Notes

First Church Decides Compensation is Remedy for Temporary Regulatory Takings—Local Governments are "Singing the Blues"

An important United States Supreme Court decision in 1987 established a doctrine which affects thousands of determinations of local zoning boards and local legislative bodies throughout the country. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[1] the Court held that the Constitution requires governments to compensate landowners for temporary regulatory takings rather than allowing a court to merely invalidate the regulation.[2] Through amici briefs, government at all levels had opposed this outcome. Therefore, when the decision was made, government decisionmakers feared the door was open to numerous lawsuits that would either cost government millions or shut down regulation of land use. Developers and landowners, on the other hand, were jubilant.

The amount of government regulation of land use has grown over time. Two centuries ago, landowners were free to develop property as they pleased, unless the use constituted a nuisance or the landowner had entered into covenants restricting the property's use. But as the country became more populated and great cities emerged, the need to protect public health and safety through use of government's police power brought on regulation. Zoning as a valid exercise of police power was upheld by the Supreme Court in 1926.[3] Over the years, land-use regulation has grown and intruded on the private property rights of landowners in order to further the social, economic, and environmental needs of the community. In the last ten to fifteen years, landowners have begun to argue that these actions are confiscations of the owners' right to use their land.

Because *First Church* expands the meaning of the Takings or Just Compensation Clause,[4] it is considered a landmark decision. The Court had never before decided that compensation was the remedy for a

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[1] 107 S. Ct. 2378 (1987).

[2] *Id.* at 2389. A temporary regulatory taking is a regulation that is declared by a court to be invalid as a taking for which the remedy is damages for the use of the property for the interim period between the date the regulation effected a taking and the date the court declared the regulation invalid. *See infra* note 59 and text accompanying notes 49-63, 91-96.

[3] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[4] "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V, § 1, cl. 5. The clause is referred to as both the Takings Clause and the Just Compensation Clause.

"temporary regulatory taking." Although the decision was narrow, it will have a profound psychological effect on lower court rulings, and on local land-use decisions. To already strapped local governments, the fear of the cost of compensating landowners for being found to have taken all use of the landowners' property may cause local decisionmakers to choose not to regulate when they would have prior to *First Church.*

The decision of the Court in *First Church* spoke only to the remedy issue; it did not specifically find in this situation that there had been a taking. Accordingly, the case was remanded for a determination of the taking issue. However, the major problem that remains is to ascertain the factors or the test for determining whether there has been a taking. The Court needs to resolve that and other issues. This Note examines the *First Church* decision as part of the evolution of the Takings or Just Compensation Clause and the effect of the decision on local planners and decisionmakers. The first section provides a context for the *First Church* decision, which is then analyzed in the second section. The third section presents what issues are yet to be resolved, including what constitutes a taking, whether alternatives in lieu of compensation may be substituted, when a taking begins, and whether a challenger must have a final decision and exhaust all state and local procedures for compensation before the challenge is ripe for adjudication. Because most land-use decisions are made at the local level, the final section focuses on the practical consequences to the local decisionmaker and planner, and concludes that government may still impose police power regulations to protect public health and safety within limits without fear of being required to compensate the landowner.

I. Introduction to Concepts

A. *Why Property Rights Should be Protected*

One object of American government is to protect the individual's accumulation of wealth as a way to encourage industriousness and productiveness. Another object is to promote the common welfare.[5] "The implication of this view is that property is to be protected only up to the bounds of some conception of civil and social responsibility."[6] The tension between these two philosophies of property helps explain the "takings" issue. Any court in deciding a takings case is determining how much to protect expectations of gain and the bundle of property

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[5]*See generally* Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle,* 57 S. Cal. L. Rev. 561 (1984).

[6]*Id.* at 592.

rights (economic rights and legal relations) of an individual and how much to protect the community for the benefit of all (civic and social responsibility).

"Property rights" means both economic rights and legal relations. Economic rights include not only property in the sense of land and things, but also "new property," for example, entitlements, and other government benefits. The legal relations relevant to property include the rights "to use," "to manage," "to the income," "to the capital," and "to security."[7] These legal relations are subject to limitations such as the duty not to use the property so as to harm others.[8]

B. *The Original Meaning of the Just Compensation Clause*

Prior to the adoption of the United States Constitution and the Bill of Rights, the colonies frequently took private property for public use.[9] No colony, except Massachusetts,[10] paid compensation when it built a public road across unimproved land although the landowner was compensated for roads across improved land.[11] When James Madison drafted the Bill of Rights, although no state had requested it, Madison included a clause that provided for compensation on his own initiative.[12] Madison intended the clause "nor shall private property be taken for public use, without just compensation"[13] to have a narrow meaning, to apply only to the federal government and only to physical takings.[14]

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[7]A. HONORE, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107-47 (A. Guest ed. 1961). For a more complete formulation based on Honore's work, see Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 WASH. L. REV. 583, 589-90 (1981). The Court in Ruckleshaus v. Monsanto Co., 467 U.S. 986, 1001-03 (1984), discusses the difficulty of defining property.

[8]For a list of limitations, see Oakes, *supra* note 7, at 589-90.

[9]According to the ideology of the revolution, such takings were justified to advance the common good. *See generally* F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE, 82-105 (1973) [hereinafter THE TAKING ISSUE]; Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L. J. 694 (1985) [hereinafter Note, *Original Significance*]. *See also* Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972); Note, *Civil Rights for the Propertied Class: The Development of Inverse Condemnation in the Federal Courts*, 55 TUL. L. REV. 897, 900-01 (1981).

[10]*See* THE TAKING ISSUE, *supra* note 9, at 695 (quoting the original Mass. Const. Art. X (1780)).

[11]*See* Note, *Original Significance*, *supra* note 9, at 695.

[12]All other provisions in the Bill of Rights were requested by at least two states. E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 161-65 (1957) (listing the sources of the provisions of the Bill of Rights).

[13]U.S. CONST. amend. V, § 1, cl.5. This Amendment was adopted in 1791.

[14]Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833). "[T]he fifth amendment must be understood as restraining the power of the general government, not as applicable to the states." *Id.* at 247. *See* Note, *Original Significance*, *supra* note 9, at 708.

The federal government did not take property for public use until 80 years later in the 1870's but prior to that state officials did condemn land for use by the federal government.[15] State governments could abridge property rights for public use in order to promote the common good, and it was the practice in several of the states to acquire land without compensation.[16] The Just Compensation Clause was made applicable to the states as well as the federal government through adoption of the fourteenth amendment in 1868[17] and by Supreme Court interpretation 29 years later in *Chicago, Burlington & Quincy R.R. Co. v. Chicago*.[18] Although the fourteenth amendment does not mention "just compensation," the Court incorporated compensation for physical takings through the Due Process Clause to apply to the states.

C. Antecedents to the Temporary Regulatory Taking of Land

In order to understand fully the decision the Court reached in *First Church*, it is necessary to briefly examine the evolution of "takings" and "just compensation" from the original meaning to quite different meanings today.

1. Eminent Domain and Just Compensation.—Federal, state, and most local government units have the power of eminent domain over property within their jurisdiction, power of a sovereign to condemn private property for public use without the consent of the owner.[19] Originally, the only meaning of the Just Compensation Clause was that the fifth amendment limits eminent domain power by requiring just compensation for property taken. Continuing to the present, when a private property owner refuses to sell property which the government wants for a public purpose, the government may condemn the property, provide the owner with just compensation, and take the property against the owner's wishes.[20] The government only need compensate if what is

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[15]Stoebuck, *supra* note 9, at 559 n.18.

[16]*See* 3 P. Nichols, Eminent Domain § 8.1[1] n.10 (3d ed. 1985).

[17]"No State . . . shall . . . deprive any person of . . . property, without due process of law . . . ." U.S. Const. amend. XIV, § 1, cl. 3.

[18]166 U.S. 226, 241 (1897). In other words, just compensation did not apply to the states for the first 100 years.

[19]1 P. Nichols, *supra* note 16, at § 1.11. *See generally* Stoebuck, *supra* note 9.

[20]Government can wait until the cost is established before making a decision to proceed with acquiring the property.

> Until taking, the condemnor may discontinue or abandon his effort. The determination of the award is an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources.

