76 raised the possibility of extending the temporary takings doctrine from the eminent domain context to regulatory inverse condemnation proceedings. Second, a recent decision by the Court exalted some private property rights to unprecedented heights in current takings analysis.76 Third, flood-control regulation is one of the forms of land-use regulation that courts are more likely to hold as excessive when challenged by property owners.77 Fourth, police powers traditionally enjoy such deferential treatment from courts analyzing the scope of the regulations that only a total deprivation of private use of the property would overcome judicial deference to sovereign actions.78

The Court's decision in First English was the culmination of a logical and orderly progression in takings analysis that had as its

72. Kratovil, supra note 2, at 609.
73. See generally Bauman, supra note 3, at 47-48 n.165; for much earlier cases, see Comment, supra note 38, at 313 n.5; Kratovil, supra note 2, at 598 n.65.
74. See San Diego, 450 U.S. at 636 (Brennan, J., dissenting) and Bauman's discussion of its genesis, supra note 3, at 58.
75. Bauman, supra note 3, at 18-32.
76. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3145 (1987) (the right to exclude others). See generally Bauman, supra note 3, at 67-68. One commentator traces this exaltation to the roots of natural law underlying the American value system. Kratovil, supra note 2, at 606; Comment, supra note 38, at 323.
78. Bauman, supra note 3, at 31.
basis the considerations of "fairness and justice." Implicit in the Court's decision is the conviction that a taking results in the same injury to the landowner without regard to the form of governmental action. The government's action in taking the property, whether "taking by" the government in eminent domain proceedings or "taking away" property rights from the landowner by the governmental regulation, was irrelevant to the deprivation if the deprivation was severe enough.

According to some commentators, the abuse of decision-making delay is as pervasive as the abuse of governmental delays that result in de facto takings under color of processing eminent domain decisions, and the abuse deserves the same remedy. Municipal zoning ordinances are a specific area of regulation in which intentional delays in deciding the appropriateness of regulation suppresses private development much more effectively than the regulation itself. Motivated by carelessly concealed and inappropriate sovereign motives, the Court used First English as a vehicle in which to equalize the analysis between eminent domain law and inverse condemnation law. If the Court had ended its decision with this fundamental change in analysis of regulatory takings, the First English decision would have fulfilled commentators' predictions that judicial common sense and fairness toward private interests would prevail over convoluted, outdated, and unsupportable takings evolution. However, the Court's evident frustration with the unfairness of current takings analysis caused the decision's

79. As is typical of the whole of takings analysis, neither courts nor commentators can agree on the constitutional basis for the "fairness" element of takings decisions. The dispute is whether the fairness concept emanates from the fifth amendment or from the due process clause of the fourteenth amendment. First English, 107 S. Ct. at 2390, 2399 (Stevens, J., dissenting); Bauman, supra note 3, at 53. "The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action' — when they are born, whether they proliferate, and when they die." Dickinson, 331 U.S. at 748.

80. Kratovil, supra note 2, at 588.
81. Id.
82. Kratovil, supra note 2, at 591-92; Comment, supra note 38, at 311.
83. Comment, supra note 38, at 311.
reach to exceed its manageable grasp. After quieting the turbulent theoretical disputes within takings analysis, the Court increased the unpredictability of the expanded regulatory takings analysis by highlighting a factor borrowed from eminent domain \textit{de facto} analysis: the length of time required to litigate these difficult issues.

"Temporary takings" exist in the inverse condemnation \textit{de facto} taking body of law precisely because the sovereign refuses to continue its offending conduct after the parties contest the issue in court. Significantly, an important aspect of \textit{de facto} taking analysis is the length of time that the sovereign’s conduct interfered with the owner’s use of the property. In \textit{First English}, both the majority and the dissent focused on the time dimension of regulatory takings. In \textit{First English}, the government’s action in denying the church the use of its property was a “considerable” part of the Court’s decision both as to the number of years of the dispute and because the Court weighed as a factor the time during which the church was denied use of its property.

In regard to the Court’s holding that the time of litigation for dispute of the takings issue is a factor in whether the government’s conduct worked a taking, the validity of police power regulations is a very different issue from the issue of whether an eminent domain taking occurred. The most significant factor in regulatory takings analysis is the absence of bright lines between permissible regula-

86. “A man’s reach should exceed his grasp, or what’s a heaven for?” Alexander Pope, “On Man.” See Kratovil, supra note 2, at 618.

