

technical  
RE F E R E . N C E  
document

DRAFT DRAFT DRAFT DRAFT  
**DRAFT**  
DRAFT DRAFT DRAFT DRAFT

The  
Taking  
Issue

December 1987

Prepared by: Siemon, Larsen, Mattlin & Purdy  
200 South Wacker Drive  
Chicago, IL 60606

The Draft Preliminary  
State  
Development  
AND  
Redevelopment  
Plan  
January 1988

### The Taking Issue Trilogy

After ten years of nibbling around the edges of the taking issue<sup>1</sup>, the United States Supreme Court finally reached the "merits" of the issue in a trilogy of cases - Keystone Bituminous Coal v. DeBenedictis.<sup>2</sup> First English Evangelical Lutheran Church v. Los Angeles County<sup>3</sup> and Yollan v- California Coastal Commission.<sup>4</sup> First English, where the Court is supposed to have reached the critical "remedies" part of the taking issue, is the centerpiece of the "trilogy" and received overwhelming, front page national media attention as a "landmark" decision upon its being announced by the Court. Unfortunately, notwithstanding the newsworthiness of the decision, the constitutional significance and practical meaning of First English is not fully apparent from a reading of the Court's opinion for a variety of reasons, not the least of which is the factual and procedural posture of the case. However, when the Court's decision in First English is considered in the context of the Supreme Court's treatment of the taking issue leading up to First English and the two other cases of the trilogy, the contours of the "taking issue" begin to emerge\*

<sup>1</sup> Agins v. City of Tiburon. 447 U.S. 255 (1980); San Diego Gas and Electric Co. v. City of San Diego. 450 U.S. 621 (1981); Williamson County v. Hamilton Bank. 105 S.Ct. 3108 (1985); MacDonald, Sommer and Frates v. Yolo County. 106 S.Ct. 2561 (1986).

<sup>2</sup> 107 S.Ct. 1232 (1987).

<sup>3</sup> 107 S.Ct. 2378 (1987).

<sup>4</sup> 107 S.Ct. 3141 (1987).

SUMMARY OF  
THE TRILOGY

The three cases that comprise the "taking issue trilogy" involve distinct factual circumstances and legal questions. In *Keystone*<sup>5</sup> referred to popularly as "son of Pennsylvania Coal",<sup>6</sup> the Court considered the constitutionality of a state statute that forbade the mining of coal that would result in surface subsidence. The Court found that the statute was a valid exercise of the state's police power and that the statute did not effect a "taking" in the constitutional sense. In *First English*,<sup>7</sup> the Court held that just compensation is constitutionally mandated anytime a governmental action effects a taking, even if the taking is only temporary; however, the majority opinion expressly denied addressing the question of what constitutes a taking. In *Nollan*<sup>8</sup> the Court held that a development permit condition effected a "taking" where the condition did not substantially advance a legitimate public interest. Notwithstanding their factual and procedural differences, each of the three cases involved the tension between the police power and private property rights tinder the "just compensation" clause of the Fifth Amendment to the United States Constitution and each of them

<sup>5</sup> **107 S. Ct. 1232 (1987).**

<sup>6</sup> *Keystone* involved the constitutionality of a coal mining subsidence act, the same subject (but different act) considered in *Pennsylvania Coal v. Hahon*, 260 U.S. 393 (1922).

<sup>7</sup> **107 S.Ct. 2378 (1987).**

<sup>8</sup> **107 S.Ct. 3141 (1987).**

contributes to an emerging image of the "taking issue".

KEYSTONE BITUMINOUS COAL

In Keystone Bituminous Coal Association v. DeBenedictis<sup>9</sup> the Bituminous Mine Subsidence and Land Conservation Act of the State of Pennsylvania<sup>3-0</sup> was challenged as violative of the Takings and Contract Clauses of the Constitution of the United States. The effect of the Act, according to the record, was to prevent the Association's members from mining 27 million tons of coal, which would have to be left in place in order to avoid surface subsidence. The Association argued that the requirement to leave the coal in place constituted a taking of that coal under Pennsylvania Coal v. Mahon.<sup>11</sup> and that the Act impaired the obligations of contracts. The action was initiated in the United States District Court for the Western District of Pennsylvania, seeking to enjoin the State of Pennsylvania from enforcing the provisions of the Act\* The parties entered into stipulations of fact and filed cross motions for summary judgment. In granting the State's motion for summary judgment, the District Court rejected the Association's assertion that Pennsylvania Coal v. Mahon was controlling. The Court of Appeals affirmed and the United States Supreme Court granted the petition for writ of

<sup>9</sup> 107 S.Ct. 1232 (1987).

<sup>10</sup> Pa.Stat. Ann., Tit. 52, section 1406.1 et seq. (Purdon Supp. 1986)\*

<sup>11</sup> 260 U.S. 393 (1922).

**certiorari.**

In front of the Supreme court the Association repeated its argument that the matter was controlled by Pennsylvania Coal v. Mahon and that the enactment of the Subsidence Act effected a taking in violation of the Takings Clause. Writing for the majority<sup>12</sup> Justice Stevens distinguished the Kohler Act at issue in Pennsylvania Coal v. Mahon and the Act under challenge in Keystone. First, Justice Stevens observed that the record in Keystone, unlike the sparse factual record in support of the Kohler Act in Pennsylvania Coal,<sup>13</sup> contained substantial factual support for the Subsidence Act, evidence that indicated that the harm resulting from mining-induced subsidence was significant and widespread.<sup>14</sup> The Court's holding in Pennsylvania Coal that the

<sup>12</sup> A majority comprised of Stevens, Brennan, White, Marshall and Blackmun.

<sup>13</sup> "The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety .\*\* we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights\* Pennsylvania Coal. 260 U.S. at 413-4.

<sup>14</sup> "Coal mine subsidence is the lowering of strata overlying a coal mine, including the land surface, caused by the extraction of underground coal. This lowering of the strata can have devastating effects\* It often causes substantial damage to foundations, walls, other structural members, and the integrity of houses and buildings. Subsidence frequently causes sinkholes or troughs in land which make the land difficult or impossible to develop. Its effect on farming has been well documented – many subsided areas cannot be plowed or properly prepared. Subsidence can also cause the loss of groundwater and surface ponds\* In short, it presents the type of environmental concern that has been the focus of so much federal, state and local regulation in recent decades." 107 S. Ct. at 1237.

Kohler Act was not a "bona fide" exercise of the police power<sup>15</sup> was -therefore not controlling, -the Court concluded, in regard to the Subsidence Act. In defining the application of Pennsylvania Coal to Keystone, the majority takes note of the fact that the so-called regulatory taking part of Justice Holmes' opinion was "dictum" and therefore "advisory," though the fact that Holmes opinion was mere "advice" does not really effect the Court's analysis and does nothing more than stimulate a snide reference in Chief Justice Rehnquist's dissent.<sup>16</sup>

The majority pointed to the findings of the Pennsylvania Legislature that "important public interests" were at risk and that the Subsidence Act was designed to minimize the damage caused by subsidence.<sup>17</sup> In contrast to the circumstances of the

<sup>15</sup> In the argument to the Court, the coal company had argued that the Kohler Act "was not a bona fide exercise of the police power, but, in reality was nothing more than "robbery under the forms of law" because its purpose was "not to protect the lives or safety of the public generally but merely to augment the property rights of a favored few." 107 S.Ct. -at 1241\*

<sup>16</sup> "In apparent recognition of the obstacles presented by Pennsylvania Coal to the decision it reaches, the Court attempts to undermine the authority of Justice Holmes' opinion as to the validity of the Kohler Act, labeling it "uncharacteristically «... advisory."<sup>9</sup>" 107 S\* Ct. at 1253 {Rehnquist, C.J. dissenting!.

<sup>17</sup> "This act shall be deemed! -to .be an exercise of the police powers of the Commonwealth for the protection of the health, safety and general welfare of the people of the Commonwealth, by providing for the conservation of surface land areas which may be affected in the mining of bituminous coal by methods other than 'open pit' or 'strip' mining, to aid in the protection of the safety of the public, to enhance the value of such lands for taxation, to aid in the preservation of surface water drainage and public water supplies and generally to improve the use and enjoyment of such lands and to maintain primary jurisdiction over surface coal mining in Pennsylvania." Pa. Ann. Stat., Tit. 52, sec. 1406.2 (Purdon Supp. 1986).

Kohler Act, the Court found that the Subsidence Act challenged in Keystone had "none of the indicia of a statute enacted solely for the benefit of private parties."<sup>18</sup> Simply put, the majority in Keystone accepted what the Court in Pennsylvania Coal could not accept in regard to the Kohler Act ~ that the Subsidence Act was directed at the public interest in health, the environment and the fiscal integrity of the area rather than to ensure against damage to some private landowner's homes.<sup>19</sup>

**18** 107 S. Ct. at 1242.

<sup>19</sup> After having concluded that the instant matter was distinguishable from the statute in question in Pennsylvania Coal v. Mahon, the court went on to amplify its holding by answering what the Court characterized as an implicit assertion that Pennsylvania Coal v. Mahon had overruled the principles of Mugler v. Kansas. In Mugler, a Kansas distiller challenged a Kansas state constitutional amendment that prohibited the manufacture and sale of alcoholic beverages as an unconstitutional "taking" of its property. The Supreme Court recognized that the practical effects of the challenged provision were such that the distiller's machinery and buildings constituting a brewery were "of little value" but nevertheless rejected the challenge. Justice Harlan explained the Court's holding and established the dichotomy between the police power and the power of eminent domain that has been characterized as overruled in Pennsylvania Coal v. Mahon, that is, that a:

prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property .... The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not-and, consistently with the existence and safety of organized society cannot be--burdened with the condition that

Then after an extensive discussion of how the nature of the governmental action is critical to a "takings analysis", including a very interesting presentation of the debate as to whether Pennsylvania Coal overruled Mugler v. Kansas.<sup>20</sup> the Court distinguished Pennsylvania Coal from the facts in the Keystone case in terms of the "certain coal" that is required to be kept in place by the Subsidence Act. In Pennsylvania Coal the Court had held that the Kohler Act's requirement that "certain coal" be kept in place "has very nearly the same effect for constitutional purposes as appropriating or destroying it."<sup>21</sup> In Keystone the

the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

**Mugler v. Kansas, 123 U.S. 623, 668 - 669 (1887).**

Justice Stevens, writing for the Court, rejects the implied assertion and affirmatively states that the Court in Pennsylvania Coal could not have intended to overrule Mugler and its kin because just five years after Pennsylvania Coal v. Kahon:

Justice Holmes joined the Court's unanimous decision in Miller v. Schoene, 276 U.S. 272, 48 S. Ct. 246, 72 L.Ed. 568 (1928), holding that the Takings Clause did not require the State of Virginia to compensate the owners of cedar trees for the value of the trees that the State had ordered destroyed....[I]t was clear that the State's exercise of its police power to prevent the impending danger was justified, and did not require compensation.