Danforth v. United States, 308 U.S. 271, 284 (1939).

taken is private property; it need not compensate for collateral interests and expectations.[21] Just compensation in eminent domain has come to mean a fair market value standard of what a willing buyer would pay to a willing seller.[22] Although eminent domain may only be used to take private land for public use, the courts are liberal in determining what constitutes public use,[23] and the low-level of scrutiny test is whether the government's exercise of eminent domain power is rationally related to a conceivable public purpose.[24]

2. Inverse Condemnation and Physical Invasion.—The United States Supreme Court has not read the Takings Clause literally nor in its original meaning.[25] Rather, the Court has expanded the meaning gradually. From the eminent domain context, the concept of just compensation expanded into what is now called inverse condemnation. When government causes damage to privately owned real property by negligent acts, the owner may not have the ability to recover damages because the government may have sovereign immunity from tort liability. To avoid this inequitable result, plaintiffs converted the request for damages into a claim of attempted acquisition. However, the parallel to a tort cause of action remains, including compensation as damages and the need for proving causation.[26] By converting the property damage into an attempted

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[21]United States v. Willow River Power Co., 324 U.S. 499, 511 (1945) (claimant's interest in high water level to maintain its power head is not a right protected by law); United States v. General Motors Corp., 323 U.S. 373, 378 (1945) (the fifth amendment concerns itself with the physical thing and not with collateral interests which may be incident to ownership).

[22]United States v. Miller, 317 U.S. 369, 374 (1943). In a situation where market value is impossible to determine, other standards such as replacement, relocation or substitute costs will be considered. United States v. Fifty Acres of Land, 469 U.S. 24 (1984); United States v. 564.54 Acres of Land, 441 U.S. 506, 508-09 (1979).

[23]Berman v. Parker, 348 U.S. 26 (1954).

> Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.

Id. at 33.

[24]Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984). "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Id.* at 241.

[25]Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 142 (1978) (Rehnquist, J., dissenting), *reh'g denied*, 439 U.S. 883 (1978) ("Because the Taking Clause of the Fifth Amendment has not always been read literally, however, the constitutionality of appellees' actions requires a closer scrutiny . . . .").

[26]*See* Ragsdale, *A Synthesis and Integration of Supreme Court Precedent Regarding the Regulatory Taking of Land*, 55 UMKC L. Rev. 213, 219-22 (1987).

acquisition, plaintiffs could argue that the Takings Clause applies and is self-executing; that is, a property owner does not need to have statutory consent to recover from government as was necessary for a tort recovery. A landowner suing for property damages can claim that government has acquired the property without paying just compensation for it.[27] If the landowner prevails, government is forced to compensate the landowner, but in so doing, it will receive title to the property.

Physical intrusion or occupation of the land by government was essential in early cases.[28] Thereafter, the concept of taking by government action when the government damaged or intruded was expanded to include government burdening of the airspace above privately owned property causing damage to the owners' use of their property.[29]

The term "inverse condemnation" appeared in the 1960's.[30] It is called inverse because the landowner rather than the government institutes the proceedings for condemnation. More specifically, inverse condemnation is a cause of action against government to recover the value of property taken (the opposite of eminent domain under which government institutes a cause of action against the private property owner to take the land and the court determines the value of the property to be taken).[31]

3. Police Power Regulation.—Police power regulations are statutes or ordinances enacted by government (either state legislatures, or local councils, boards and commissions) which impose duties or limits upon those regulated in order to promote, protect and prevent harm to public interests in health, safety, order, morals and general welfare. A state is said to inherently have police powers because such powers were left to the states in our constitutional system.[32] A law duly passed by a state

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[27]*See* D. Hagman & J. Juergensmeyer, Urban Planning and Land Development Control Law § 24.3 (2d ed. 1986).

[28]Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871) (a dam constructed for flood control had caused land to be flooded that had not been purchased by the government).

[29]United States v. Causby, 328 U.S. 256 (1946). The Court held that U.S. aircraft flying in and out of a nearby Air Force base, thus rendering a chicken business unprofitable and preventing the owners from sleeping at night, was "as much an appropriation of the use of the land as a more conventional entry upon it." *Id.* at 264.

[30]*See* Bauman, *The Supreme Court, Inverse Condemnation, and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 Rutgers L. J. 15, 45 (1983).

[31]United States v. Clarke, 445 U.S. 253 (1980). Inverse condemnation is a "shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *Id.* at 257.

[32]Thurlow v. Massachusettes, 46 U.S. 504, 527 (1847) (the License Cases). *See generally* R. Rotunda, J. Nowak, & J. Young, 2 Treatise on Constitutional Law, Substance and Procedure § 15.1 at 31 (1986). *See* Ragsdale, *supra* note 26, at 223.

legislative branch of government is valid unless it violates a provision of the United States Constitution or the state's constitution having to do with the rights of individuals or unless it interferes with a power allocated to the federal government by the United States Constitution.[33] If a regulation is not valid, the remedy is to invalidate the regulation.[34] Zoning became a judicially sanctioned police power early in the 1900's.[35]

4. The Blending of Two Different Doctrines, the Idea that the Taking Clause is a Restraint on Police Power.—The first suggestion that a police power regulation could be a "taking" of property under the fifth amendment came in 1887 in *Mugler v. Kansas*.[36] The Supreme Court rejected the argument:

> 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 an appropriation of property for the public benefit. . . . The power which the States have of prohibiting such use by individuals of their property, . . . is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that 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.[37]

In cases that challenged the use of police power to regulate land use, the Supreme Court employed substantive due process analysis.[38] The Court's rejection of the suggestion that a police power regulation could

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[33]The burden of proof is on the one challenging the law. *See* Cook, *What is the Police Power?*, 7 COLUM. L. REV. 322 (1907).

[34]Lake Shore & M.S.R. Co. v. Smith, 173 U.S. 684, 699 (1899).

[35]Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[36]123 U.S. 623 (1887) (owner of a brewery contended that a statute prohibiting manufacture and sale of intoxicating beverages was invalid under the Due Process Clause as a taking of property). *See infra* note 109 and text accompanying notes 108-17.

[37]*Id.* at 668-69.

[38]*See* Hadacheck v. Sebastian, 239 U.S. 394 (1915); *Euclid*, 272 U.S. 365; Nectow v. Cambridge, 277 U.S. 183 (1928). Today for substantive due process analysis in government actions which do not limit "fundamental" constitutional rights, when the plaintiff presents a prima facie case of an arbitrary and irrational regulation, the government must prove 1) the regulation serves a public purpose, 2) the means employed by the regulation bear a reasonable relation to the purpose the regulation seeks to achieve, 3) the means do not unduly burden the individual affected by the regulation, and 4) the public interest in the regulation outweighs the harm to the individual. *See* Hodel v. Indiana, 452 U.S. 314, 331-33 (1981). *See generally* R. ROTUNDA, J. NOWAK, & J. YOUNG, *supra* note 32, at 61-64.

be a taking was not challenged for 35 years, until Justice Holmes stated in dictum in *Pennsylvania Coal Co. v. Mahon*[39] that an exercise of police power could at some point become a "taking."[40] It should not be understated; this was a radical idea at the time.[41] It should also be noted that Justice Holmes used the Contract Clause[42] and the Due Process Clause[43] in arriving at the decision; the Court did not find a taking which required just compensation.[44] The next Supreme Court case in which both due process and takings analysis were used to suggest a regulatory taking was *Goldblatt v. Town of Hempstead*[45] in 1962.

In the 1970's, more than 50 years after *Pennsylvania Coal Co. v. Mahon*, landowners began to allege that *regulations* had effected an inverse condemnation for which just compensation (rather than invalidation) was due.[46] Although it has not been the holding of any United States Supreme Court case since then,[47] the Supreme Court has cited

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[39]260 U.S. 393 (1922). The Court held that a state statute exceeded the police power and contravened the rights of the coal-owner under the Contract Clause and the Due Process Clause of the fourteenth amendment. *Id.* at 413. "We assume, of course, that the statute was passed upon the conviction that an exigency exists that would warrant the exercise of eminent domain." *Id.* at 416.

[40]"[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. The meaning of Justice Holmes' statement is unclear; it may mean simply that the regulation would be invalid, or that compensation would be due. *Compare* Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193, 208-14 (1984) [hereinafter *White River Junction Manifesto*] *with* Bauman, *supra* note 30, at 38-44.

[41]*See* Roberts, *Mining with Mr. Justice Holmes*, 39 VAND. L. REV. 287, 294 (1986).

[42]"No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10.

[43]*See supra* note 17.

[44]"But obviously the implied limitation must have its limits, or the contract and due process clauses are gone." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). Justice Holmes went on to say, if the regulation violates these, government may acquire the property by eminent domain. *Id. See generally* Note, *Takings Law—Is Inverse Condemnation an Appropriate Remedy for Due Process Violations?*—San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981), 57 WASH. L. REV. 551, 557 n.42 (1982).

[45]369 U.S. 590, 594-96 (1962). The Court recognized the *Mahon* formulation that a "regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation," however, it found no need to decide that question because of lack of evidence that the regulation reduced the value of the lot in question. The Court then proceeded to use traditional due process analysis to reach its decision (citing Lawton v. Steele, 152 U.S. 133, 137 (1894)). For an explanatory model designed to explicitly combine substantive due process and takings analysis see Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983).

