

The Nasty, Brutish, and Short Life of *Agins v. City of Tiburon*

Gideon Kanner and Michael M. Berger*

Oh, the grand old Duke of York,
He had ten thousand men;
He marched them up to the top of the hill,
And he marched them down again.

And when they were up, they were up,
And when they were down, they were down.
And when they were only half-way up,
They were neither up nor down.¹

IF THE DUKE OF YORK'S MEN THOUGHT they were being made to perform useless, repetitive tasks to no worthwhile end, they were in about the same condition as the American lawyers who were practicing takings law in the 1970s and 1980s. During that period of time, hordes of lawyers representing the competing sides in regulatory taking cases were sent, figuratively, charging up the hill to the Supreme Court (which, to make the analogy complete, sits on top of Capitol Hill in Washington, D.C.) in an effort to do intellectual battle over the issue of remedies in regulatory taking cases. That issue was whether such takings call for constitutionally mandated "just compensation" as specified in the Fifth Amendment, or only for judicial invalidation of the constitutionally overreaching regulation.² But instead of answering this straightforward question, which by then had been repeatedly

*Gideon Kanner is Professor Emeritus at the Loyola of Los Angeles Law School. He briefed and argued *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (*Agins II*) in the U.S. Supreme Court, which had affirmed *Agins v. City of Tiburon*, 598 P.2d 25 (Cal. 1979) (*Agins I*) on grounds other than those relied on by the California Supreme Court. Michael M. Berger is a Partner at Manatt, Phelps & Phillips and Adjunct Professor of Law, Washington University in St. Louis. He briefed and argued *First English Evangelical Lutheran Church of Glendale, v. County of Los Angeles*, 482 U.S. 304 (1987), which expressly overruled the California Supreme Court's decision in *Agins I*.

Each of the authors has spent a half-century as an appellate lawyer mostly representing property owners in direct and inverse condemnation cases and related land use litigation at all levels and in courts throughout the country.

1. MOTHER GOOSE (1913).

2. For an exhaustive discussion of both theories, see, for example, Robert I. McMurry, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 UCLA L. REV. 711 (1982).

decided by the U.S. Supreme Court (of which, more presently) but nevertheless was then dividing courts, academics, and advocates throughout the country, the court became bogged down in the question of when—if ever—such cases become ripe for litigation. In four successive cases, the Supreme Court granted certiorari or noted probable jurisdiction, ostensibly to decide the remedies issue, but instead found either a lack of ripeness or a lack of finality, rendering it unable to reach the merits of the issue of remedies. Or so it said.³

Finally, in 1987, the Supreme Court did reach the issue (in a case that was no more ripe than its predecessors).⁴ But between 1980 and 1987, the legal combatants in these cases found themselves “neither up nor down,” trudging up and then back down the hill, intellectually bloodied but without any

Agins Chronology

- **1979** – California Supreme Court abrogates the availability of inverse condemnation and payment of just compensation as a remedy for uncompensated regulatory takings, and relegates aggrieved property owners to seeking a writ of mandate invalidating the regulation as the sole remedy. *Agins v. City of Tiburon (Agins I)*, 598 P.2d 35 (1979).
- **1980** – U.S. Supreme Court affirms, but on grounds of lack of ripeness (failure to seek construction permit before suing), without reaching or addressing the issue of remedies. *Agins v. City of Tiburon (Agins II)*, 447 U.S. 255 (1980).
- **1987** – U.S. Supreme Court reaches the merits of the taking remedies issue, in *First English Evangelical etc. Church v. County of Los Angeles*, 482 U.S. 304 (1987), overrules *Agins I*, and reaffirms the rule that just compensation is the sole remedy for regulatory takings, the same as for other takings.
- **2005** – In *Lingle v. Chevron*, 544 U.S. 528 (2005), U.S. Supreme Court overrules its own *Agins II* takings test, concluding that its analysis had erroneously confused substantive due process and takings law.

3. In *First English*, the Court catalogued the failed attempts that had gone before, noting its “concerns with finality.” *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 311 (1987). Some of the more cynical among us were of a mind to blame the deadlock on the Supreme Court’s internal voting system. The total number of Justices is nine, but the rules allow a vote of four to place a case on the docket—but not to decide it; that takes five. So it seemed that for years there were four who wanted to decide the issue (although we outsiders were never told who they were or what result they wanted to reach), but they could not find a fifth vote going to the merits of the substantive issue. As noted later, see *infra* note 27, we eventually picked up some clues.