<sup>20</sup> 123 U.S. 623 (1887)

<sup>21</sup> 260 U.S. at 414.



Court reached an opposite conclusion even though it was stipulated in the record that the result of the Subsidence Act was to require that 27 million tons of coal be kept in place.

According to the Keystone majority, the question was whether the regulations, as applied to the property of the plaintiffs, •made mining of \* certain coal\* commercially impracticable in violation of the principles of the Court's "regulatory takings cases."<sup>22</sup> The Court's analysis of the question is interesting. First, the court states, without citation or attribution of authority, that "one alleging a regulatory taking" must satisfy a "heavy burden."<sup>23</sup> The explanation for the "heavy burden" becomes apparent, however, as the Court emphasizes that the challenge to the Subsidence Act was a facial challenge and that therefore the "only question before this court is whether the mere enactment of the statutes and the regulations constitutes a taking."<sup>24</sup> Citing to Hodel v. Virginia Surface Mining and Reclamation Assn.. Inc.<sup>25</sup> the Court points out that the impact of the mere enactment of a statute is unlikely to create a sufficient factual controversy to support a takings claim, creating what Justice Stevens characterizes as "an uphill battle in making a facial attack on

<sup>22</sup> What the majority intended to refer to as "our regulatory taking cases" is not clear. However, the balance of the opinion suggests that Perm Central Trans Co. v. City of New York, 438 U.S. 104 (1978) is the centerpiece of those cases.

<sup>23</sup> **107 S.Ct. at 1246.**

<sup>25</sup> **452 U.S. 264 (1981).**

the Act as a taking."<sup>26</sup> The majority opinion takes great pains to point out the nature of the Petitioner's challenge – not that the Subsidence Act makes it commercially impracticable to mine coal, rather that the Act prevented the Association members from mining all of their coal.

The second step in the Court's takings analysis is directed to the "before and after" value question,<sup>27</sup> a question that turns on the "unit of property" to be valued. The majority recites that in Penn Central<sup>28</sup> the Court had made it clear that a takings analysis does not separate property into divisible interests but evaluates the impact of the regulatory program on individual interests.

"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated\* In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights in the parcel as a whole – here the city tax block designated as the "landmark site."<sup>29</sup>

The Court then amplified its view of the appropriate takings

<sup>26</sup> 107 s. Ct. at 1247. Stevens goes on to note that the "hill is especially steep because petitioners have not claimed, at this stage, that the Act makes it commercially impracticable to continue mining their bituminous coal interests in Western Pennsylvania."<sup>11</sup> Jfl. at 1247-8.

<sup>27</sup> Although the Court does not attribute the "before and after" value rule, it is apparent that the Court is applying the takings analysis described in Penn Central Trans Co. v. City of New York, 438 U.S. 104 (1978).

**28 438 U.S. 104 (1978).**

<sup>29</sup> **438 U.S. at 130-1.**

analysis by reaffirming a critical element of *Andrus v. Allard*.<sup>30</sup> "where an owner possesses a full "bundle"<sup>1</sup> of property rights, the destruction of one "strand"<sup>1</sup> of the bundle is not a taking because •the aggregate must be viewed in its entirety.\* Stevens concedes that the formulations of Penn Central and Andrus v. Allard do not solve "all of the definitional issues that may arise in defining the relevant mass of property" but concludes that the application of the cases to the facts in Keystone makes it clear that the Association's taking claim should be rejected.

Critical to the Court's analysis of before and after value, the so-called "diminution in value" test, is the Court's determination that the "mass" of relevant property is the Association's members entire holdings, according to the record some 1\*46 billion tons in 13 mines. In reaching its determination as to the appropriate "mass", the Court explains that to accept the Coal Association! s definition of the "unit of property"—the 27 million tons of coal — would mean that a building setback, validated as not constituting a taking 60 years ago in Gorieb v. Fox,<sup>31</sup> constitutes a taking because the footage represents a distinct segment of property for takings law purposes\* Figure 1 illustrates the issue presented by the coal mining association — the pillars of coal should be the unit of property rather than the entire ownership, represented by the complete box, should be the analytical unit of ownership.

<sup>30</sup> **444 U.S. 51 (1979) .**

<sup>31</sup> **274 U.S. 603 (1927) .**

The Court goes to great pains, in its opinion, to explain its unit of property analysis in light of language of Pennsylvania Coal<sup>32</sup> that seems to imply that a taking occurs no matter how little of the coal is rendered unmineable.<sup>33</sup>

What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it\*<sup>34</sup>

The Court's explanation, reflected in the Circuit Court's opinion,<sup>35</sup> was that the "certain coal\*\*" sentence must be read in conjunction with the Court's conclusion in Pennsylvania Coal that •the Kohler Act had the practical effect of making it commercially

<sup>32</sup>\ 107 U.S. at 1249.

<sup>33</sup> ~~xtt.~~

<sup>34</sup> 260 U.S. at 414 (emphasis added).

<sup>35</sup> 771 F. 2d 707 (3rd Cir. 1985).

infeasible to do any mining. Therefore the Pennsylvania Coal Court had in fact used a "unit of property" consonant with the unit identified by the Court in Keystone.

Using 1.46 billion tons as the "denominator of the fraction," the Court computes that the effect of the enactment of the Subsidence Act and its implementing regulations, to require that 27 Billion tons of coal remain in place, is to diminish the value of the Association's members coal interests by 2 per cent.<sup>36</sup> In other words, the Court held that a comparison of before and after values on the record in the matter using the entire coal interests of the Association's members as the unit of property for the denominator of the "takings" fraction, revealed that the mere enactment of the Subsidence Act and its implementing regulations did not interfere with "reasonable \* investment-backed expectations'", and that therefore "the petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property."<sup>37</sup>

Chief Justice Rehnquist dissented and was joined in his dissenting opinion by Justices Powell, O'Connor and Scalia. For Rehnquist the case was simple – Pennsylvania Coal "has for 55 years been the foundation of our 'regulatory takings \*

<sup>36</sup> This diminution is, in contrast to other decisions of the Supreme Court, de minimis. For example in the landmark zoning case of Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the reduction in value was 75%.

<sup>37</sup> 107 S. Ct. at 1249.

jurisprudence\* and Keystone "effects an interference with such interests fright to mine coal] in a strikingly similar manner."<sup>38</sup> Rehnquist disputes both of Stevens' analyses – that the Subsidence Act is factually distinguishable from the Kohler Act as a statute directed at a legitimate public objective and that the Act and its implementing regulations do not interfere with investment-backed expectations. The dissent's principal basis for dispute in regard to the factual support of the Subsidence Act is a critical review of Pennsylvania Coal directed at showing that the facts were much more similar to the facts in Keystone than the majority had suggested, an interesting exercise but of little significance in regard to principles of law. After rehearsing a number of quotations from the record in Pennsylvania Coal, the Chief Justice completes his challenge to the majority's factual distinction succinctly:

Thus, it is clear that the Court has severely understated the similarity of purpose between the Subsidence Act and the Kohler Act. The public purposes in this case are not sufficient to distinguish it from Pennsylvania Coal.<sup>39</sup>

Nevertheless, the dissent does not dwell on its views of Pennsylvania Coal and goes on to focus on the "real\* issue.

The similarity of the public purpose 'of the present Act to that in Pennsylvania Coal does not resolve the question of whether a taking has occurred; the existence of such a public purpose is merely a necessary prerequisite to the

38 107 S- *ctm* at 1253 (c.j. Rehnquist, dissenting

39 107 S. Ct. at 1255.

government's exercise of Its taking power.<sup>40</sup>

According to Chief Justice, another threshold question in a takings analysis is -the "nature" of the purposes that are Involved\* That is so Because;

we have recognized that a taking does not occur where a government exercises its unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use.<sup>41</sup>

In other words if the purpose of the regulation is to eliminate a "nuisance" then compensation would not be required, hence there could be no taking. The majority, although not relying on the principle, had indicated that the "nuisance exception" might support the majority's position that no taking had occurred, and Rehnquist takes issue, explaining that the "recognition of public interests" by the assertion that the activity here regulated is "akin to a public nuisance" is "not the type of regulation that our precedents have held to be within the nuisance exception to takings analyses\*" According to Rehnquist, the "nuisance exception\*" is a narrow exception allowing the government to prevent "a misuse or illegal use" and is not intended "to allow the \* prevention of a legal and essential use, an attribute of its

<sup>40</sup> 107 S.Ct\* at 1256. This passage is difficult to understand in the context of Justice Scalia's opinion in *Nollan v. California Coastal Commission*, 107 S.Ct. 3141 (1987), in which the Chief Justice joined, -where it is -clearly stated that a regulation which does not "substantially advance" a legitimate public interest is a taking. How, one can ask, can a regulation which fails the "necessary predicate to the government's ..» taking power" test described by Rehnquist, still be a taking?

<sup>41</sup> 107 S.Ct. at 1256 (Rehnquist, C\*J- dissenting)

ownership.<sup>1</sup><sup>42</sup> In explanation of the substantive basis for the "narrow exception" and why the exception should remain narrow, Rehnquist explains what he perceives to be the "concerns underlying the Fifth Amendment."<sup>43</sup>

to prevent "the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is extracted from other members of the public, a full and just equivalent shall be returned to him." A broad exception to the operation of the Just Compensation Clause based on the exercise of the multifaceted health, welfare, and safety regulations would surely allow government much greater authority than we have recognized to impose societal burdens on individual landowners, for nearly every action the government takes is intended to secure for the public an extra measure of "health, safety and welfare."<sup>44</sup>

For the Chief Justice, the nuisance exception has very little if any application because of two narrowing principles. The exception is limited to regulations directed to discrete and narrow purposes as distinguished from general economic regulations which Rehnquist implies are of less importance to society, at least in his view.<sup>45</sup> The nuisance exception is

<sup>42</sup> The circularity of the point is obvious. If a state law declares a use to be "illegal", then the "narrow exception" comes into play, i.e. any regulation comes within the exception.