[46]HFH Ltd. v. Superior Ct., 15 Cal.3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976). *See* Ragsdale, *supra* note 26, at 230.

[47]The cases involving land use regulation, in which the landowner has claimed a taking, that have reached the Supreme Court since *Mahon* have either upheld the regulation

Holmes' "too far" doctrine in other decisions.[48] The effect of Holmes' doctrine is to limit police power land-use regulatory authority by declaring that the Constitution will trump its exercise at some point. The Takings Clause has come a long way from its original meaning as a restraint on the federal government physically taking land for public purposes without payment, to the idea of its use as a restraint on government regulation in the land use and zoning context. *First Church* moved the meaning of the clause a step further.

5. *A New Doctrine.*—A new doctrine, temporary regulatory taking, formed the basis for requiring just compensation as a remedy in *First Church*. Justice Brennan initiated the "temporary taking" idea in his 1981 dissent in *San Diego Gas & Electric Co. v. City of San Diego*:[49]

> The fact that a regulatory "taking" may be temporary, by virtue of the government's power to rescind or amend the regulation, does not make it any less of a constitutional "taking." Nothing in the Just Compensation Clause suggests that "takings" must be permanent and irrevocable. Nor does the temporary reversible quality of a regulatory "taking" render compensation for the time of the "taking" any less obligatory. This Court more than once has recognized that temporary reversible "takings" should be analyzed according to the same constitutional framework applied to permanent irreversible "takings."[50]

One of the cases cited to support Justice Brennan's statement was *United States v. Causby*,[51] a 1946 Supreme Court case in which frequent low-level flights of Army and Navy airplanes effected a "taking" of an air easement over a chicken farm. In *Causby*, it was not clear whether the taking was a temporary or a permanent taking. "Since on this record *it is not clear whether the easement taken is a permanent or a temporary one*, it would be premature for us to consider whether the amount of

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or not decided the issue. *See* Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987) (condition required for granting of a building permit); Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987) (state regulation of coal mining); MacDonald, Sommer, & Frates v. Yolo County, 106 S.Ct. 2561 (1986) (proposed subdivision); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (residential cluster zoning); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (open-space plan); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (historic preservation zoning); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (ordinance prohibiting use of land for gravel mining below water table).

[48] *See, e.g.*, Agins v. Tiburon, 447 U.S. 255, 260 (1980); Andrus v. Allard, 444 U.S. 51, 66 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978).

[49] 450 U.S. 621 (1981) (Brennan, J., dissenting).

[50] *Id.* at 657.

[51] 328 U.S. 256 (1946). *See supra* note 29 and accompanying text.

the award made by the Court of Claims was proper."[52] Justice Brennan cited three World War II cases in which the government was required to compensate property owners for temporary use and occupation of their property—eminent domain cases which involved temporary physical use for which lease payments were due.[53]

Justice Brennan feared that if the remedy for a regulation that goes "too far" was merely the invalidation of the regulation and not money damages, government would not exercise restraint. Government, Justice Brennan warned, could prolong decisionmaking, and make landowners run the gauntlet repeatedly.[54] The Court and critics may be, as one commentator said, willing to live with the "petty larceny of police power" regulations but not with highway robbery.[55]

Justice Brennan may have wanted to be fair to landowners and to increase regulatory decisions which lead to efficient resource allocations. Fairness to landowners affected by land-use regulation implies compensation for their losses caused by the regulation. Economists speak of decisions which efficiently utilize resources by internalizing external costs and benefits, or imposing on decisionmakers all the effects of their decisions.[56] A remedy that requires a damage award or compensation to an injured landowner influences governmental decisionmakers' behavior by imposing the threat of liability for government's regulatory actions.[57] It increases efficiency in decisionmaking by forcing decision-

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[52]*San Diego Gas*, 450 U.S. at 657 (Brennan, J., dissenting) (quoting *Causby*, 328 U.S. at 268) (emphasis in original).

[53]Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945).

[54]*See San Diego Gas*, 450 U.S. at 655 (Brennan, J., dissenting). A City Attorney of Thousand Oaks, California, was quoted by Justice Brennan as a glaring example of this tactic:

> If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent [California] Supreme Court case . . . appears to allow the City to change the restriction in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.

Id. at 655 n.22 (quoting Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, 38B NIMLO Municipal L. Rev. 175, 192 (1975)).

[55]Roberts, *supra* note 41, at 291 (noting that one week before the *Pennsylvania Coal Co. v. Mahon* decision Justice Holmes deleted the "petty larceny" phrase from his opinion).

[56]*See* R. Musgrave & P. Musgrave, Public Finance in Theory and Practice 60-80 (1973). *Cf.* W. Fischel, The Economics of Zoning Laws 116-122 (1985) (argues for a property rights approach as an alternative to traditional economic analysis).

[57]"The knowledge that a municipality will be liable for all of its injurious conduct,

makers to weigh the costs and benefits of regulation.[58]

The remedy Justice Brennan fashioned was one of interim compensatory damages:

> In my view, once a court establishes that there was a regulatory "taking," the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation.[59]

Justice Brennan later denied in a footnote that the remedy was a damages remedy;[60] however, upon his first statement of the remedy, the footnote included a discussion of interim damages,[61] and, in addition, a discussion followed ending with his statement that "[i]nvalidation unaccompanied *by payment of damages* would hardly compensate the landowner for any economic loss suffered during the time his property was taken."[62] Therefore, the theory of a "temporary regulatory taking" is that, if a court holds a government has taken by regulating, the government may keep the regulation and file eminent domain actions, amend the regulation to make it acceptable to the court, or rescind the regulation; nonetheless, government pays damages for the period the property was "taken." In reaching its decision in *First Church*, the majority adopts Justice Brennan's temporary regulatory taking doctrine and remedy as formulated in the dissenting opinion in *San Diego Gas*.[63]

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whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." Owen v. City of Independence, 445 U.S. 622, 651-52 (1980).

[58]Sometimes regulatory policies are designed to impose external costs on others in order to keep the government and society in general from bearing those costs, such as regulations designed to induce polluters to internalize the costs of their activities. If government liability is used as a policy tool to deter the passing of regulations, however, such liability may instead provide an incentive for government inaction because no liability attaches to a decision not to act, resulting in inefficiency. The efficiency argument can go either way. *See generally* Sterk, *Government Liability for Unconstitutional Land Use Regulations*, 60 Ind. L. J. 113 (1984).

[59]San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 653 (1981)(Brennan, J., dissenting). In a footnote, Justice Brennan explains that under his rule, he would give the government entity whose police power regulation was found to be in violation of the Takings Clause the option upon the court's ruling to then amend the offending regulation or to use eminent domain powers to condemn the property. *Id.* at 653 n.19.

[60]*Id.* at 659 n.24.

[61]*Id.* at 655 n.20.

[62]*Id.* at 656 (emphasis added).

[63]*See infra* note 74. Justices Marshall, Powell, and Stewart joined Justice Brennan in his dissent in *San Diego Gas*, while Justice Rehnquist, writing separately, indicated

II. Analysis of *First Church*

The Supreme Court ruled June 9, 1987, for the first time that a government that prohibits all use of a property by enactment of a land-use regulation must pay compensation for the period of time between the "taking" and the date when a court holds that the property has been taken. The decision modified existing law, adding compensation for a "temporary regulatory taking."[64] Prior to the decision, the California Supreme Court had declared invalidation of the regulation to be the appropriate remedy.[65]

A. The Court Did Not Find a Taking

The First English Evangelical Lutheran Church of Glendale owned a twenty-one acre tract of land nestled in a canyon in Los Angeles County. Upon the land was situated a church camp, "Lutherglen", which was used by church members and by handicapped children and adults. On February 9 and 10, 1978, following a forest fire that denuded acres of forest upstream, a rainstorm dropped eleven inches of rain on the camp and the surrounding area and caused a flash flood which took ten lives and destroyed much property. The flood wiped out Lutherglen's dining hall, two bunkhouses, a caretaker's lodge, an outdoor chapel, and a footbridge across the creek.[66] The flood was the second major flood in the twenty year period the church had owned the property.[67]

In response to the flood, Los Angeles County enacted an interim flood control ordinance which placed building restrictions on twelve acres of the property located on flat land in the floodway. All of the plaintiff's buildings had been located on this land in the floodway. Thus, the church sought compensation alleging that the ordinance prohibited all use of its property. The California courts ruled against the church receiving compensation, citing a 1979 case, *Agins v. City of Tiburon*[68] (upheld by the United States Supreme Court in 1980 on procedural grounds), in which the remedy available was limited to overturning the land-use regulation, not compensation.