4. Except that the lower court had said it was legally prevented from reaching the merits of the constitutional question and was “obligated” to follow the California Supreme Court’s *Agins I* decision “because the United States Supreme Court has not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief” *First English*, Jurisdictional Statement, ¶16. In at least that sense, the case was ripe for something—in a generic way, if no other.

definitive guidance on the contentious—and critical—question of the remedy, if any, for a regulatory taking.⁵

In the end, the Court came to its senses and reaffirmed its preexisting holding that the payment of just compensation is the proper, indeed, the sole remedy,⁶ which had been black letter law all along and could have been applied all along, thus sparing us close to a half-dozen “marches up and down the hill.”⁷ This was the mad, mad, mad litigational world begat by the California Supreme Court’s erroneous decision in *Agins I*.

The problem with the *Agins II* litigation (aside from its short-lived erroneous affirmance of *Agins I*, to which we will get presently), and its out-of-the-blue creation of a new takings test⁸ without mentioning the pre-existing “polestar” three-element *Penn Central* test (which had been created by the U.S. Supreme Court only two years earlier and is not even cited in *Agins II*), was that, in disregard of prior law,⁹ it provided the seed for a series of inconclusive U.S. Supreme Court ripeness opinions that, instead of clarifying the contentious issue of remedies, only confounded it by enmeshing it in a series of ripeness cases¹⁰ so that eventually the court had to overrule both the California

5. This led to anomalies like *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), in which a California regulatory taking case was brought and tried in U.S. district court because *Agins I* had held there could be no compensatory remedy under California law in state courts. 598 P.2d at 28. Being tried in federal court, compensation was awarded upon the jury’s finding of a taking, and both the Ninth Circuit Court of Appeals and the U.S. Supreme Court affirmed.

6. See *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1016 (1984).

7. See *Hurley v. Kincaid*, 285 U.S. 95 (1932). The rationale of *Hurley* was that, apart from general doctrine that prefers monetary to specific remedies (*Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1941)), it would be unsound public policy for the courts to intervene in the accomplishment of important ends of other branches of government, when the harm complained of by the aggrieved party could be rectified by a judicial award of just compensation, as expressly provided in the Constitution. *Hurley*, 285 U.S. at 104 & n.3. See generally Michael M. Berger & Gideon Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the “Gang of Five’s” Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A.L. REV. 685, 703–12 (1986).

8. Whether the challenged ordinance substantially advances legitimate state interest (*Agins II*, 474 U.S. at 260), a due process, not a taking, test. But since *Agins II* used the former (due process) test to determine whether a taking had occurred, it was based on a legally inappropriate basis. For the court’s description of the resulting problems. See *Lingle*, 544 U.S. at 541–42.

9. See *Euclid v. Ambler Realty Co.*, 272 U.S. 365 386 (1926) (holding that no application for a building permit was required before suing the land regulatory entity on constitutional grounds); see also *infra* note 24 and accompanying text.

10. For discussions of the jurisprudential mess created by this series of “ripeness” rulings (which were actually no more than “ducking the substantive issue” rulings), see Michael M. Berger & Gideon Kanner, *Shell Game! You Can’t Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 URB. LAW. 671 (2004); Michael M. Berger, *The “Ripeness” Mess in Federal Land Use Cases or How the Supreme Court Converted*

holding in *Agins I* as well as its own *Agins II* takings test, realizing that the latter had been based on an entirely wrong doctrinal basis.¹¹ *Agins* thus achieved the dubious distinction of having been overruled not once but twice by the U.S. Supreme Court.

It was only after seven years of wasteful, ruinously costly, and inconclusive litigation that the Court came to its senses and addressed the issue of remedies on the merits in *First English*. What made this judicial performance bizarre was the fact that by then the issue of remedies for uncompensated takings had already been decided twice—once in 1932,¹² and once again in 1984¹³—for physical and regulatory takings, respectively.

How, might you ask, could this happen? The short answer to this question appears to be that the California Supreme Court had set out on some sort of anti-property rights holy war and decided to abolish the doctrine of regulatory takings, in outright defiance of the U.S. Supreme Court's existing takings law. For unfathomable reasons, the U.S. Supreme Court as then composed lacked either sufficient knowledge of takings law or the intellectual fortitude to deal forthrightly with the then ongoing intellectual rebellion by California and New York courts.¹⁴

Federal Judges into Fruit Peddlers, INST. ON PLAN., ZONING, & EMINENT DOMAIN, ch. 7 (1991).