<sup>43</sup> 107 S.Ct. 1256 (Rehnquist, CJ dissenting) .

<sup>44</sup> 107 S.Ct. at 1256-7 (Rehnquist, CJ dissenting) -

<sup>45</sup> It is not possible to discern whether Rehnquist actually intended to establish a hierarchy of regulatory purposes, or whether his musings are more accurately described as argumentatively directed to the majority opinion. When it is recalled that the majority did not in fact rely on the nuisance exception, the dissent's protests prove "too much."



further limited because it has never justified "complete extinction of the value of a parcel of property."<sup>46</sup> In support of the later proposition, the Chief Justice astonishingly draws upon Mucrler v. Kansas<sup>47</sup> to point out that although the result of prohibition on a brewery was devastating, it did not exceed the nuisance exception because "the prohibition on manufacture and sale of intoxicating liquors made the distiller's brewery "of little value" but did not completely extinguish the value of the building."<sup>48</sup> Equally astonishing is the Chief Justice's invocation of Miller v. sehoene<sup>49</sup> for the proposition that the Court's taking cases have never authorized the complete extinction of the value of property, a case that on its face provides, and for many years has been recognized to provide, a

<sup>46</sup> This last proposition would undoubtedly not rest well with the owners of diseased plants and animals that have been completely destroyed to avoid the spread of disease. The value of animals destroyed annually to avoid the introduction of avian diseases into the country, based on an economic regulation directed toward the protection of the poultry industry, is substantial and owners have suffered these losses for years on the assumption that it has always been the law that the complete destruction of nuisance property and all of its value are not compensable under the Takings Clause.

<sup>47</sup> **123 U.S. 623 (1887).**

<sup>48</sup> **107 S.Ct. at 1257 (Rehnquist, C.J. dissenting). The distinction between "of little value" and "completely extinguishes the value of the building" seems to be one of little difference.**

<sup>49</sup> 276 U.S. 272 (1928). Miller involved an economic protection regulation (in the hierarchy implied by Rehnquist a less important purpose) and the record in the cause indicated that the cedar trees required to be destroyed in order to prevent a disease that affected apple trees but did not hurt cedar trees from being spread were virtually valueless except for "firewood."

clear articulation of the government's authority to completely destroy property to abate a nuisance. Of course Miller v. Schoene is not the only case where the Supreme Court has allowed the complete destruction of property without payment of just compensation. The "rags" cases, the dog case<sup>50</sup>, the horse case and the alcoholic beverage cases<sup>51</sup> are examples of a tradition in the law that is not mentioned by the Chief Justice. Indeed, it could not be made more clear that the complete destruction of alcoholic beverages, by requiring their disposal, did not require compensation because the action was public in nature to eliminate a public nuisance.

The Chief Justice's discussion of this point is made even more confusing by his assertion that "[in none of these cases did the regulation destroy essential uses of private property."<sup>52</sup> What is intended by this phrase is anything but clear; however, in each of the cases referred to, substantial uses were destroyed by regulation and in others all use was extinguished. Even if one assumes that the word "essential" is intended to describe the minimum use that is the benchmark of a so-called "regulatory taking,"<sup>11</sup> the Chief Justice's statement denies the reality of the Court's many decisions where the complete destruction of nuisances was sanctioned without payment of just compensation\*

<sup>50</sup> **Sentell v. New Orleans & C.R. Co.** 160 U.S. 698 (1897).

<sup>51</sup> The leading case is Samuels v. McCurdy, 267 U.S. 188 (1925); see also, Clarke v. Haberle Brewing Co., 280 U.S. 384 (1930).

54 107 S.Ct\* at 1257. (Rehnquist, C.J. dissenting\*.)

Then abruptly, after arguing semantics and nuances with the majority opinion, the Chief Justice changes course without introduction or explanation and concludes that the Association members<sup>1</sup> interest in 27 million tons of coal have been completely destroyed by the enactment of the Subsidence Act and its implementing regulations.<sup>53</sup> That is so, the dissent concludes, because the "Subsidence Act has extinguished any interest one might want to acquire in this property, for "the right to coal consists in the right to mine it;"<sup>1</sup><sup>54</sup> and because of a description of the "relevant mass of property"<sup>55</sup> differing from that of the majority.

the Court's broad definition of the "relevant mass of property" ante. at 1248, which allows it to ascribe to the Subsidence Act a less pernicious effect on the interests of the property owner. The need to consider the effect of regulation on some identifiable segment of property makes all important the admittedly difficult task of defining the relevant parcel.<sup>56</sup>

Rehnquist's view of the relevant parcel is dramatically different than that of the majority's and his analysis asks far

<sup>53</sup> Citing to *Pennsylvania Coal v. Mahon*. Although it really does not matter given the focus of the dissent, the Chief Justice makes no attempt to deal with the record in the *Keystone* matter that clearly indicated that the "support estate" had value to both the mineral estate and the surface or use estate.

<sup>54</sup> 107 S.Ct. at 1257 (Rehnquist, C.J. dissenting).

<sup>55</sup> 107 S.Ct. at 1257 (Rehnquist, C.J. dissenting).

<sup>56</sup> *loretto v. Teleprompter*, 458 U.S. 419 (1982).

more questions than it answers. According to Rehnquist, the majority opinion is able to avoid finding that the requirement that 27 million tons of coal be kept in place practically destroys the coal, by finding that the 27 million tons does not constitute a separate segment of property in the context of a takings analysis. In the Chief Justice's view the culprit in the majority holding is an analysis that the Court has evolved for "regulatory takings"<sup>11</sup> as distinguished from physical invasion takings. If there is a physical invasion, no analysis is necessary because a taking, no matter how small, is a taking.<sup>57</sup> In contrast, where a regulatory taking is alleged, it is necessary to analyze the impact of the regulations on the affected property.

The trouble is that Rehnquist's opinion is contrary to a century of established law. Indeed, if the references to 27 million tons of coal are replaced in the argument with references to additional rents<sup>58</sup>, air rights<sup>59</sup>, wetlands or building setbacks (required yards)<sup>60</sup>, the contrariness of the Chief Justice's argument is revealed. Figure 2 describes two common

<sup>57</sup> Block v. Hirsh. 256 U.S. 135 (1921).

<sup>58</sup> Id. See also Penn Central Transportation Co. v. City of New York. 438 U.S. 104 (1978).

<sup>59</sup> Gorrie v. Fox. 274 U.S. 603 (1928).

<sup>60</sup> The Chief Justice's dissent occasionally reminds one of the sage answers parents sometimes give to hard questions: "because I said so." Indeed reading the majority and dissenting opinions one can not help but recall the different pictures of an elephant drawn by two artists, one sighted and one blind.

examples of accepted regulations where the unit of property includes discrete areas that are made totally undevelopable, yard and preservation of environmental areas.

The law has never been that a regulation that prevents a landowner from building above a prescribed height or in a required yard constitutes a taking of what is an "identifiable and separable" segment of property; nevertheless that is the result of the Chief Justice's position\*

The Rehnquist dissent goes on to argue that the status of the support estate as a recognized separate interest in property in Pennsylvania reinforces his conclusion that the subsidence Act effects a taking<sup>61</sup>, by simply saying so - "the majority's view is wrong." The Chief Justice, however, does argue with some force that the Court has always looked to state law<sup>62</sup> to define what is

<sup>61</sup> The Chief Justice's argument is extremely clever on this point but seems to conflict with the settled proposition that while state law defines what is property, federal law defines what is a taking.

<sup>62</sup> **438 U.S. 104 (1978)** .

property, and that the majority's rejection of the State of Pennsylvania's recognition of the support estate as a separate and distinct interest is inappropriate. Again, however, having succeeded in articulating a basis for evaluating the impact of the regulations on the 27 Billion tons of coal, the dissent is able to argue that the Subsidence Act effects a taking.

In the final analysis, the import of the Keystone case lies in the "takings analysis" that is employed to evaluate the impact of a regulation. A majority of the Court has reaffirmed that in takings cases that do not involve physical invasion, the Court looks to the impact of the governmental action on investment backed development expectations and employs the analyses described in Penn Central.<sup>63</sup> And in particular the Court affirmed, in Keystone, that taking jurisprudence does not separate property into discrete segments for a takings analysis but looks at the property as a whole.

FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH V. LOS ANGELES COUNTY

The centerpiece of the taking issue trilogy. First English Evangelical "Lutheran Church v. Los Angeles County.<sup>64</sup> involved another facial challenge, this time to a temporary floodplain ordinance adopted by Los Angeles County. The Church was the owner of a 21 acre parcel of land in a steep valley that is coursed by a watercourse subject to periodic flooding. The property, known as "Lutherglen" was formerly improved with a series of camp

<sup>63</sup> 107 S.Ct. 2378 (1987).