87. \textit{First English}, 107 S. Ct. at 2388. The Court evidently endorsed Justice Brennan’s dissenting advice in \textit{San Diego}, 450 U.S. at 658-59, when he suggested a wholesale borrowing of eminent domain guidelines for the new regulatory cause of action: “Ordinary principles determining the proper measure of just compensation, regularly applied in cases of permanent and temporary ‘takings’ involving formal condemnation proceedings, occupations, and physical invasions, should provide guidance to the courts in the award of compensation for a regulatory ‘taking.’”


89. “Property is taken in the constitutional sense when inroads are made upon the owner’s use of it to an extent that . . . a servitude has been acquired . . . in the course of time.” \textit{Dickinson}, 331 U.S. at 748 (The government chose not to institute eminent domain proceedings although flood waters interfered with the owner’s use of the property for more than six years).

90. \textit{First English}, 107 S. Ct. at 2387, 2393 (Stevens, J., dissenting).

91. \textit{Id.} at 2389.
In regulatory takings analysis, all of the current guidelines emanate from owner litigation, and such litigation is the stimulus for advancing judicial analysis. The Court now attempts to extend the judicial framework for analyzing litigational delays prior to eminent domain action to analyzing litigational delays prior to a court’s holding that regulation is impermissible. But the government’s attempt to avoid compensation is the only underlying factor that the two forms of litigation have in common. In the eminent domain context, the government’s attempts to avoid compensating the owner usually only delay the inevitable court ruling that the owner deserves compensation for the property taken. However, in the regulatory context, the coincidental governmental intent to avoid compensation is based on the court-engendered belief that regulation itself is permissible if it is reasonable, without respect to the disputes that follow the enactment of the regulation. Only when courts can examine the circumstances of litigating the validity of a regulation and conclude that the litigational delay was a tool to thwart the landowner’s fair compensation should the courts hold that the governmental intent to prolong the delay was enough of a factor to warrant a compensable taking.

Several courts in California foreshadowed the First English decision. Those courts held that restrictive zoning ordinances constituted de facto takings if the regulator’s conduct interfered with all use of the property for an unreasonably long length of time.

92. "There is no set formula to determine where regulation ends and taking begins." Goldblatt, 369 U.S. at 594. As Justice Brennan points out in his dissent to the San Diego majority opinion, this issue is tossed on a sea of ad hoc analysis. Yet, Justice Brennan would burden planners with the responsibility of assessing constitutional permissibility of regulations: "After all, a policeman must know the Constitution, then why not a planner?" 450 U.S. at 661 n.26.


94. See Comment, supra note 6.

Reasonableness . . . is the yardstick by which the validity of a zoning ordinance is to be measured and reasonableness in this connection is a matter of degree. A temporary restriction upon land may be . . . a mere inconvenience where the same restriction indefinitely prolonged might possibly metamorphize into oppression.96

The lack of clear definition of "takings" terms hampers Court examination of the circumstances of litigating the validity of regulation. One source of confusion in takings analysis is the inability of the members of the Court to agree on any aspect of the takings analysis. This lack of agreement induces adoption of important aspects of regulatory law without wide bases of support.97 Because takings analysis rests on a case-by-case circumstantial analysis,98 the Justices often concentrate on issues that will give them the results that they seek without regard to the impact of a decision on the development of a general area of law. First English is a case in point, with the majority adopting Justice Brennan's dissent in a prior regulatory takings case.99

In First English, Justices Stevens, Blackmun, and O'Connor dissented from the Court's holding that a police power regulation could ever constitute a taking. The dissent based its argument on the legitimacy of the government's interest in protecting the health, safety, and welfare of the community.100 The dissent also deferred to the state court's decision as to the proper procedure by which to remedy excessive regulation.101 Both of these issues are fraught with uncertainty, and the majority wisely avoided them, since addressing them could have prevented indefinitely the resolution of the theoretical problems.

96. Peacock, 77 Cal. Rptr. at 402 (The restriction affected the land for six years). See also Johnson, supra note 5, at 595.
98. Id. at 2393.
99. Id. at 2394.
100. Id. at 2391.
101. Id. at 2396.
Justice Stevens, writing alone in part of the dissent, severely criticized the majority opinion for differentiating between "normal delays" associated with governmental decisions that insulated the government from liability for monetary compensation and delays due to valid litigation of whether a regulation was invalid and for which the government was liable. Justice Stevens classified the differentiation as an "artificial distinction" which the majority could not justify.