11. See *Lingle*, 544 U.S. at 540, 542 (due at least in part to the Solicitor General's erroneous analysis in *Agins II*, which wrongly conflated due process with takings doctrine, *Agins II* had to be overruled on this point as well as on the issue of remedies, which had been dealt with earlier in *First English*).

12. *Hurley v. Kincaid*, 285 U.S. 95 (1932).

13. *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984).

14. *Fred F. French Inv. Co v. City of New York*, 350 N.E.2d 381 (N.Y. 1976) is the foundational New York case. Criticism of California's *Agins I* rule came from all quarters. The following comments, for example, were all written after *Agins I* was decided but before *First English* overruled it: I Norman Williams, *AMERICAN LAND PLANNING LAW* § 151.02, at 276 (rev. ed. 1985) (noting decisions "which would not be upheld in many other states, and (in some instances) probably not in any other"); David L. Callies, *The Taking Issue Revisited*, 37 *LAND USE L. & ZONING DIG.*, July 1985, at 6, 7 ("inability of private landowners to obtain any sort of judicial relief"); Richard Babcock & Charles Siemon, *THE ZONING GAME REVISITED* 251 (1985) ("[K]now better than to expect the California courts to be sympathetic"); *id.* at 257 ("one has to be a madman to challenge a government regulation in that bizarre jurisdiction"); *id.* at 293 (why would a developer "sue a California community when it would cost a lot less and save much time if he simply slit his throat"); Joseph DiMento et al., *Land Development and Environmental Control in the California Supreme Court*, 27 *UCLA L. REV.* 859, 872 (1980) (characterizing California Supreme Court decisions as "more hostile . . . than any other high court in the nation"); David L. Callies, *Land Use Controls: An Eclectic Summary for 1980–1981*, 13 *URB. LAW.* 723, 724 (1981) ("We all know the California courts won't let landowners/developers build anything!"); Gus Bauman, *The Supreme Court, Inverse Condemnation, and the Fifth Amendment*, 15 *RUTGERS L.J.* 15, 70 (1983) (noting that California is the "most restrictive state in the country with respect to land use").

The 1979 California Supreme Court decision in *Agins I* followed the reasoning of the New York Court of Appeals (without attribution) and simply defied the U.S. Supreme Court's contrary holdings, notably those in *Pennsylvania Coal Co. v. Mahon*¹⁵ and *Hurley v. Kincaid*, by holding that there is no such thing as a regulatory taking requiring payment of just compensation. The landmark *Mahon* decision held explicitly that when a property regulation goes "too far" it will be judicially recognized as a taking.¹⁶ The California Supreme Court disagreed and disregarded that holding, without so much as citing either *Mahon* or *Hurley*.

The *Mahon* opinion did not specify the remedy for takings effected by regulations, as opposed to takings effected by other means. We surmise that Justice Holmes, speaking for the eight-Justice *Mahon* majority, must have thought that this was obvious (i.e., that compensation for takings was explicitly specified in the Fifth Amendment, and that it was therefore unnecessary to be dealt with in a case that pitted two private parties against one another, with no compensation claim made against the regulating entity that, in any event, was not a party to this litigation).¹⁷ And it was that omission that gave rise to the issue of remedies in the 1980s and led to the *Agins* controversy.¹⁸

15. 260 U.S. at 415.

16. In *Mahon*, the plaintiff owned the surface of the property, but the property in issue contained subsurface coal deposits that were owned by the coal company. The regulation in question (Kohler Act) forbade extraction of the coal if doing so would cause surface subsidence. However, the agreement between the Coal Company and Mahon, entered into before enactment of the Kohler Act, expressly provided that the company retained its right to extract its coal, even if doing so would cause surface subsidence. That may have been shortsighted on the surface owner's behalf, but, under Pennsylvania law, the coal company owned the mineral estate and the support estate in the land, while Mahon owned only the surface. For a discussion of the factual background and legal context of the *Mahon* case, see WILLIAM A. FISCHER, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 13–63 (1995); cf. *Griggs v. Allegheny County*, 369 U.S. 84, 89–90 (1962) (community that constructs airport without adequate approaches not entitled to acquire them at no cost by a claim that it is only regulating).

17. We base that surmise in large part on two events. First, six years after *Mahon*, the Court held that "it does not follow that the due process clause of the Fourteenth Amendment would not safeguard to the owner just compensation for the use of its property." *Del. Lackawanna & W.R.R. Co. v. Town of Morristown*, 276 U.S. 182, 193 (1928) (citing *Mahon* in support). Second, four years later, the unanimous court held in *Hurley* that just compensation was the sole remedy for uncompensated property takings, with no injunctive relief available to the aggrieved owner in such cases.