<sup>64</sup> 24 Cal 3d 266 (1979)

buildings used for retreats and other purposes, but the buildings had been destroyed by a flood. In response to the flood, Los Angeles County adopted a temporary regulation that prohibited the development of any buildings in the area subject to flooding. The ordinance did not contain any permitting or variance procedures and the Church sued claiming that the mere enactment of the ordinance denied the landowner of all use of its property\* The California courts, adhering to the principles of ftains v. city of Tiburon<sup>65</sup> struck the allegations of the complaint alleging a taking because under California law, allegations sounding in inverse condemnation (not available as a remedy under Agins) were irrelevant and impertinent because the only relief sought by the Church was "just compensation" and "money damages"\* The Church appealed and the California Court of Appeals declined the Church's entreaties to reconsider the Agins rule. The Church filed a petition for writ of certiorari which was granted and finally the merits of the taking issue were considered.<sup>66</sup>

The opinion of the Court requires careful, almost laborious analysis \* and even then, the import of the opinion lies between the lines\* The issue presented to the Court was, according to the papers filed in the case, fairly straightforward, though there were a number of "procedural" arguments advanced in hopes

<sup>65</sup> **Aains v. City of Tiburon. 447 U.S. 72 (1980); San Diego Gas and Electric Co. v. City of San Diego. 450 U.S. 621 (1981)? Williamson County v. Hamilton Bank 105 S.Ct. 3108 (1985); and MacDonald. Sommer & Frates v. Yolo County. 106 S.Ct. 2561 (1986)\***

<sup>66</sup> **107 S.Ct. at 2381 (emphasis added).**

of persuading the Court to once again avoid the merits of the taking issue. According to the Chief Justice the case involved a situation where:

the California Court of Appeal held that a landowner who claims that his property has been "taken" by a land use regulation may not recover damages for the time before it is finally determined that the regulation constitutes a "taking" of his property. We disagree, and conclude that in these circumstances the Fifth and Fourteenth Amendments to the United States Constitution would require compensation for that period.<sup>67</sup>

In many ways First English is a tale of two cases « the case actually presented to and decided by the Supreme Court, and the case the devotees of the "taking issue" wished had been submitted to the Court. The actual case involved a very narrow legal question, that in truth admitted to but one, obvious answer. If there is a taking, no matter how it is accomplished and no matter whether the taking occurs for only a limited period

<sup>67</sup> 107 S.Ct. at 2381 (emphasis added). The Chief Justice's use of the word "damages" in the context of the constitutional imperative of just compensation is difficult to understand\* It is well-settled that "damages" are not an element of "just compensation" in the constitutional sense. ( ) It is probable that the Court does not intend a distinction and that the use of the word "damages" is nothing more than a reflection of the fact that the parties referred to the matter in that vocabulary and the Court was focusing on the remedies aspect of the "taking issue." The distinction between "just compensation" and "damages"<sup>1</sup> is not an academic issue and the measure of relief under a constitutional cause of action for inverse condemnation may be very different from the damages available under 42 U.S.C. section 1983.



of -time, just compensation is mandated by the Constitution. This unremarkable principle was, of course, established decades ago, and the Court's reiteration of it in the context of a rambling, disjunctive discourse about taking precedents does nothing but confuse what has already been recognized as a "Serbian" bog.<sup>68</sup>

The Court notes that for the purposes of its decision (in light of the procedural posture of the case), the regulations in question constituted a regulatory taking and expressly disavowed any intention to address whether the regulations in fact effected a taking:

We ... have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations. Those questions, of course, remain open for decision, on the remand we direct today.<sup>69</sup>

The Court, after having stated the question presented in a fashion that could admit but to one answer, commences its analysis of the "remedy" question with reference to the language of the Fifth Amendment itself and an oblique observation that the

<sup>68</sup> What is the source of this reference?

Although it is probably unfair to quibble with the Chief Justice's language, this quote contains a number of troubling references. For example the Court invokes the concept of "compensable taking." Does the Court intend to say that there are non-compensable takings? How about the constitutional imperative? Similarly, how does the Court's avoidance of the "safety" issue square with Rehnquist's dissenting opinion in Keystone?

Amendment does not prohibit the taking of private property, "but Instead places a condition on the exercise of that power\*"70

This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights per se. but rather to secure compensation in the event of otherwise proper interference amounting to a taking.<sup>71</sup>

How this point is relevant to the Court's analysis is not clear; nor is it obvious how the concept of "constitutional limit" affects the Court's holding.<sup>72</sup>

**70** 107 S.Ct. at 2385.

<sup>71</sup> This little piece of "gobbly-gook" of course disposes of the taking issue question by simple word play, a particularly surprising turn of events in light of the obvious conflict with the Pennsylvania Coal v. Mahon opinion. Rehnquist posits that the compensation clause is not a limit on governmental power, even though that was the very essence of Pennsylvania Coal; it is impossible to reconcile Rehnquist's word play with Holmes' closing statement in Pennsylvania Coal:

The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation\*\*\* When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears\* But that cannot be accomplished in this way under the Constitution of the United States. 43 S.Ct. at 160.

<sup>72</sup> Presumably the Court intended to rebut what it perceived to be a claim that the just compensation clause is a limit on governmental power to the effect that if the government wishes to take private property, it can only do so by an exercise of the power of eminent domain. If that is so, then the Court's analysis leaves such to be desired because the argument that has been

The Court begins its analysis with quoting from *Pennsylvania Coal*,

"[the general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."<sup>74</sup>

Figure 3 graphically describes the matter of degree that determines whether a regulation goes too far – the closer the regulation gets to prohibiting all use, the darker the bar and the greater the probability that a regulation "goes too far."

repeatedly submitted to the Court on this point is that where a the alleged taking does not involve the destruction of property, actual conversion of title or physical occupation, the attempt to go too far by regulation by unlawfully prohibiting private use is a violation of the due process clause. See *Williamson County* (Stevens, J, dissenting). The proposition advanced by the majority completely ignores the distinction between the various types of takings and the jurisprudence the Court has evolved to measure each type, a shortcoming that is repeated throughout the opinion and cogently exposed in Justice Stevens' dissent.

<sup>73</sup> **260 U.S. 393 (1922)**

<sup>74</sup> *260 U.S. at 415*. it is ironic that Justice Holmes should incorrectly use the word "certain" to describe the point beyond which the regulatory power can not extend. Nothing has turned out to be less "certain" than the definition of that point.

Then the opinion observes that while most "takings" result from exercises of the power of eminent domain, the "entire doctrine" of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceeding. Chief Justice Rehnquist elevates the Pumpelly concept that physical occupation without a formal exercise of the power of eminent domain is a taking to a regulatory taking "doctrine" and states that the Court has "unhesitatingly applied this principle," whatever the principle is, citing Kaiser Aetna.<sup>75</sup> United states v. Dickinson<sup>76</sup> and United States v. Causbv,<sup>77</sup> cases that involved actual invasions of property interests. What the Court has in fact done is negotiate a "leap of faith" that overcomes the questions of the taking issue by transmogrifying the rules that apply to uncompensated physical occupations to the regulatory context without explanation or precedent\* The Court then moves on, totally ignores the stated proposition, and states that "we have not resolved whether abandonment by the government requires payment of compensation for the period of time during which regulations deny a landowner all use of his land. "<sup>78</sup> Why the

<sup>75</sup> Kaiser Aetna v. United States, 444 U.S. 164 (1979)

<sup>76</sup> 331 U.S. 745 (1947) .

<sup>77</sup> 328 U.S. 256 (1946) .

<sup>78</sup> 107 S.Ct. at 2387.

Court makes this statement where it has expressly disclaimed that the question of what constitutes a compensable event is before the court is not easy to understand.<sup>79</sup>

The Court's analysis then proceeds to the question of the temporary character of the interference and supplants the most important question in the taxing issue - whether a mere interference with private use for a period of time during which an overly restrictive regulation is in effect is a "taking"- with the self-fulfilling question of whether there can ever be a "temporary taking."<sup>80</sup> The conclusion to be drawn, according to the Chief Justice is that:

"temporary" takings, which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation. Cf, San Diego Gas & Electric Co.- 450 U.S., at 657, 101 S. Ct. at 1307 (BRENNAN, j. dissenting) ("Nothing in the Just Compensation Clause suggests that \* takings • must be permanent and

It is tempting of course to suspect that the Court has a hidden agenda and is intent on deciding the issue that has evaded Supreme Court articulation because of the absurd finality rules that the Court has erected in lieu of discharging its role to clarify the law. This case avoided the finality rule because the question of a taking was a given, yet here we are with the Court trying to edge into what constitutes a taking.

<sup>80</sup> The Court's analytical approach takes a series of non-questions, substitutes them for the "merits" of the taking issue\* No one, of course, ever doubted that there could be temporary takings\* The law has been settled for many years that a taking for a period of time is a taking. ( ) Indeed, the historical antecedents of the just compensation clause are derived from "temporary takings", the occupation of private quarters by troops during periods of conflict. ( ) The Court \* s citation of authority for temporary takings indicates how preposterous the "self-executing" question the Court has posited is.

**irrevocable\*) .<sup>81</sup>\***

Of course the Chief Justice is correct when he writes that it is well-settled that governmental interference for a limited time period can effect a compensable taking,<sup>82</sup> but that is not the point nor a question before the Court. In fact, if the question posed by the case is recalled, it will be observed that »most of the opinion in First English is an abstract exercise in irrelevancies. The question posed in the case is whether compensation is required where there is a taking. In that the Constitution quite plainly says that such is the case, it is difficult to understand where the Court's analysis is directed and why the Court goes to such pains to discuss without considering questions that are not before the Court\* It is doubtful that even the most zealous of the "no compensation mavens" would have suggested that a compensable taking is not compensable\*

The Court does quote from Armstrong v. United States<sup>83</sup> and United States v. General Motors<sup>84</sup> for the jurisprudential concerns underlying the just compensation clause, apparently hoping to convince the reader that if there is a taking,

<sup>81</sup> 107 S. Ct. at 2388. Again the Court's analytical presentation of what are virtually self-evident truths is unnecessary\*

<sup>82</sup> This self-evident and undisputed truth appears to be nothing more than a judicial shell game.