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support for Justice Brennan's dissent, but joined the majority in dismissing for "want of a final judgment." *Id.* at 636. In *First Church*, the majority consisted of Chief Justice Rehnquist, who wrote the opinion, Justices Brennan, Marshall, Powell, Scalia, who replaced Stewart on the Court, and White, who appears to have switched sides.

[64]First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 2383 (1987).

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

[66]*First Church*, 107 S. Ct. at 2381.

[67]Brief of Appellee at 7, *First Church* (No. 85-1199).

[68]24 Cal.3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

The Supreme Court in *First Church* did not say that a flood control ordinance is on its face a taking, or that this ordinance as applied is a taking. Because the church did not challenge the flood control ordinance facially, facial validity was not an issue or a question decided. Rather, the church alleged that this ordinance as applied denied the landowner all use of its property; nevertheless, the Court did not decide the as-applied question on the merits but remanded for the California Court of Appeal to decide whether the flood control ordinance denied all use.[69]

B. The First Church *Decision*

1. The Claim for Compensation was Properly Presented.—The Supreme Court in *First Church* wanted to decide the remedy issue, an issue not reached in four previous cases before the sharply divided court since 1980.[70] The Court could have again refused to decide the issue by

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[69]The Court rejected the suggestion that

> [W]e must independently evaluate the adequacy of the complaint and resolve the takings claim on the merits before we can reach the remedial question. . . . We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property . . . . [The question remains] open for decision on the remand we direct today.

First Church, 107 S. Ct. at 2384-85.

Most local flood control ordinances based on solid technical information and accurate hydrological studies that have been challenged have been upheld. *See* Plater, *The Takings Issue in a Natural Setting: Floodlines and the Police Power*, 52 TEX. L. REV. 201, 233 n.61 (1974). Ordinances were upheld in Turner v. Town of Walpole, 409 N.E.2d 807 (Mass. App. 1980) and Turnpike Reality Co. v. Town of Dedham, 362 Mass. 221, 284 N.E.2d 891 (1972), *cert. denied*, 409 U.S. 1108 (1973). *See generally* R. ANDERSON, AMERICAN LAW OF ZONING § 9.49 (3 ed. 1986). The Federal flood insurance statute discourages floodplain development by requiring local governments, as a precondition to issuance of subsidized insurance policies, to adopt local flood control ordinances. 42 U.S.C. § 4015 (1982 & Supp. 1983). *See infra* note 172.

[70]The Court had been chided for this lack of decision, *see, e.g.*, Sallet, *Regulatory "Takings" and Just Compensation: The Supreme Court's Search for a Solution Continues*, 18 URB. LAW. 635 (1986). "Legal scholars with a flair for the arcane may discover whether the Court has now set a record for futility by deciding four cases without once reaching the issue for which review was granted." *Id.* at 655.

The four cases were *MacDonald, Sommer, & Frates v. Yolo County*, 106 S. Ct. 2561 (1986) (5-4 decision); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (5-4 decision); and Agins v. Tiburon, 447 U.S. 255 (1980). In *Agins*, the United States Supreme Court ruled the regulation did not effect a taking and, therefore, did not reach the remedy issue. 447 U.S. 255. In *Yolo County*, the court held lower court rulings left open the possibility that some development would be permitted, and, without reaching the taking issue, the remedy issue was not ripe. 106 S.Ct. 2561. In *Williamson County*, the Court held the landowner was required to "resort to the procedure for obtaining variances [that] would result in a conclusive determination by the Commission whether it

ruling there was no taking as a matter of law, or it could have found the case was not ripe for decision. Instead, in *First Church*, the Court noted that the complaint *alleged* that a regulation had denied the landowner all use,[71] that the California Court of Appeal in an unreported decision assumed the complaint sought "damages for the uncompensated *taking* of all use,"[72] and that the California Supreme Court denied review. Therefore, the United States Supreme Court found the constitutional question squarely presented without the need to independently evaluate the adequacy of the complaint or resolve the taking claim on the merits before reaching the remedial question.[73]

2. *The Just Compensation Clause of the Fifth Amendment Provides Compensation for a Temporary Regulatory Taking.*—The issue the United States Supreme Court decided was whether the payment of damages is required for the period of time prior to the ultimate invalidation of the challenged regulation during which a regulation denies a landowner all use of his land.[74] Chief Justice Rehnquist, writing for the majority of six Justices, found guidance in the same cases from the World War II period cited by Justice Brennan in *San Diego Gas*.[75] "These cases reflect the fact 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."[76] The opinion

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would allow [the landowner] to develop the subdivision in the manner . . . proposed." 473 U.S. at 193. Also, the landowner "did not seek compensation through the procedures the State has provided for doing so." *Id.* at 194. In *San Diego Gas*, the Court held that no final judgment had been entered in the state court and "further proceedings are necessary to resolve the federal question whether there has been a taking at all." 450 U.S. at 633.

[71]In *Williamson County*, the Court had required a final decision by the lower courts that the land-use regulation was a "taking" before the issue was ripe. 473 U.S. at 186. Following that, in *Yolo County*, the dissent suggested the issue was not premature if the landowner's pleading sufficiently alleged there had been a final decision denying all reasonable economic beneficial use. 106 S. Ct. at 2572. Subsequently in *First Church*, the majority accepted *Yolo County's* dissenting opinion that an allegation was all that was necessary. 107 S. Ct. at 2384.

[72]In the California trial court, the defendant county moved to strike (Cal. Code Civ. Proc. § 436) the allegation in the complaint as irrelevant. The trial court granted the motion, and the California Court of Appeal affirmed. 107 S. Ct. at 2384. In contrast, in *Yolo County* the California Court of Appeal read the trial court opinion as a demurrer (Cal. Code Civ. Proc. § 430.10(3)) which challenges the sufficiency of the pleadings, therefore, not admitting the conclusions of the complaint. 106 S. Ct. at 2563.

[73]*First Church*, 107 S. Ct. at 2384-85. *See supra* note 69.

[74]"[W]e believe . . . [the Supreme Court of California] has truncated the [Takings Clause] rule by disallowing *damages* that occurred prior to the ultimate invalidation of the challenged regulation." *Id.* at 2387 (emphasis added).

[75]*Id. See supra* note 53 and accompanying text.

[76]*Id.* at 2388.

regarded two earlier cases which denied compensation for the regulatory "taking" of property prior to invalidation as "cases merely stand[ing] for the unexceptional proposition that the valuation of property which has been taken must be calculated as of the time of the taking. . . ."[77] The Court's statement of the holding was, "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."[78]

The Court reversed the California Court of Appeal and remanded the case for that court to decide on the merits if the church had been denied all use[79] and, if so, whether the denial might be non-compensable on the theory of the state's authority to enact safety regulations,[80] directing attention to the police power regulatory cases, *Goldblatt v. Town of Hampstead*,[81] *Hadacheck v. Sebastian*,[82] and *Mugler v. Kansas*.[83]

3. Justice Steven's Dissent.—Justice Stevens wrote the dissenting opinion, in which he was joined in part by Justices Blackmun and O'Connor.[84] The dissent concluded that the majority had acted imprudently by deciding the remedy issue when a decision could have been avoided because no lower court had decided there was a taking. Justice Stevens stressed that this appellant was not "entitled to compensation as a result of the flood protection regulation that the County enacted."[85] Citing *Keystone Bituminous Coal Association v. DeBenedictis*[86] and *Mugler v. Kansas*,[87] he argued that government may protect the health and safety of the community.[88] Stevens wrote, "As far as the United States

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[77]*Id.* The cases were Danforth v. United States, 308 U.S. 271 (1939), and Agins v. Tiburon, 447 U.S. 255 (1980).

[78]*First Church*, 107 S. Ct. at 2389.

[79]*Id.*

[80]*Id.* at 2384-85.

[81]369 U.S. 590 (1962). *See supra* notes 45, 47, & *infra* note 99.

[82]239 U.S. 394 (1915). *See infra* note 109.

[83]123 U.S. 623 (1887). *See supra* note 36 & *infra* note 109.

[84]Justices Blackmun and O'Connor did not join in Justice Steven's discussion of whether a temporary taking that goes too far always constitutes a constitutional taking even if in effect only for a limited period of time, *First Church*, 107 S. Ct. at 2393-96, or in his discussion of preference for the Due Process Clause in protecting property owners from unfair and dilatory government decisionmaking. *Id.* at 2398-99. For discussion of the Due Process Clause in relation to land-use regulations, *see* Note, *Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative To Takings Analysis*, 57 Wash. L. Rev. 715 (1982).

[85]*First Church*, 107 S. Ct. at 2391.

[86]107 S. Ct. 1232 (1987). *See infra* note 115 and accompanying text.