Viewing the "temporary" regulatory takings from the government's viewpoint, Justice Stevens pointed out several of the direct effects of the First English decision. In addition to disagreeing with the majority on the basic issue of whether a taking occurred, Justice Stevens saw three major effects of the decision. First, the "mere duty to defend" its conduct would chill the regulator's land-use regulation of private property. Second, Justice Stevens visualized regulations as three-dimensional and emphasized that the single dimension of duration of the restriction is indivisible from the dimensions of the extent of the interference and the amount of property affected by the regulation. Last, Justice Stevens reserved his harshest criticism of the majority for its failure to "explain why there is a constitutional distinction between denial of all use of the property during . . . 'normal delays' and an equally total denial for the same length of time in order to determine whether a regulation has 'gone too far' to be sustained."

In addition to Justice Stevens's concerns, other more troubling practical aspects of the decision arise. Because the public fisc is at risk for the source of the new remedy, regulators are less likely to exercise police powers that prohibit substantial use of the property, regardless of the time duration of the ban. Regulators are less likely to exercise powers in areas of private activity in which courts indicate their willingness to assess takings. Regulators will attempt to anticipate at the onset of a challenge whether a court is likely to find that the regulation worked a taking, or if not,

102. Id. at 2395.
103. Id. at 2396.
104. Id. at 2390.
105. Id. at 2394.
106. Id. at 2395.
108. "When the court has plainly delineated its views on the appropriate zoning and the municipality thereafter adopts an amendment that disregards the court's decision, difficult questions arise." Kratovil, supra note 2, at 620.
whether the basis for the regulation warrants a dispute with the owner. Despite the Court's assurances that judicial interpretation will not usurp legislative prerogative, judicial analyses will have significant impact on regulator conduct.  

Finally, a paradoxical situation confronts the regulator when an owner challenges the regulation in court. Despite the regulator's internal assessment that a court will uphold the regulation as a valid exercise of police powers, protracted litigation itself is more likely to result in a taking. The longer the litigation, the greater the amount of compensation for which the regulator is liable. Litigation in which relatively close questions of whether the regulation is permissible could actually result in owners dragging out the litigation to enhance their chances of the court finding a taking, particularly if the denial of use is substantial enough.

The courts' reaction to government abuses of regulatory power is evident in commentary that speculated on the long-overdue compensation remedy, a remedy which the Court's ruminations finally produced. Although the new remedy addresses willful delay by governmental bodies, the danger exists that courts will perceive that meritorious governmental defenses of regulation are overzealous and subsequently dilatory. Statements such as the one that follows, although taken somewhat out of context, give evidence of thought processes leading to such a judicial conclusion: "It is unrealistic to talk of usurpation of legislative power, for if the legislature had done its sworn duty, the action would never have been brought in the first place."  

Governmental bodies may decide that prompt rescission of the offending regulation before the owner initiates court action would effectively limit liability in two ways. Rescission would remove the length of the dispute as a crucial factor affecting whether a taking occurred and limit potential damages for the temporary taking if a court finds a taking. The ultimate result of designating the length of litigation time as a factor in takings analysis is the same kind of delaying tactic by which regulators formerly abused the owners.  

An inevitable effect of the First English decision is to shift judicial emphasis to another dimension of the regulatory takings
analysis, the amount of the interference with the property use. As the Court dictated in First English, the owner must allege that the regulation denied the owner total use of the property.\textsuperscript{113} To prevent exactly the kind of inhibitions of governmental action discussed above, the courts will look at the extent of the interference with use with a much more critical eye. More critical evaluation of the amount of interference leads the courts back to the problems of takings analysis from which the Court intended to salvage them with the First English decision.

**CONCLUSION**

In First English, the Supreme Court decided perhaps the most important takings case since Pennsylvania Coal, in which the Court first held that regulations could rise to the level of a taking. The Court extended the full complement of takings causes of actions and remedies to private interests against overprotected governmental interests. As a result, the tide of judicial deference to governmental action clearly wanes in favor of fairer treatment of private property rights.

The First English decision undoubtedly will put every regulator on the defensive. The Court decided to analyze regulatory takings with the same framework that it uses for eminent domain analysis. It finally recognized that some property rights are so important that to deprive the owner of their uses is inherently unfair and uncomplementary to traditional constitutional constraints.

At the same time that the Court ties the loose cannon of regulatory takings analysis to the smoothly sailing ship of eminent domain, however, one cannonball careens madly from stem to stern. The Court's unfortunate highlighting of the litigation time aspect of regulatory takings will damage the new cause of action as much as the extension of the traditional framework mends in abuses of the regulatory process.

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\textsuperscript{113} First English, 107 S. Ct. at 2385 n.8, 2389.