<sup>83</sup> **364 U.S. 40 (1960).**

<sup>84</sup> **323 U.S. 373 (1945).**

compensation must be paid. Of course, that question does not need explication as it is veil-settled. Therefore, it may be assumed that the Court's "wanderings" are directed at some other, unstated purpose. This conclusion seems justified, not only because of the strange character of the opinion, but also because of the Court's musings about Danforth v. United States<sup>85</sup> and Aains v. city of Tiburon<sup>86</sup> which ought not to have been relevant given that the question of whether there was a taking was not before the Court. Nevertheless, in answering an argument advanced by the State of California in regard to a question that was not before the Court, the Court apparently felt obligated to respond to the argument that the compensation rule articulated by Justice Brennan in San Diego Gas & Electric conflicted with Danforth and Aains. The dictum of this effort is of limited value, however, because the Court disposes of any argument that there is an inconsistency between the Court's holding and those cases, by describing the cases as standing for the "unexceptional proposition that the valuation of property which has been taken must be calculated as of the time of the taking and that the depreciation in value of the property by reason of preliminary activity is not chargeable to the government."<sup>87</sup> It may be assumed that the Court's consideration of this issue reflects the fact that the parties to the matter and the various amici and

**85** 308 D-Sw 271 (1939).

**86** 447 T.J.S. 255 (1980).

**87** 107 S.Ct. at 2388 (emphasis added).

commentators viewed the case before the Court as presenting far broader questions about the taking issue, and that the Court found it difficult to limit its focus to the question actually presented and decided. The State's position in regard to Danforth and Aains was that a temporary interference with private use of property is not a "taking", a proposition the Court apparently did not accept, though the Court's reference to valuation undoes any explicative value of the question. Nevertheless, the Chief Justice's diversion does serve to reinforce the continued vitality of the principles of Agins after First English:

"[m]ere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are 'incidents of ownership.'"<sup>88</sup>

The Court, after having rambled through some of the briar patches of the taking issue, most of it unnecessary and irrelevant to the narrow issue presented to the Court, then retreats from any implication of substance by announcing that "nothing we say today is intended" to abrogate the principle that the decision to exercise the power of eminent domain is a legislative decision.<sup>89</sup> The State of California had obviously argued that inverse condemnation violated the separation of powers by allowing the Court to judicially transmogrify a regulatory effort into an exercise of the power of eminent domain. This question of course was long ago disposed of in

<sup>88</sup> **447 U.S. at 263.**

<sup>89</sup> **107 S.Ct. at 2389.**



Muoler v. Kansas<sup>90</sup> and was not presented in First English. Nevertheless the Court dealt with the issue, by simply saying it was not so. Similarly, the Court in response to the Solicitor General's suggestion that the effect of the Brennan rule<sup>91</sup> was to allow the courts, at the behest of a property owner, to convert a regulatory action into an exercise of the power of eminent domain, precisely what would happen if a regulation that does nothing more than prohibit private use of property is judicially determined to have affected a taking – a subject not before the Court, but assumed, in the abstract for the purposes of the opinion. The Chief Justice's response is "it just is not so:"<sup>1</sup>

We merely hold that where 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.<sup>92</sup>

The Court then goes on to further qualify the dictum in the opinion by reaffirming that the opinion is based on the assumption that the allegations of the complaint are true, i.e. that the regulations did constitute a regulatory taking, and is limited to the facts presented:

We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building

<sup>90</sup> **123 U.S. 623 (1887).**

<sup>91</sup> Sa Diego Gas & Electric Co., 450 U.S. 621 (1981) (Brennan, T., dissenting).

<sup>92</sup> **107 S.Ct. at 2389.**

permits, changes in zoning ordinances,  
variances, and the like which are not before  
US."<sup>93</sup>\*

What the Court means by this passage <sub>f</sub> after having dealt with an assortment of issues not presented, is anybody's guess, as is the reference to "normal delays ... and the like\*" Although it is impossible to ascertain from the opinion, perhaps the Court is telegraphing that when it does reach the question of what constitutes a deprivation of all use of property, that a suspension of all use for a period of time will not necessarily be a "talcng."<sup>94</sup>

The Court's final disclaimer goes to the anticipated impact of the Court's holding on the "freedom and flexibility" of land use planners and municipalities and as the Court dismisses the "bloody shirt"<sup>95</sup> of raids on the public fisc as a necessary consequence of the Constitution.

As Justice Holmes aptly noted more than 50 years ago, -"a strong 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,"<sup>96</sup>

**93 107 S.Ct. at 2389.**

<sup>94</sup> The inclusion of this passage is particularly strange given the absolutist view of the compensation clause that was set forth in the Chief Justice's dissent in *Keystone*, 107 S. Ct. at

<sup>95</sup> See Hernandez brief.

<sup>96</sup> *Kahon*. 260 U.S. at 416. Although the Chief Justice invoked Holmes in support of the Court's decision, the Chief Justice choose to overlook the fact that Holmes' opinion made it clear that:

Some values are enjoyed under the implied

Then in an almost apologetic but confusing style, the Court reiterates its holding:

Here we must assume that the Los Angeles County ordinances have denied appellant all use of its property for a considerable period of years and we hold that invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy.<sup>97</sup>

Presumably the Court intended, by this closing passage, to say that where there is a taking, compensation must be paid, and did not intend to address the question of when, if ever, there can be a regulatory taking.<sup>98</sup> And presumably this passage should not be read to establish that any time a regulation is declared to be unconstitutional because it is overly restrictive, that the

limitations and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of the power of eminent domain and compensation to sustain the act.

260 U.S. at 413 (emphasis added). Presumably the Chief Justice ignored this passage because it can not be reconciled with the literalist reading of a portion of the Holmes opinion necessary to the Court's analysis.

**97 101 107 S.Ct. at 2389.**

<sup>98</sup> The Chief Justice identified the "safety" justification as one example of a circumstance where a regulatory limit on all use might not be a taking, and identifies "normal delays" for permitting etc. as an example of an interference with all use of property for a period of time that would not be a taking. 107 S.Ct. at 2389.

constitutional imperative for compensation is necessarily invoked.

Justice Stevens dissented, joined by Justices Blackmun and O'Connor."

One thing is certain. The Court's decision to day will generate a great deal of litigation. Most of it, I believe, will be unproductive. But the mere duty to defend the actions that today's decision will spawn will undoubtedly have a significant adverse impact on the land-use regulatory process. The Court has reached out to address an issue not actually presented in this case, and has then answered that self-imposed question in a superficial and, I believe, dangerous way\*

Justice Stevens identified four flaws in the majority's decision.

First the dissent argues that the Court had the authority to decide that the allegation of the complaint did not allege a taking under the Federal Constitution. That is so because "whether the regulation is treated as one that deprives appellant of its property on a permanent or temporary basis, this Court's precedents demonstrate that the type of regulatory program at issue here cannot constitute a taking."<sup>100</sup> In other words, Stevens argues that the allegations of the complaint do not necessarily allege a taking under the precedents of the Court\* Stevens\* analysis starts with the proposition that "all property in this country is held under the implied obligation that the

<sup>99</sup> Justices Blackmun and O'Connor joined in parts I and III of Stevens dissent. Justice Blackmun and Justice Stevens were aligned with each other in all three of the trilogy cases, while O'Connor (dissent in Keystone and First English and majority in Nollan) was unaligned in the three cases\*

100 107 s.Ct. at 2391 (Stevens, J. dissenting).

owner «s use of it shall not be injurious to the community,"<sup>101</sup> a proposition that had been reiterated in *Keystone*.<sup>102</sup> In other words, Stevens points out that simply because the complaint alleges that the regulations deny the landowner of all use of its property does not necessarily mean that the Court "must" assume that the complaint alleges a taxing. This principle, that is that the mere allegation of prohibition of all use does not necessarily effect a "taking" is in fact recognized by the Chief Justice himself when he admits that it is possible that the so-called "safety" justification for regulation might avoid the circumstance of a taking,<sup>103</sup> and when he admits that a total ban on use for a period of time may not be a taking "in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like ...."<sup>104</sup> According to Stevens, the complaint did not allege a taking, and therefore the Court should not have reached the "merits."

In Part II of the dissent,<sup>105</sup> Stevens outlines what he regards as the second flaw in the majority opinion. Accepting

101 <sup>107</sup> S.Ct. at 2391 (Stevens, J. dissenting).

**102 <sup>107</sup> s.Ct. at 1245.**

<sup>103</sup> <sup>107</sup> s.Ct. at 2384-5. "We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations T"

<sup>104</sup> **107 S. Ct. at 2389.**

<sup>105</sup> neither Justice Blackmun or Justice O'Connor joined in Part ii«

that it is settled that a regulation that goes too far "must be deemed a taking", Stevens nevertheless writes that when a regulation goes too far, "the Government has a choice: it may abandon the regulation or it may continue to regulate and compensate those whose property it takes."<sup>106</sup> Moreover, according to Stevens, while a "temporary taking" may be affected by a regulation, not every interference rises to the level of a "taking".<sup>107</sup> The question, as stated by Stevens is whether the regulations have "such severe consequences that invalidation or repeal will not "mitigate the damage enough to remove the \*taking'".<sup>108</sup>

While virtually all physical invasions are deemed takings, a regulatory program that adversely affects property values does not constitute a taking unless it destroys a major portion of the property's value.<sup>109</sup>

The dissent then observes that an essential element of the regulatory taking equation is "diminution in value" a concept that is "unique to regulatory takings."

Unlike physical invasions, which are

<sup>106</sup> 107 S.Ct. at 2393 (Stevens, J. dissenting).

<sup>108</sup> 107 S.Ct. at 2393 (Stevens, J. dissenting) . The dissent's view of the question is that very different rules apply in regard to determining what is a taking in the context of physical occupation and non-occupation activities.

<sup>109</sup> I&. Stevens cites to *Keystone Bituminous Coal Association, Hodel v. Virginia Surface Mining & Reclamation Assn.*, and *Agins v. City of Tiburon*, for this proposition. It may assumed, given the text of those opinions that Stevens does not intend to say that a "majority" rule applies to determining when a regulation destroys value to such an extent to be equal to a "taking" .

relatively rare and easily identifiable without making any economic analysis, regulatory programs constantly affect property values in countless ways, and only the most extreme regulations can constitute takings.\*<sup>10</sup>

And it is the failure to recognize the uniqueness of the regulatory taking inquiry that constitutes the second flaw in the majority's opinion.<sup>111</sup>

According to Stevens the Chief Justice's conclusion that the application of the Los Angeles County ordinance constituted a "temporary taking" ignores the economic analyses required for determining when, if ever, a regulatory taking has occurred. The majority ignored the fact that a "temporary"<sup>1</sup> interference in the private use of property, may involve a diminution in value that is inconsequential, and therefore not constitute a taking. On the other hand. Justice Stevens accepts that even a temporary interference in use may have such a substantial effect on the value of property that it would constitute a taking. And therein lies the flaw, because the majority made no attempt to analyze the economic impact of the Los Angeles County ordinance; to the contrary, the Court concluded that it had no choice but to accept that the regulation affected a "taking".

<sup>110</sup> 107 S.Ct. at 2393 (Stevens, J. dissenting).