[87]123 U.S. 623 (1887). *See supra* note 36 and text accompanying note 37, & *infra* note 109 and text accompanying notes 108-17.

[88]*First Church*, 107 S. Ct. at 2391.

Constitution is concerned, the claim that the ordinance was a taking of [the church's property] should be summarily rejected on its merits."[89]

The dissent regarded as a distortion of precedent the majority's conclusion that all ordinances which would be a "taking" if in effect permanently, necessarily were a "taking" if in effect temporarily. The question, according to the dissent, is whether a "temporary" regulation was so severe that a taking occurred during the period before the regulation was invalidated; only extreme regulations are "takings." Only where a "major portion of the property's value" is taken away is there an actual taking.[90]

C. A New Remedy

Compensation for a "temporary regulatory taking" is a new remedy. "Temporary regulatory taking" means the taking that occurs in the interim period after enactment or the effective date of the regulation, but before the regulation is held unconstitutional, which holding forces the government to choose either to amend or rescind the regulation, or to exercise eminent domain powers. However, a very similar remedy was available prior to the *First Church* decision using either the Takings Clause[91] or substantive due process analysis,[92] and Section 1983.[93] If a regulation is declared invalid on substantive due process grounds, the landowner can then file a Section 1983 suit for damages for the interim period during which the regulation was in effect. The primary difference between the two remedies is that the new remedy is based on the United States Constitution, while the Section 1983 claims are statutory. One problem with the new remedy is that a regulation cannot be invalidated without requiring a damage award, a separation which might be appropriate in some cases. The goal of the landowner may not be to win damages, but to get the unwanted regulation rescinded.

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[89]*Id.* at 2393.

[90]*Id.* at 2393-96.

[91]Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981).

> Since the just compensation clause applies to the states through the due process clause of the fourteenth amendment . . . an action for damages will lie under § 1983 in favor of any person whose property is taken for public use without just compensation by a municipality through a zoning regulation that denies the owner any economically viable use thereof.

Id. at 1200. *See generally* Madsen & DeMeo, *Private Property Rights and Local Government Land Use Control: 42 U.S.C. § 1983 as a Remedy Against Unconstitutional Deprivations of Property*, 1 J. LAND USE & ENTL. L. 427 (1985).

[92]Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1985).

[93]42 U.S.C. § 1983 (1982). *See generally* D. HAGMAN & J. JUERGENSMEYER, *supra* note 27, at 311-17 & 845-73.

1. *"Temporary" Means Interim.*—The word "temporary" in temporary regulatory taking is an inaccuracy of speech. An additional confusion regarding the word "temporary" is the fact that in *First Church*, the "temporary" regulation was replaced with a permanent regulation. More specifically, the challenged regulation was a temporary emergency ordinance enacted on January 11, 1979, to be in effect while a permanent ordinance was being drafted, hearings were being held, and the ordinance was being adopted. In spite of this fact, the church's claims were based on the temporary ordinance and were not amended to reflect the permanent ordinance adopted on August 11, 1981.[94] In the opinion, Chief Justice Rehnquist states that a "temporary" regulatory taking is one later invalidated by a court.[95] A distinction in duration is used as if it were a difference in kind of taking, when really the Court is promulgating a new remedy for a different time period—the period before a court invalidates a regulation. The correct word is interim because the holding in *First Church* was that a regulation, whether in effect for a short or a long duration (one use of "temporary"), whether replaced by another regulation or not (another use of "temporary"), *if* invalidated by a court leads in every case to the government paying for the interim "use" of the property.[96]

2. *"All Use" as a Standard or Test.*—The Court utilized the phrase "all use" in the holding of *First Church*. "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."[97] Undoubtedly, a challenger will find it difficult to prove that a regulation took all use. Possibly, the Court could have meant that unless *all use* has been denied, no compensation is required.[98] Although such an argument can be made, a more likely reason for choosing the phrase is that it was taken from the complaint to avoid

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[94]Brief of Appellee at 10-13, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378 (1987) (No. 85-1199).

[95]*First Church*, 107 S. Ct. at 2383.

[96]*Id.* at 2389.

[97]*Id.* (emphasis added).

[98]All zoning will permit the owner some use, even if the use is only agricultural, open space, or wetland. The zoning may restrict buildings but still provide for uses which have some economic value, e.g., archery ranges, arboretums, athletic fields, beaches, boarding horses, boat rental, campgrounds, fishing and casting ponds, greenhouses, golf courses, golf driving ranges, parks, pastures, playgrounds, polo fields, riding and hiking trails, riding academies, stables, rodeos, ski lifts, tows, and runs, swimming pools, tennis courts, volleyball courts, and so forth. *See generally* P. Rohan, 6 Zoning and Land Use Controls (1987). In addition, restrictions may effect only part and not all of a property. *See generally* R. Anderson, *supra* note 69, at § 17.01-17.79.

stating what the standard for finding a taking is because the Court has said it has no clear standard or test.[99]

Various statements of a test for finding a taking have appeared in the cases. Justice Holmes in *Mahon* used "diminution in value."[100] Since then, there have been many formulations; the one closest to "all use" is found in *United States v. General Motors Corp.*,[101] where the Court noted, "[when the] effects [of government's actions] are so complete as to deprive the owner of *all* or most of his interest in the subject matter, [it amounts] to a taking."[102] A formulation of a test more favorable to a challenger is interference with the investor's investment-backed expectations.[103] In *MacDonald, Sommer, & Frates v. Yolo County*,[104] the Supreme Court wrote, "Our cases have accordingly 'examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment-backed expectation, and the character of the governmental action—that have particular sig-

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[99]Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

> The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. . . . [T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by government . . . . Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."

Id. at 123-24. *Accord* MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986). "To this day we have no 'set formula to determine where regulation ends and taking begins.' " (quoting Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962)). *Id.* at 2566.

[100]Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation 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 in all cases there must be an exercise of eminent domain and compensation to sustain the act.

Id. at 413.

[101]323 U.S. 373 (1945).

[102]*Id.* at 378.

[103]*See* Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 175 (1985); *Penn Central*, 438 U.S. at 127. *But see* Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 J. of Urb. & Contemp. L. 3 (1987) (the author argues the Court should abandon the investment-backed expectations taking factor).

[104]106 S. Ct. 2561 (1986).

nificance.' "[105] More recently in *Agins v. City of Tiburon*,[106] the Supreme Court stated that "[t]he application of a general zoning law to particular property effects a taking if [(1)] the ordinance does not substantially advance legitimate state interests, or [(2)] denies an owner economically viable use of his land."[107] Where the phrase "all use" came from and what the Court meant is certainly not clear.

III. What Remains Unresolved

The *First Church* decision left important unresolved issues that will be argued about in the future. Most importantly, the Court has yet to resolve what a taking is. Two lines of cases, the *Mugler* line and the *Mahon* line, lead to different formulations of the answer. The older *Mugler v. Kansas*[108] line established that proper use of government's police power in passing appropriate regulations is not a taking:

> 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 an appropriation of property for the public benefit. . . . The exercise of the police power by . . . prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law.[109]

The more recent *Pennsylvania Coal Co. v. Mahon*[110] line argues that a regulation that goes "too far" can be a taking.[111] Although the two

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[105] *Id.* at 2566 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)).

[106] 447 U.S. 255 (1980).

[107] *Id.* at 260 (citations omitted).

[108] 123 U.S. 623 (1887). *See supra* note 36. The attempt to distinguish "regulation" from "taking" has been said to be the "most haunting jurisprudential problem in the field of contemporary land-use law— . . . one that may be the lawyers' equivalent of the physicists' hunt for the quark." C. Haar, Land Use Planning 766 (1977).

[109] 123 U.S. at 668-69. Mugler, who owned a brewery, was convicted of making beer without a license during prohibition. He claimed the state's statute violated the fifth and fourteenth amendments and that the regulation of his use was a taking of property without just compensation. Justice Harlan found a valid exercise of regulatory authority to protect the public health, safety and morals.

Other cases in this line are Hadacheck v. Sebastian, 239 U.S. 394 (1915) (a ban on a brickyard within a residential area which had grown up around it; the brickyard had become a health hazard because it produced fumes, gases, smoke and dust) and Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962). *See supra* note 45.

[110] 260 U.S. 393 (1922).