It is debatable that the second flaw actually exists, because the majority, at least, purports to accept for the purposes of analysis that a "taking" has in fact been alleged and that the Court has no alternative but to accept that allegation given the procedural posture of the case. Stevens disagrees, and points out that the assumption is flawed, but that does not necessarily mean that the Court actually reached the issue of what constitutes a taking, the objective of Part II of the dissent\*

Stevens goes on to point out that the majority's supposition that there is no difference between physical occupation cases and regulatory taking cases is based on precedents that did not involve diminution in value analyses for the simple reason that such analyses are irrelevant to physical occupation cases. Indeed, Stevens writes that the Court's citation to the temporary occupation cases in the context of a regulatory taking case are not relevant to the proper inquiry - the extent of the diminution of value.

Why should there be a constitutional distinction between a permanent restriction that only reduces the economic value of the property by a fraction « perhaps one-third-- and a restriction that merely postpones the development of a property for a fraction of its useful life -- presumably far less than a third? In the former instance, no taking has occurred; in the latter case, the Court now proclaims that compensation for a taking must be provided.<sup>112</sup>

Stevens then points out the internal inconsistency of the majority's absolutist view of a regulatory temporary taking and the notion that normal delays are not takings; and argues that the facts of the case, delay occasioned by litigation, are •normal\* even under the Chief Justice's opinion and can not be accepted as alleging a taking.<sup>3-3-3</sup>

112 107 s.ct. at 2395 (Stevens, J. dissenting).

113 ipae other two flaws according to Stevens relate to procedural questions and do little to explain further the implications of the majority opinion in regard to the taking issue, including a recognition of the distinction between "damages"<sup>1</sup> under 42 U.S.C. § 1983 and "just compensation" under the self-executing provisions of the Constitution.



Yt CALIFORNIA COASTAL COMMISSION

The last of the 1987 trilogy of taking issue cases, No 11 an v. California Coastal Commission, presented an opportunity for the Court to clarify some of the confusion created by First English through addressing the issue of "exactions" and the "takings clause."<sup>114</sup> As with First English, however, the Court failed to shed much light on these important issues and in fact, given the confusing reparte between the majority and the dissent about the standard of review, merely further muddled the discussion.

In Nollan, a divided Supreme Court invalidated a beach access condition imposed on a building permit granted by the California Coastal Commission. The majority opinion was authored by the newest member of the Court, Justice Scalia, who was joined by Chief Justice Rehnquist and Justices White, Powell and O' Connor. Justices Brennan, Blackmun and Stevens authored separate dissenting opinions.

In Kollan<sub>r</sub> the contract purchaser of a coastal lot sought permission from the California Coastal Commission to construct a home on the lot. The purchaser \* s contract required that a dilapidated structure on the lot, a small "bungalow" of approximately 500 square feet that had been rented out before its decay and deterioration, be demolished. The Coastal Commission gave notice that it intended to grant the requested permit, but

<sup>114</sup> 107 S.Ct. 3141 (1987).

that the permit, in keeping with Commission policy and practice (at least 43 prior permits in the area had contained the same condition), would be conditioned on the granting of an easement of public access across a portion of the lot along the beach. The area of required "pass and repass" was seaward of an eight foot seawall on the lot. After unsuccessfully protesting the condition in front of the Coastal Commission, the Nollans challenged the condition in state court as violative of the Fifth Amendment "takings clause", alleging that the condition was a taking of private property for public use without payment of just compensation. The action sought only to have the condition invalidated and was not in the form of an action for inverse condemnation. During the pendency of the litigation, the Nollans closed on the property, demolished the dilapidated structure and pursuant to the issued permit constructed a new 2400 plus square foot house.

The California Court of Appeal, despite a lower court decision holding that the conditions were not valid, affirmed the condition on the grounds that a required conveyance was not unconstitutional where the "exaction" was "sufficiently related to the burdens created by the project.\* When the California Supreme Court declined to review the case, the landowner appealed to the United States Supreme Court, and the Court reversed the California Court of Appeal, holding that, on the record in the matter, the condition requiring the conveyance of an easement of access along the beach in front of the Nollans<sup>1</sup> new house was

violative of the takings clause and therefore invalid.

Whatever may be the outer limits of "legitimate state interests" in the takings and land use context, this is not one of them."<sup>15</sup>

Unfortunately, notwithstanding then-Justice Rehnquist's admonition in his dissent in Metromedia that the Court's role is to provide decisions from which definitive principles can be "clearly drawn"» the Court's opinion, consistent with First English, gives little explicit guidance as to the outer or any other limits of how the "taking clause" applies to the law of exactions and requires that interested and affected interests "read between the lines."

In support of the beach access condition, the Coastal Commission had argued 1) that they had the authority to deny the requested permit because the proposed house would intensify development in the coastal zone and would interfere with visual access to the ocean (a public value of recognized and significant importance), and 2) that the access condition was nothing more than a less-intrusive mitigation strategy that allowed the Nollans to go forward with their development plans, notwithstanding the Commission's authority to disapprove the proposed intensification of use.

The Court's response to the Commission's position was at least instructive as to the Court's view of exactions as legitimate police power regulations. First, the Court states

there would have been "no doubt" of a taking if California had required the Nollans to make available to the public an easement across their property on a permanent basis. The majority equates such a requirement with the "permanent physical occupation" taking cases represented by Loretto v. Teleprompter Manhattan CAT CfiTE.<sup>116</sup> Then the Court frames the issue as whether requiring an uncompensated conveyance as a "condition for issuing a land use permit alters the outcome."<sup>117</sup> The Court accepted, for the purposes of analysis, that the Commission could have lawfully denied the Kollan's application for a permit to build a larger house on the lot\* Then, in perhaps the most important passage in the opinion, the Court held that the Commission's power to limit development:

must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end - If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.<sup>118</sup>

For municipalities, the Court' s statement is surely a welcome endorsement of the use of the police power to mitigate the impacts of growth through a program of exactions because the Court plainly states that if a regulatory limitation would be

<sup>116</sup> 458 U.S. 419 (1982) cited at 107 S.Ct. at 3145.

<sup>117</sup> 107 s.Ct. at 3146.

**IFL.**

valid, then an exaction that serves "the same end"<sup>1</sup> is also valid. This statement of the law is correct, the Court holds, even if the exaction, standing alone (independent of a valid regulatory context), would constitute a compensable taking under the Fifth and Fourteenth Amendments to the Constitution of the United States.

a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking.<sup>119</sup>

But how strong must the nexus be between the exaction and the stated public purpose? Or, as the Court puts the question: "what type of connection between the regulation and the state interest satisfies the requirement that the former \* substantially advance<sup>1</sup> the latter\*"<sup>120</sup> Is a rational nexus enough, as implied by the phrase "utterly fails"<sup>121</sup> and centuries of balance of powers jurisprudence, or has the Court, by virtue of its exacting review of the Commission's legislative and factual judgments, erected a new standard of judicial review?

It would be facile to conclude that the Court did not intend to establish a rule of strict scrutiny and that the unique facts of the instant case were so "extreme" that the Court found that the Commission had "utterly failed" to establish any nexus between the condition and the stated legitimate interest.

**Jfl. 120 107 s.Ct.**

**at 3147.**

However, Justice Brennan's dissent argues forcefully that the majority opinion requires a "precise fit" in support of an exaction, a challenge that is not rebutted in the majority opinion even though Justice Scalia goes to great lengths to respond to Brennan's dissent.<sup>122</sup>

The Court accepts as a given for the purposes of analysis the Commission's assertion that the access condition would be valid if it is "reasonably related" to the avowed public purpose, stating that it did not matter what standard of review was applied because "we find that this case does not meet even the most untailed standards."<sup>123</sup>

According to the Court, the public objective interposed as the justification for the permit condition by the Commission was impairment of visual access to the ocean, a concept the Court apparently accepted as legitimate and sufficient to justify denial of the Noll an permit request. Having accepted the Commission's judgment as to the wisdom of preserving visual access to the beach and ocean, the Court found that:

it is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the No Han's property reduces any obstacles to viewing the beach created by the new house.<sup>124</sup>

Passing over the imprudency of invoking the word "impossible" in

<sup>122</sup>       !&• at 3148.

<sup>124</sup> IS. at 3149.

-this day and age, the Court's holding is difficult to understand. First, Justice Brennan, with little difficulty, does the "impossible" by outlining several different ways in which the condition serves to mitigate the adverse impacts of the construction of a house five times the size of the prior structure.<sup>125</sup> While the justifications described by Justice Brennan may not rise to the level of self-evident truths, they clearly exceed the absolutist meaning of the word "impossible." Moreover, it defies logic to suggest that giving the public a view place on the Nollan's lot, seaward of the new house, would not eliminate an obstacle to "viewing" the beach. The illogic of the Court's position is made doubly difficult to understand by the fact that the majority opinion explicitly states that providing "a viewing spot on their [Nollans] property would be constitutional...."<sup>126</sup> Figure 4 illustrates the issues that were presented in regard to •the obstructed view and the required pass and repass easement and the alternative viewing spot.

24. <sup>126</sup> . at

3154-3156.

How, it is "surely" legitimate to ask, could a viewing spot be more effective in providing visual access to the ocean and less intrusive of the Nollan's privacy, than to provide a viewing spot that is seaward of the Nollan's seawall and accessible not by trespassing through the Nollan's yard but by movement along the beach from public holdings to the north and south of the Nollan lot? It is one thing for a Court to disagree with the wisdom and judgment of a co-equal branch of government, it is quite another to reach a conclusion of impossibility\* It is difficult to read the majority opinion without recalling the halcyon days of "substantive due process" and wondering what happened to the oft-repeated and well-settled proposition that the court does not sit "as a super-legislature...."<sup>127</sup>

It is tempting, given the contradictions inherent in the Court \* s opinion, to dismiss the majority's holding as nothing more than another "bad" fact case from California and therefore a "lot to do about nothing\*\* Indeed Justice Brennan states that "I can only hope that today's decision is an aberration, and that a

127 Day Brite Lighting v. Missouri, 342 U.S. 421, 423 (1952).



broader vision ultimately prevails."<sup>128</sup> On its face, the proposition that a majority of the Court actually intends to establish a Takings Clause standard of review that harkens back to a much-maligned era of judicial "super legislatures" is unthinkable; therefore the explanation of "extreme" facts without precedential implications is theoretically plausible\* Yet, Justices Brennan, Marshall, Blackmun and Stevens clearly believe that the majority is serious, and, in a footnote rebuttal to Brennan\*s dissent. Justice Scalia does not disabuse the reader of an apparent invocation of strict judicial scrutiny.<sup>129</sup> Worse still, the majority opinion appears to say that it is serious about strict scrutiny, under at least some, unfortunately undefined, circumstances.

[O]ur cases describe the condition for "substantial advanc[ing]" of a legitimate State interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is a heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.<sup>130</sup>

Nevertheless it is possible, to suggest, without resolving the extent to which a court will be inclined to "second guess"

<sup>128</sup> 107 S.Ct. at 3162.

<sup>129</sup> at 3162.

<sup>130</sup> Id. at 3147 n.30.  
Andrew v. Al lard, 444 U.S. 51, 66 (1979)  
Just v\* Marinette County  
Estuary Properties, Inc.  
National Dredge

legislative judgments, that the United States Supreme Court, if faced with a less extreme set of facts, would hold that a development condition involving a concession of property rights that would otherwise (by itself) constitute a compensable taking, need only bear a "rational" or "reasonable" relationship to the public interest that is intended to be served; that only those exactions which "utterly fail" to relate to the stated purpose will be invalid\*

The language of the opinion suggests that a "touchstone<sup>1\*</sup> of municipal comfort in regard to exactions is the concept of "substantially advancing" the stated public purpose for which the exaction is a mitigation alternative. If an exaction is a "substantially advancing alternative" to a regulatory limitation of equal or greater economic impact on the landowner that itself is not otherwise a taking by depriving the landowner of "all" use, then the exaction is likely to be sustained.

More important than the decision itself, however, may be the significance of Nollan in the context of the Court's decision in First English. The Court in First English did not explain the circumstances where a regulation should be considered to destroy all use or what uses would be considered sufficient to avoid the label of a taking. Both the majority opinion and Justice Brennan's dissent, in which Justice Marshall concurred, assume, without discussion, that the Coastal Commission could have lawfully denied the Nollan's application for a permit and that such denial would not have denied them all use of their

property.<sup>131</sup>

The Commission argues that among these permissible purposes are protecting the public's ability to see the beach, assisting the public in overcoming the "psychological barrier" to using the beach created by a developed shorefront, and preventing congestion on the public beaches. He assume, without deciding, that this is so — in which case t>>e Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone. or by reason of cumulative impact produced in conjunction with other construction\* would substantially impede these purposes, unless the denial would interfere so drastically with the Nollan's use of their property as to constitute a taking\*<sup>132</sup>

It is true, of course, that the Court does not decide that the permit denial would not constitute a taking; nevertheless, it is, to use the majority's words, -impossible to read the opinion In pari mater i a without concluding that the Court appreciated the validity of the outright denial of the permit, particularly in light of Justice Brennan's dissenting opinion and the majority's rebuttal of those portions of Brennan's opinion with which the majority disagreed.<sup>133</sup>

In his dissent, without the qualifier invoked by the majority, Brennan states that "The Coastal Commission, if it had so chosen, could have denied the Noll an<sup>1</sup> s request for a development permit, since the property would have remained

<sup>131</sup> m. at 3148-3152.

<sup>132</sup> Id, at 3147 (emphasis added).

<sup>133</sup> Ifl. at 3152 (emphasis added).

economically viable without the requested new development-"<sup>134</sup>  
In light of the facts of the case – the bungalow on the lot "had fallen into disrepair, and could no longer be rented out"<sup>135</sup> it is surely apparent that the "other viable uses" deemed constitutionally sufficient to avoid a regulatory taking by Justice Brennan do not necessarily involve what the real estate industry conceives of as "economically viable" and that such minimum uses are more reminiscent of the remaining uses in Andrus v- Allard<sup>136</sup> – that is, not very much. Indeed, in his discussion of the case in the context of takings jurisprudence. Justice Brennan relies on Andrus and denigrates as protected property interests developer expectations for permits authorizing the intensification of use of a parcel of land. ("[T]he interest in anticipated gains has been traditionally been viewed as less compelling than other property-related interests."<sup>137</sup>)

More importantly, Justice Brennan goes very far in explaining that while his view of regulatory takings is that just compensation is required if a regulation goes too far, that few regulations, even very restrictive regulations that would involve the denial of permits to intensify the use of property will constitute a so-called "regulatory taking."<sup>138</sup> Reading between

<sup>135</sup> **Id\*at 3143.**

**136 444 ^s, 51 (1979)**

<sup>137</sup> **Ifi. at 67.**

<sup>138</sup> **IS. at 66.**

'the lines, it is possible to suggest that Justice Brennan's view of use intensification and economically viable use is coincident with the Wisconsin Supreme Court's view that no one has a property interest in changing the inherent, natural character of land in order to support more intense development.<sup>139</sup>

Even more important is Justice Brennan's deliberate consideration of the "concerns"<sup>1</sup> that underlie the Court's taxing jurisprudence of which Justice Brennan has been the Court's most prominent architect. First, Justice Brennan makes it clear that notwithstanding the contrary implication in Loretto v. Teleorompter<sup>140</sup> physical intrusion does not necessarily constitute a compensable event: "physical access to private property in itself creates not takings problem if it does not \* unreasonably impair the value or use of [the] property."<sup>141</sup> This proposition is made all the more significant because the author of the majority in Loretto (Justice Marshall) joined in Brennan's dissenting opinion in Nollan. Second, Brennan carefully articulates that it is significant whether the governmental activity that burdens private use is a result of a private initiative to intensify use of the property. If so, then Brennan clearly posits that limitations are less likely to constitute a

<sup>139</sup> **Just v. Hainette County. 56 Wise. 2d 7, 201 N.W. 2d 761 (1972)?** **Graham v. Estuary Properties. Inc.. 399 So. 2d 1374 (1981).**

**140 458 U.S. 419 (1982).**

**141 107 s.Ct. at 3157.**

regulatory taking: "had the Nollan's not proposed more intensive development in the coastal zone, they would never have been subject to the provision that they challenge."<sup>142</sup>

Third, Justice Brennan takes a sharp look at the "economic" impacts of the regulation at issue and measures it in the context of a "reciprocity of advantage" and in so doing clearly indicates that a balancing of public interests is appropriate and invites the possibility that a very restrictive regulation will be sustained if the economic impact to the landowner does not measure up to the public harm sought to be avoided.<sup>143</sup> It is important that economic impact is not an absolute element in the Brennan equation for a regulatory taking; "Ultimately, appellants' claim of economic injury is flawed because it rests on the assumption of entitlement to the full value of their new development."<sup>144</sup> Finally, and most importantly, Justice Brennan discusses the concept of "investment-backed expectations" and explains that the 'reasonableness of such expectations depends upon the prevailing planning and regulatory climate and that State policy, expressed by statute or constitution, prescribes the legitimacy of development expectations. In other words, compensable interests may not be formed in contradiction of state policy or law.

Even were we somehow to conclude a pre-

<sup>142</sup> **I&\* at 3158.**

<sup>144</sup>

existing expectation of a right to exclude, appellants were clearly on notice when requesting a new development permit that a condition of approval would be a provision ensuring public lateral access to the shore. Thus, they surely could have had no expectation that they could obtain approval of their new development and exercise any right of exclusion afterward.<sup>145</sup>

And it is clear that Brennan does not view construction of improvements as an immutable right of property: "If the Court is somehow suggesting that 'the right to build on one's own property'<sup>1</sup> has some privileged natural rights status, the argument is a 'curious one.'<sup>146</sup> In summary, Brennan reveals that his theory of temporary regulatory takings is nothing more than the constitutional imperative that if a regulation goes too far, compensation is required, but that few well-conceived regulations are likely to have such an effect:

I believe that States should be afforded considerable latitude in regulating private development, without fear that their regulatory efforts<sup>147</sup> will often be found to constitute a taking.

#### WHAT DOES IT

It is not easy to comprehend the implications of the seven opinions that make up the trilogy, and it is even more difficult to pull the three cases together. Nevertheless there are a number of obvious points that bear discussion.

<sup>145</sup> **Jfl. at 3159.**

<sup>146</sup> **IS. at 3160 n.10.**

<sup>147</sup> **fl. at 3162.**

One thing is clear from the three cases, the Court is divided on the taking issue, and that the division is dynamic and still adjusting. No more than three justices<sup>148</sup> took the same positions in all three cases and one of the three, Justice Powell, has subsequently retired. Chief Justice Rehnquist and Justices Scalia and Powell were in the majority in First English Kollan and dissented in Keystone Bituminous Coal Association v. PeBenedictus<sup>149</sup>, Justice Stevens and Blackmun were in the majority in Keystone, but in the dissent in First English and Kollan. Justices Brennan and Marshall joined the majority in Keystone and First English and dissented in Nollan. Justice White was in the majority in all three cases and Justice O'Connor was in the majority in Nollan but dissented in Keystone and First English.-

The question is what do the trilogy mean? Do they represent a significant turning point in the law, or are they simply restatements of well-settled principles. The answer is relatively simple in regard to Keystone Bituminous Coal Association v. DeBenedictus-\*<sup>50</sup> The legal principles advanced are relatively consistent with prior decisions, and the only remarkable aspect of the case is the outcome which is viewed by many, including the Chief Justice, as irreconcilable with the result in Pennsylvania

148 The only alignment of three included Justice Powell who retired at the end of the 1986 term.



poal\_y• Mahon•\*\*• In Hoj.lan y. California Coastal Commission the Court ventured into a new area for the Court – exactions – and the opinion, authored in a form nominally reserved for dissents, was surprisingly supportive of local land use regulation. Few would have predicted that a conservative appointee to the Court would affirmatively approve of the provision of a viewspot on the owners lot as an appropriate condition to the building permit. It is not as easy to characterize First English Evangelical Lutheran Church v. Los Angeles County.<sup>152</sup> however, and depending on one's persuasion, and therefore how one reads the case, First English is either a simple restatement of an established principle of law or a dramatic turning point in land use law\*

Although there is some doubt raised by the majority opinion in First English- it appears that the Court has reaffirmed that the analysis of alleged regulatory takings is distinct from the analysis that is appropriate for alleged physical occupation takings. For an alleged physical occupation, actual invasion constitutes a taking unless the taking is militated as a development permit condition that substantially advances a legitimate public purpose as defined in Noll an as an alternative to a strict regulatory prohibition. As to alleged regulatory takings, the analysis of whether a particular action effects a taking turns on the economic impact of the action, from a relative and an absolute perspective, unless there is a

**151 260 U.S. 393 (1922).**

**152 107 S.Ct. 2378 (1987).**

countervailing public policy basis such as "normal delay"<sup>1</sup> or safety to sustain the limitation.