[111] *Id.* at 415. *See supra* notes 39-40 and accompanying text.

appear to conflict, *Mahon* did not overturn *Mugler*. In writing about the just compensation issue, commentators have argued that one of these lines of cases was controlling and the other did not apply. Those who argued for compensation as a remedy "heard" *Mahon* and Justice Brennan's dissent in *San Diego Gas*,[112] and found the *Mugler* line not controlling.[113] Those who argued for invalidation only and opposed compensation as a remedy "heard" *Mugler* and found Justice Holmes' statement in *Mahon* "metaphoric."[114]

The fact is, the two are not mutually exclusive; the Court is still following both lines as evidenced by two decisions handed down in 1987—*First Church*, which descends from the *Mahon* line, and *Keystone Bituminous*,[115] which descends from the *Mugler* line. In *Keystone Bituminous*, the Court held that a Pennsylvania regulation of coal mining was a valid exercise of the state's police power to protect public health and welfare. "Many cases before and since *Pennsylvania Coal* have recognized that the nature of the State's action is critical in takings analysis."[116] The Court explicitly rejected the assertion that *Pennsylvania Coal* overruled *Mugler* and the *Mugler* line of cases which focus on the state's legitimate interest in regulating.[117]

Another unresolved issue is whether alternatives to compensation may be substituted for compensation. Alternatives in lieu of compensation could work to a property owner's advantage without as great a cost to

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[112]San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981). *See supra* text accompanying notes 59-62.

[113]*See* Bauman, *supra* note 30.

[114]*See White River Junction Manifesto*, *supra* note 40, at 212 n.62 (quoting Justice Breitel in Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 594, 350 N.E.2d 381, 385, 385 N.Y.2d 5, 8 (1976), who said the metaphor Holmes used should not be confused with the reality which was that the regulatory measure was an invalid exercise of police power under the due process clause).

[115]Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987) (5-4 decision). At first reading, the facts of *Keystone Bituminous* seem very similar to the facts of *Pennsylvania Coal Co. v. Mahon*, but the majority opinion distinguishes the cases on two bases:

> First, unlike the Kohler Act, the character of the governmental action involved here leans heavily against finding a taking; the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare. Second, there is no record in this case to support a finding, similar to the one the Court made in *Pennsylvania Coal*, that the Subsidence Act makes it impossible for petitioners to profitably engage in their business, or that there has been undue interference with their investment-backed expectations.

Id. at 1242.

Chief Justice Rehnquist, who wrote the dissenting opinion in *Keystone Bituminous*, is unpersuaded that either reason makes this case distinguishable. *Id.* at 1253.

[116]*Id.* at 1244.

[117]*Id.*

government. An example, transferable development rights, was used in *Penn Central Transportation Co. v. New York City*.[118] It is not clear what the Court meant in *First Church*, but it appears to have ruled out alternatives when it noted, "[only compensation] meet[s] the demands of the Just Compensation Clause."[119]

An additional issue concerns the possibility of government enacting moratoria without liability for compensation. "Pauses for planning and deciding" moratoria have been considered valid exercises of police power if in effect only for a limited time. However, in one sense, a moratorium would deprive an owner of *all use* for a defined period, and therefore, after the *First Church* decision, arguably would be impossible without payment of compensation.[120] Conversely, an argument can be made that courts are not likely to invalidate such moratoria, and, unless a regulation is ultimately invalidated by a court, compensation is not required.

The Court also failed to delineate clearly when a "taking" begins in a temporary regulatory taking. The analysis of when a taking begins benefits from dividing time into three periods—before the regulation is enacted or becomes effective, from that time until the regulation is invalidated by the court, and after invalidation. The Court had said that normal delays in the first period are acceptable.[121] In the second period, just compensation is the remedy.[122] The Court in *First Church* says a taking begins when a regulation is adopted or becomes effective, but, if those dates are not the same, the Court does not say which date is the time when a taking begins.[123] A more appropriate time in some cases may be when the landowner applies unsuccessfully for a permit to begin development or when the decisionmaking body refuses a landowner's petition.

In developing the new temporary regulatory taking remedy, two issues appear to have been resolved, but counsel seeking innovative arguments may still want to attack them. One issue that appears to be resolved is the proper measure of the amount of compensation. In past debate, one suggestion has been the difference between the market value

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[118]438 U.S. 104 (1978), *reh'g denied*, 439 U.S. 883 (1978).

[119]First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 2388 (1987). However, at this point the opinion was arguing that invalidation was not sufficient; therefore, perhaps the Court would allow alternatives to compensation.

[120]*See White River Junction Manifesto*, *supra* note 40, at 218.

[121]*First Church*, 107 S. Ct. at 2389.

[122]*Id.*

[123]*Id.* at 2388. In *First Church*, the interim ordinance was *adopted* by the County of Los Angeles in January, 1979, and became *effective* immediately. Thus, the dates were the same and there was no need for the Court to explain which it meant.

as regulated and the market value if unregulated.[124] Another suggestion has been "fair compensation."[125] The Court decided to apply a rental or lease value, the "value of use of land during the period."[126] Another issue that appears to be resolved is whether government receives any interest in the challenger's land if a temporary regulatory taking is found.[127] In the dissenting opinion in *San Diego Gas*, Justice Brennan said the payment is not for ownership but for the temporary use.[128] The Supreme Court in *First Church* held "that invalidation . . . without payment of fair value for the *use* of the property . . . would be a constitutionally insufficient remedy."[129] Government apparently receives no interest because nothing really is "taken"; the property is only used.

Prior to *First Church*, an issue thought to be resolved was that a challenger must have a final decision and exhaust all state or local procedure by which it might obtain just compensation. Although the Court in *First Church* chose to formulate a new remedy by assuming without deciding that the complaint alleged a taking of all use, rather than requiring the church to have a final decision and exhaust state and local procedure for compensation, the rule should be settled based on precedent. In *MacDonald, Sommer & Frates v. Yolo County*,[130] the Court held landowners must obtain a final decision regarding an application of a zoning ordinance to their property before it is possible to tell whether the land retains any reasonable beneficial use.[131] In addition, the majority in *First Church* declared that a claim is not ripe for review until the litigant seeking compensation has sought compensation through

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[124]*See generally* Note, *Affirmative Relief for Temporary Regulatory Takings*, 48 U. Pitt. L. Rev. 1215, 1221-27 (1987) (the author argues that affirmative relief, the power of the court to order government action, coupled with a damages remedy is superior to either invalidation or compensation alone); Ragsdale, *supra* note 26, at 231.

[125]*See* Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 Col. L. Rev. 1021, 1052 (1975). "Fair" compensation, according to Professor Costonis, is a middle level of compensation based on a reasonable beneficial use standard rather than a highest and best use standard.

[126]*First Church*, 107 S. Ct. at 2388.

[127]If there is a name for it, the interest taken by a land-use regulation would be a negative easement in gross. *See* Humback, *A Unifying Theory for the Just-Compensation Cases: Taking, Regulation and Public Use*, 34 Rut. L. Rev. 243, 250 (1982).

[128]San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 658 (1981). Justice Brennan identifies the interest taken: "[W]here the 'taking' already effected is temporary and reversible and the government wants to halt the 'taking' . . . 'abandonment [of the regulation] . . . merely results in an alteration of the property interest taken—from full ownership to one of temporary use and occupation. . . .' " *Id.* (quoting United States v. Dow, 357 U.S. 17, 26 (1958)).

[129]*First Church*, 107 S. Ct. at 2389 (emphasis added).

[130]477 U.S. 340 (1986).

[131]*Id.* at 350.

the procedures the state has provided.[132] Nevertheless, the majority ignored this requirement in reaching the decision because of its perception of the procedural posture of the case. However, the rule based on the Supreme Court's own declarations and holding should be that a challenger must have a final decision and exhaust state or local procedure for compensation before a challenge is ripe for adjudication.

IV. THE PRACTICAL CONSEQUENCES OF *FIRST CHURCH* TO LOCAL PLANNERS AND DECISIONMAKERS[133]

Government at all levels is concerned about the effect the *First Church* decision will have. All levels of government filed amici briefs[134] before the Supreme Court. The legal daily and monthly press[135] prominently featured articles about the decision. Justice Stevens, in his dissent, suggested that although the Court's decision would spawn a great deal of unproductive litigation, the duty to defend these challenges would have significant adverse impact on the land-use regulatory process.[136] Justice Stevens concluded his dissenting opinion, warning:

> The policy implications of today's decision are obvious and, I fear, far reaching. Cautious local officials and land-use planners

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[132]*First Church*, 107 S. Ct. 2378 at 2384 n.6 (quoting Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)). *Cf.* Paratt v. Taylor, 451 U.S. 527, 544 (1981) (Section 1983 requires exhaustion of state common law remedies). *See* Note, *Ripeness for the Taking Clause: Finality and Exhaustion in* Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 13 ECOLOGY L. Q. 625, 639-42 (1986).

[133]The author uses the word "local" to include cities, towns, municipal corporations, counties, water, fire, and other special-purpose units called "special districts."