In First English Evangelical Lutheran Church v. Los Angeles County- the Court implies that a regulation that deprives a property owner of all use of his property, even for a limited period of time, constitutes a taking. That implication, of course, contradicts the Court's disclaimer that the question of whether the regulation in question actually affected a taking was not before the Court. Moreover, the Court undermines the "all use" analysis by pointing out at least two situations where the analysis would not apply - required safety actions and normal delays. Nevertheless it can be said with some confidence that a regulation that deprives a property owner of all use of his property is likely to be "too far" except in very limited circumstances. In Keystone the Court did not really reach the question of what would constitute a taking, because the Court found that the statute in question was in no real danger of "going too far".

It is also fairly clear, notwithstanding the Chief Justice's dissent In Keystone,, that a regulatory taking analysis does not focus on discrete units of property that have been restricted\* Rather, the analytical unit of property is the owner's entire unit, in Keystone all of the Coal Association's holdings\* It is, not clear, however, how the unit of property is to be determined where the property owner only owns an individual segment of property. Consider, for example, how the unit of property would

be identified if the plaintiff in Penn Central Trans Co. only owned the air rights above the Grand Central Station. Would the unit of property be just the air rights? Could a clever litigant alter the unit of property by selling the support estate to a third party? One of the unresolved flaws in contemporary taking jurisprudence is the inconsistency between Pennsylvania Coal v. Mahon and Penn Central Trans Co. v. City of New York. If the facts of the cases are analyzed, it appears that the only difference between the two cases is the unit of property involved. In Pennsylvania Coal the fee had been divided into discrete segments by private transaction and the unit of property was the property owned by the coal company. In Penn Central Trans Co. the owner retained all segments of the fee and the unit of property was the entire fee.

In the final analysis the cases mean that the Court is still confused and still grasping for a doctrinal basis for resolving the taking issue. That is not to say that a regulation can never effect a taking. Rather it is to say that the taking issue does not have as its source Justice Holmes' opinion in Pennsylvania coal v. Mahon, and that other precedents more clearly define the contours of the law. The origins of contemporary taking jurisprudence, at least as the issues are defined in the trilogy, are in fact, as Chief Justice Rehnquist notes in First English<sup>53</sup> found in Pumpelly v. Green Bay Co.<sup>154</sup> In Pumpelly a

property owner demanded compensation for the total destruction of of his property due to flooding resulting from governmental action. In Pumpelly. the Supreme Court recognized that the just compensation clause constituted a constraint on the power of government and held that the fact that the government had not instituted eminent domain proceedings did not avoid the constitutional imperative for compensation:

It would be a very curious and unsatisfactory result if ... it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use.<sup>155</sup>

The principle laid down in Puapelly has been reaffirmed on many occasions and United States v. Clarke<sup>156</sup> makes it clear that governmental actions other than condemnation proceedings nay require payment of just compensation. The use of airspace<sup>157</sup> is another familiar example of takings that have been recognized even though no condemnation proceedings were initiated\*

Simply put, it can not be seriously questioned that since P<sup>155</sup>umpelly \*t least, it has been well-settled that a taking in the

**154** 13 Wall. 166 (1872) .

<sup>155</sup> 13 Wall at 177-8.

<sup>156</sup> 445 U.S. 253 (1980) .

<sup>157</sup> United States v. Causby. 328 U.S. 256 (1946) .

constitutional sense stay be affected by governmental actions other than exercises of the power of eminent domain, including regulations. But that does not mean that a regulation that limits private use effects a taking. Indeed given the nature of the Interferences which characterized the takings In the cases like Puapelly on which the Court relies, it is difficult to equate a good faith regulatory effort that temporarily displaces a landowner's private use of his property until a court declares that the regulation goes too far with flooding, total destruction and aviation use\* Yet that is the leap of faith that is being attributed to the opinion in First Enal ish Evangel leal Lutheran -Church^ -----

The dissent of course recognizes the thrust of the Court's implication and argues that the mere interference in use is not the kind of interference that has previously been recognized as an interference amounting to a taking. The dissent-'s discussion of the value of property in the dimension of time, although presented as a dissent, seems logical and consistent with the Court's precedents and it would be imprudent to assume that the Court has actually rejected that analysis\* To the contrary, it seems to be most logical to assume that the Court meant what it said and that the question of whether the regulations at issue, if they deprived the owner all use of property even for a limited period of time, constituted a taking was not before the Court.

What is needed is a more studied view of the taking issue and a holding that is appropriate for an alleged taking that does

not involve physical occupation\* As the Court correctly points out, the analysis is basically an economic analysis; however, it is not completely economic because of the temporal nature of regulatory impacts and the possibility of an overriding public interest\* Of course if a regulation goes beyond simply limiting private use and commands public use or total destruction of a property interest, then a taking should be found. On the other band, if the only impact on property is a temporary interference with private prerogatives while a court determines that the regulation transcends what is admitted by the Court to be a case by case analysis based on individual cases and facts, then the established principle that a mere diminution in value is not a •taking would seem to mean that the kind of regulation in First English will turn out on remand to not effect a taking.

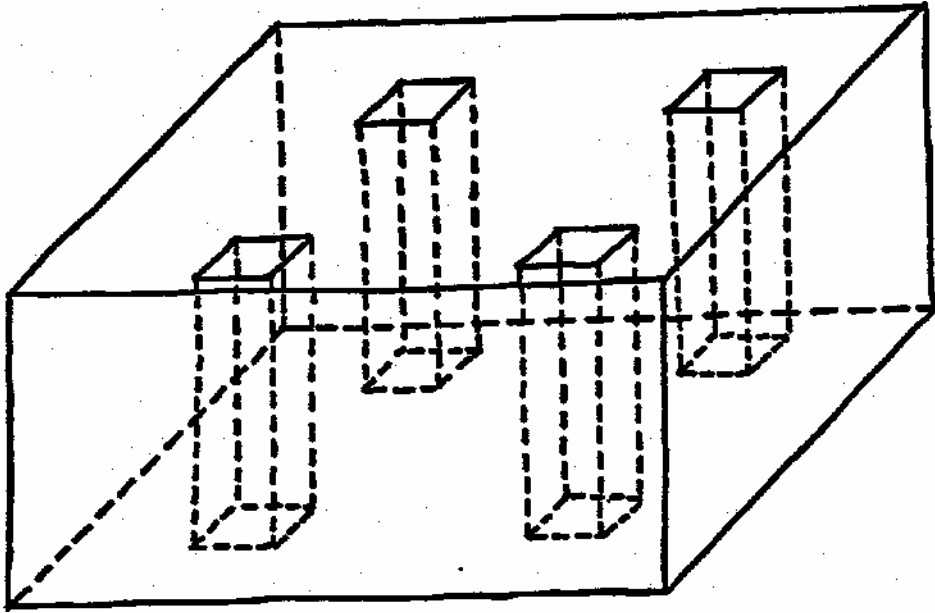


FIGURE 1

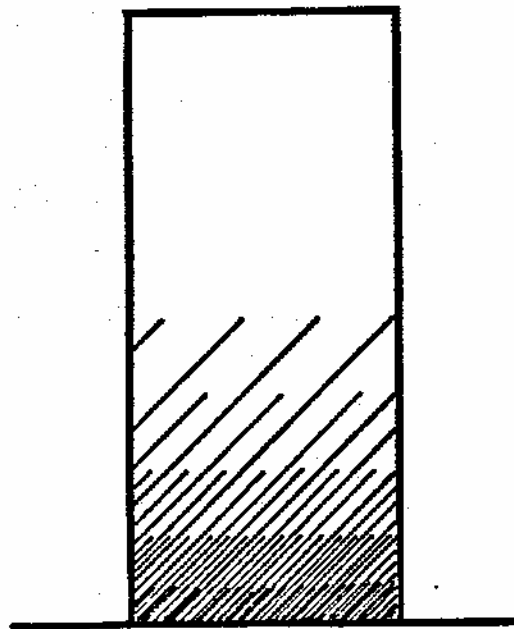


FIGURE 3

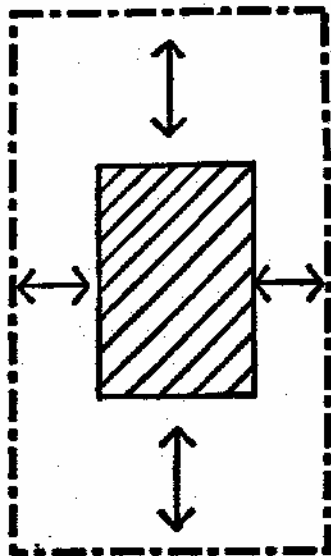


FIGURE 2

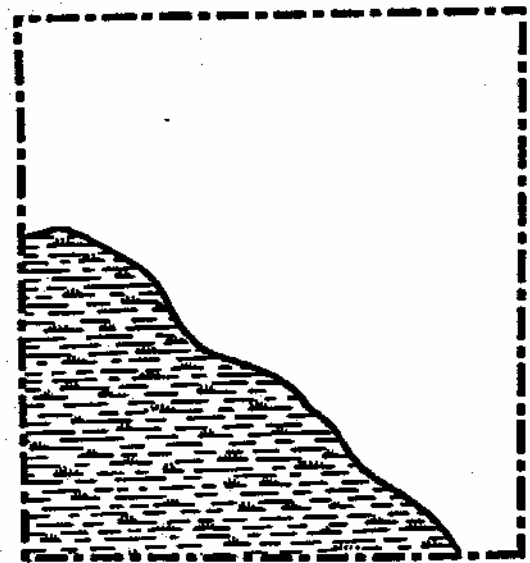


FIGURE 2