[134]The brief for the United States was filed by the Solicitor General and an Assistant Attorney General. A brief was filed for the states of California, Alaska, Arkansas, Florida, Hawaii, Illinois, Maine, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New York, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, Wyoming, and the Commonwealth of Puerto Rico. The county level was represented by the National Association of Counties, joined by a diverse group of city, city management, planning, legislative, gubernatorial and mayoral national associations. A brief was filed by a number of California cities. In addition to government, a brief was filed by a group of environmental, conservation, park, historic preservation, and natural resource national organizations in support of the County of Los Angeles. (Five amici curiae briefs were filed in support of the church.)

[135]*See, e.g.*, Callies, *Takings Clause—Take Three*, 73 ABA J., 48 (1987); Guskind, *Takings Stir Up a Storm*, PLANNING, Sept. 1987, at 5; Sallet, *Court Expands "Takings" Clause*, Legal Times, Sept. 14, 1987, at 25; Merrill, *Takings Clause Re-Emerges, But No Clear Pattern Seen*, Nat'l Law Journal, Aug. 17, 1987 at 5-8; *Supreme Court Holds Compensation Is Due*, ZONING NEWS, June 1987, at 1.

[136]First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 2389-80 (1987).

> may avoid taking any action that might later be challenged and thus give rise to a damage action. Much important regulation will never be enacted,[137] even perhaps in the health and safety area. Were this result mandated by the Constitution, these serious implications would have to be ignored. But the loose cannon the Court fires today is not only unattached to the Constitution, but it also takes aim at a long line of precedents in the regulatory takings area. It would be the better part of valor simply to decide the case at hand instead of igniting the kind of litigation explosion that this decision will undoubtedly touch off.[138]

Chief Justice Rehnquist was aware the decision would impede enactment of land-use regulations:

> We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the Just Compensation Clause of the Fifth Amendment is one of them.[139]

Both sides agree the decision has serious implications for the land-use regulatory process.

A. Land-Use Decisions Are Made Primarily at the Local Level

Almost all land-use decisions are made at the local level.[140] The decisions are primarily case by case dispute resolution influenced by notions of economic efficiency and legal fairness. Most people in local communities want local government to promote growth and development

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[137]There is real concern that planners will chose not to act. A survey of 300 members of the National Association of County Planning Directors showed that forty-eight percent would adopt zoning regulations modeled on the provision upheld in Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), which closed a sand and gravel mine. However, if damages were to be awarded as well as invalidation of the regulation, only eight percent said they would, while eighty-three percent would chose not to act. Sallet, *The Problem of Municipal Liability for Zoning and Land-Use Regulation*, 31 Cath. U. L. Rev. 465, 478 (1982). The cost of one suit, if it would have been lost, was $36 million. *Id.* at 478 n.91.

[138]*First Church*, 107 S. Ct. at 2399-2400 (footnote omitted).

[139]*Id.* at 2389.

[140]The state of Hawaii is an exception; a state land-use commission makes the land-use decisions. Haw. Rev. Stat. § 205-1 to 37 (1985). In addition, a few states have set up for all or for part of the state regional land-use commissions which review decisions of local government for regional impacts. W. Fischel, *supra* note 56, at 26.

which will generate tax revenue, but to control and guide development, and to mitigate harmful impacts. Land has value because land use has value, and therefore, it follows that restrictions on use reduce the economic value of the land.

State courts rather than federal courts provide most of the judicial review of land-use decisions. *All* the zoning cases in the 40 years after *Nectow v. City of Cambridge*[141] were decided at the state level.[142] Although all state courts rely on the same United States Supreme Court decisions, the states have interpreted those decisions differently. For example, one commentator has characterized the California courts as being "exceedingly deferential to land-use controls adopted by local government."[143]

The process of land-use decisionmaking usually involves staff recommendations, appointed or elected legislative or quasi-judicial boards or commissions holding public hearings, two sides (petitioners and remonstrators), often represented by attorneys, presenting their case, and ultimately voting requiring a majority or supermajority to decide.[144] Land-use planners work with the community to design a comprehensive land-use plan which is a map document designed to distribute classes of land uses, e.g., residential, commercial, industrial.[145] Zoning ordinances are laws prescribing permitted uses and standards within each district for building height, bulk, setbacks, density, and so forth.[146] Each parcel of property is, therefore, in a zoning class with restrictions on the use and

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[141]277 U.S. 183 (1928).

[142]*See* R. Ellickson & A. Tarlock, Land-Use Controls 67 (1981).

[143]*See id.*, at 75.

[144]The author served for nearly five years on the Metropolitan Development Commission for the City of Indianapolis. Ind. Code § 36-7-4-202 (1988). State law generally grants specific authority to local governmental units to perform certain functions. The Metropolitan Development Commission consists of nine appointed and unpaid commission members drawn from the general population. The Commission approves planning and zoning ordinances for the city which are then sent to the City-County Council for adoption, and then to the Mayor for his signature. Among other duties, it also hears requests for rezonings. Indianapolis, Ind. Code § 2-229 (1983). The task of the Commission is formidable. Trying to follow as much as possible plans that have previously been adopted, trying to arrive at equitable decisions, realizing a decision may mean a lot of money to someone, and trying to foresee what will be the best solution overall for the community in the long run is difficult. In addition, who *wants* to decide where the trash may go (landfill siting), and where the smut may go (Adult Entertainment Ordinance)?

For an excellent discussion of the usual parties in interest in land-use disputes (developers, neighbors, and third party non-beneficiaries), the relative strengths (the cards are often stacked against neighbors, heavily stacked against third party non-beneficiaries), and the influence on public decisions of the need for local tax revenue (there is an inherent bias in the system in favor of proposals that generate tax revenue), see *White River Junction Manifesto*, *supra* note 40, at 197-208. For comic relief, *see id.*, at 194 n.10.

[145]*See* R. Anderson, *supra* note 69, at §§ 9.02, 23.11.

[146]*See id.* § 9.12.

with prescribed standards for development. A landowner who wants a change requests a rezoning (e.g., residential to commercial), a variance (e.g., height greater than the standard), conditional use, administrative approval, special permit or other means to change or vary the zoning restrictions on the property.[147] Large developments may use a provision called a Planned Unit Development.[148] Of course, land-use regulation includes more than zoning; it also includes environmental, flood, signage, safe building, and historic preservations controls. The list is not exclusive, but rather shows the magnitude of local land-use regulatory decisions that are affected by the *First Church* decision.

Local land-use decisionmakers are criticized for responding irrationally and unfairly; decisions are often made on the basis of who howls the loudest. But the American public prefers land-use decisions to be made locally where they have the most influence.[149] Local decisionmaking bodies are often mediators of competing interests, deciding each case on it own facts. The process is not perfect but it does allow people to be heard.

B. *Local Governments Are in a Vulnerable Position*

The impact of the new liability for damages is heightened because local governments are already in a vulnerable position. As the following four sub-sections elaborate, local governments are vulnerable because they may not have the sovereign immunity that the federal and state governments enjoy, because they are subject to substantial costs under both Section 1983 and antitrust actions, and because they are "caught in the middle," between litigants, and between being required to regulate and being liable if they do.

1. Tort Liability.—Historically, sovereign immunity applied to state and local governments as a complete defense against tort claims.[150] Between 1957 and 1979, at least 28 states judicially abolished sovereign immunity and at least six states legislatively abolished or severely limited it.[151] Therefore, in some states a litigant can now raise tort theories (assumption of duty, common law negligence, interference with economic and business relationships, and statutory negligence) against local governments.[152]

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[147]*See id.* §§ 4.27, 19.06, 20.02, 21.01, 34.22.

[148]*See id.* § 11.12. A Planned Unit Development permits a mix of residential, commercial, and sometimes industrial uses within a large tract of land under one ownership.

[149]*See* Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 Calif. L. Rev. 837, 911 (1983).

[150]*See* R. Ellickson & A. Tarlock, *supra* note 142, at § 26.01, 26.02.

[151]*See id.*

[152]*See* 18 E. McQuillin, The Law of Municipal Corporations § § 53.02b, 53.16 (3d ed. 1984).

2. *Section 1983 Liability.*[153]—Originally enacted to protect the civil rights of newly freed slaves, Section 1983 has practically become a federal tort law.[154] In 1978, the Supreme Court held in *Monell v. New York City Department of Social Services*[155] that municipalities were "persons" and, therefore, subject to suit under Section 1983 for land-use regulations. "Congress *did* intend municipalities and other local government units to be included among those persons to whom section 1983 applies."[156] In addition to actions against local government, government officials may be sued in their official or individual capacity.[157] Although state and local legislators and judges have absolute immunity for acts within the scope of official duties, local government officials may not be immune for enforcement actions which can be characterized as administrative rather than legislative[158] and for actions with malicious intent.[159] Even if damage awards are minimal, local government can be held liable for attorney fees which can be substantial.[160] The availability of attorney fees has dramatically increased the amount of this kind of litigation.[161]

3. *Antitrust Liability.*—In 1978, the Supreme Court decided in *City of Lafayette v. Louisiana Power & Light Co.*[162] that a city's regulatory activity, unlike a state's, is not exempt from antitrust liability. Cities

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[153]42 U.S.C. § 1983 (1982) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

See generally Madsen & DeMeo, *supra* note 91.

[154]*See* D. Hagman & J. Jeurgensmeyer, *supra* note 27, at 845.

[155]436 U.S. 658 (1978).

[156]*Id.* at 690 (emphasis in original).

[157]Owen v. City of Independence, 445 U.S. 622 (1980). Although individual government officials may be sued, their actions do not cause vicarious liability of the government unit on respondeat superior theory unless they act under an official government custom or policy. The dissent in *First Church* expressed apprehensiveness. "I am afraid that any decision by a competent regulatory body may establish a 'policy or custom' and give rise to liability after today." First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 2400 n.17 (1987) (Stevens, J., dissenting).

[158]Scheuer v. Rhodes, 416 U.S. 232 (1974).

[159]Procunier v. Navarette, 434 U.S. 555, 566 (1978).

[160]Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (1982)).

[161]*See* M. Gelfand, Federal Constitutional Law and American Local Government, xv (1984).

[162]435 U.S. 389 (1978). *See generally* Hovenkamp & Mackerron, *Municipal Regulation and Federal Antitrust Policy*, 32 U.C.L.A. L. Rev. 719 (1985).

became targets for antitrust suits, many involving land-use regulation.[163] Antitrust law is designed to foster action in private markets; land-use regulatory controls may interfere with the free operation of supply and demand. Treble damage judgments were awarded against local government[164] until Congress passed the Local Government Antitrust Act of 1984.[165] Although local governments and their officials are immune from damage claims, they may still be sued for antitrust violations with injunctive relief as the remedy. Compliance with the injunction can be very costly to carry out.[166]

4. *Caught in the Middle.*—Finally, local government is in a vulnerable position because it is caught in the middle, subject to suit for land-use decisions by both developers (petitioners) and neighbors or "public interest" lawyers in the land-use field (remonstrators).[167] Most of the suits are filed by developers. Fewer suits are filed by public interest lawyers because public interest law is underfunded but the threat always is present.[168] However, public interest lawyers usually do not pursue individual's claims. Suits filed by "neighbors" are rare because neighbors generally are not organized and lack funds to litigate.[169]

Additionally, a new way that local government is caught in the middle is that it may be required to regulate by federal or state law, but after *First Church* it is also subject to damages if the regulation goes "too far."[170] In some instances, environmental, flood control, safe building, and similar ordinances are required by federal or state laws.[171]

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[163]*See* Mason City Center Assocs. v. City of Mason City, 468 F. Supp. 737 (N.D. Iowa 1979), *aff'd in part, rev'd in part,* 671 F.2d 1146 (8th Cir. 1982); Cedar-Riverside Assocs., Inc. v. United States, 459 F. Supp. 1290 (D. Minn. 1978), *aff'd on other grounds sub nom.* Cedar-Riverside Assocs. v. City of Minneapolis, 606 F.2d 254 (8th Cir. 1979).

[164]Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982).

[165]Pub. L. 98-544, 98 Stat. 2750 (1984) (codified at 15 U.S.C. §§ 35, 36 (Supp. IV 1985)). Section 3(a) says, "No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act . . . from any local government, or official or employee thereof acting in an official capacity." 15 U.S.C. § 35(a) (Supp. IV 1985).

[166]*See* D. HAGMAN & J. JEURGENSMEYER, *supra* note 27, at 907-09.

[167]*See generally* Hall, *Defending the Urban Environment: A Practitioner's View*, 55 U.M.K.C. L. REV. 251 (1987).

[168]Court-awarded attorney fees are available in some states and for cases brought under the Clean Air Act, the Clean Water Act, and other environmental legislation passed after 1970. *Id.* at 262. *See generally* M. DERFNER & A. WOLF, COURT AWARDED ATTORNEYS FEES (1985).

[169]*See White River Junction Manifesto*, *supra* note 40, at 197-208.

[170]The Advisory Commission on Intergovernmental Relations has identified more than 35 major federal regulatory statutes aimed at or implemented by state and local governments. Some of them have an impact on zoning. Beam, *From Law to Rule: Exploring the Maze of Intergovernmental Regulation*, ACIR, Spring 1983, Vol. 9, No. 2, at 7-22.

[171]Examples of federal laws which mandate local government to pass local ordinances

Even when not required, federal and state law may provide benefits to local government and local beneficiaries for passage by government of such regulation. An example is flood protection regulations which make landowners eligible for federal flood insurance.[172]

V. Conclusion

Despite the dour predictions of Justice Stevens, the gravity of the *First Church* decision to the governmental amici, and the banner headlines of the press, local government need not be overly concerned that the ruling will bankrupt local government and, as a result, cease regulating land use. Why? *First Church* is an important but narrow decision. It merely said compensation is the remedy for temporary regulatory takings.[173] However, the decision in *Keystone Bituminous*[174] shows that state and local governments may regulate as long as the state's interest in the regulation is a valid exercise of the police power to protect public health and safety. Such regulations are not likely to be held to be a "taking"; therefore, the remedy will not be imposed by the courts. Moreover, a heavy burden is on a landowner who claims that a land-use regulation works an unconstitutional taking of property because the landowner has to prove a regulatory taking.[175] Finally, the test or standard

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include the National Environmental Policy Act of 1969, and the Clean Air Act Amendments of 1970. An example of a state law is the California Coastal Act which requires local government within the coastal zone to prepare and submit a local coastal plan including land use plans, zoning ordinances, and zoning district maps. Cal. Pub. Res. Code § 30500(a) (1986).

[172]Congress enacted a federal flood control policy designed to make those who develop flood hazard areas responsible for the results of their own actions. To implement this policy, the federal flood insurance program is intended to be self-financing with those who use flood prone land paying insurance premiums to cover the cost of disaster relief. 42 U.S.C. §§ 4001, 4002 (1982). For landowners to be eligible for the insurance, local governments must adopt flood control ordinances. Local government is required to designate property eligible for flood insurance by preparing maps defining flood prone areas. Local governments also are required to guide development with building standards and to control use with a permit system for all new construction within the designated areas. 44 C.F.R. § 60.3(b) (1987).

[173]*See supra* text accompanying note 78.

[174]Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987). *See supra* note 115 and text accompanying notes 115-17.

[175]For example, the lower court on remand could yet decide the regulation substantially furthered a legitimate police power purpose. Land-use regulations do not affect takings if they substantially advance legitimate state interests and do not deny landowners economically viable use of their land. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3146 (1987) (5-4 decision). Furthermore, the Court in *Nollan* said government is permitted to do more than simply regulate; it may impose conditions for the issuance of a land-use permit as long as a rational nexus exists between the condition and the purpose

for finding a taking is unclear, leaving government attorneys free to argue about what a challenger must show before compensation is due.[176]

As long as local governments proceed cautiously, enacting only those regulations that meet legitimate health, safety, and welfare needs, and do so fairly and without unnecessarily burdening landowners or taking away all use, they have little chance of having to pay compensation. Private property rights should be protected, but the public needs regulation of land use for health, safety, and general welfare reasons. Courts must balance those interests. If government oversteps legitimate need or denies economically viable use, acts unfairly in how it regulates, or unnecessarily burdens landowners when a less burdensome way to accomplish the legitimate goal is possible, then a sanction is necessary. The sanction will deter "inefficient" decisions and encourage "efficient" decisions.

The United States Supreme Court in *First Church* said the Just Compensation Clause of the fifth amendment establishes such a sanction, a right of a landowner[177] to be compensated as a remedy for temporary regulatory takings. If such an interim "taking" is found, a right to compensation for the "use" of the land is found in the clause. The Supreme Court continues to try to find an appropriate balance between property rights of the individual and legitimate health and safety needs of the public.

Carol Kirk

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of the building restriction. In *Nollan*, the Court held the essential nexus did not exist. *Id.* at 3148. *See generally* Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 Hastings L. J. 335, 352-56 (1988); Falik & Shimko, *The "Takings" Nexus—The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 Hastings L. J. 359, 376-96 (1988).

[176] *See supra* text accompanying notes 97-107.

[177] Landowner, not property owner, is correct because other kinds of property besides land (in particular new property, such as entitlements and benefits) are not included. More specifically, Chief Justice Rehnquist treats "new property" differently than traditional property rights. Note, *Justice Rehnquist's Theory of Property*, 93 Yale L. J. 541 (1984).