18. For an exploration of this controversy by advocates for each of the competing sides shortly before the Supreme Court settled the mess in *First English*, see Norman Williams, Jr. et al., *The White River Junction Manifesto*, 2 VT. L. REV. 193 (1984), supporting the invalidation remedy, and Berger & Kanner, *Gang of Five*, 19 LOY. L.A.L. REV. 685 (1986), supporting compensation as the remedy for takings,

The California Supreme Court's *Agins I* decision also disregarded a century of prior state law holding uniformly that once private property is taken, "public use attaches" and the aggrieved owner's sole remedy then is to seek just compensation on an inverse condemnation theory.¹⁹ Instead, without any mention of its own prior state law of remedies, *Agins I* abrogated the compensation remedy and held that in cases where regulation went "too far" the aggrieved property owner could only petition the courts for a writ of mandate seeking judicial invalidation of the offending regulation.²⁰ Since the *Agins* plaintiffs, relying on preexisting law, had filed an inverse condemnation complaint seeking just compensation, the California Supreme Court held that their action was properly dismissed by the trial court since there was no such cause of action under the newly minted California law.

On further appeal, the *Agins I* holding was affirmed by the U.S. Supreme Court in *Agins II* but on other grounds; the Court did not reach the issue of remedies.²¹

The *Agins I* ruling came as a doctrinal surprise, although the California court hinted at it in *HFH, Ltd. v. Superior Court*,²² four years earlier. In *Agins I* or *Agins II*, the issue of ripeness had never been raised, briefed, litigated, or even mentioned either below, or in oral argument, leaving the substantive issue of proper remedies for

whether physical or regulatory. The Supreme Court adopted the latter position in *First English*.

19. *E.g.*, *Hillside Water Co. v. Los Angeles*, 10 Cal. 2d 677, 688 (1938); *Loma Portal Civic Club v. Am. Airlines, Inc.*, 61 Cal. 2d 582 (1964) (injunction not available to control noisy aircraft flights at public airport, as the public use had attached to the project and the plaintiffs' only remedy would be a lawsuit for compensation).

20. The evident motivation behind this wordplay was that, although the Due Process Clause forbids deprivation of property without due process of law, it lacks the "just compensation" guarantee of the Taking Clause. *See* Gideon Kanner, *Kelo v. New London: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201, 210–11 (2006) (citing ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 546–47 (1904)). And so went the ingenious theory, once labeled as a mere "deprivation" rather than a "taking," the government could violate an owner's property rights without having to face the danger of paying the "just compensation" specified in the Fifth Amendment as the remedy for property takings. *Agins I* was expressly based on a fear of placing too much stress on the public purse, conjuring up visions of "fiscal chaos." *See Agins*, 598 P.2d at 30–31. The intriguing perversity in this theory, of course, is that the U.S. Supreme Court has for years used the due process clause of the Fourteenth Amendment as the springboard for "incorporating" Bill of Rights guarantees into the Fourteenth Amendment, so they could be enforced against the states. And the first guarantee so incorporated was the just compensation guarantee of the Fifth Amendment. *See Chicago, B.&Q.R.R. v. City of Chicago*, 166 U.S. 226 (1897). For a brief summary of the evolution of that law, see *Waltz v. Tax Comm'n*, 397 U.S. 664, 701–02 (1970) (Douglas, J., dissenting).

21. The court also held that the ordinance was not facially unconstitutional, but precluded the plaintiff from demonstrating that it was unconstitutional as applied.

22. 15 Cal. 3d 508, 518 n.16 (1975).

uncompensated regulatory takings unresolved.²³ On the contrary, in its briefing in the California Supreme Court, Tiburon implored the state supreme court justices to reach the merits of the remedies issue and to eliminate the just compensation remedy, and the court complied. The U.S. Supreme Court—ignoring prior law directly on point²⁴—held that an action seeking just compensation for a taking of private property was unripe (without mentioning the word “unripe” or even the concept of “ripeness”) until the aggrieved owner applied for, but was denied, a development permit from the regulatory agency.²⁵

The U.S. Supreme Court finally revisited the issue of remedies on the merits seven years later in *First English*, where it held that the California Supreme Court erred in deciding *Agins I* because the “just compensation” undisputedly required in cases of physical property takings was also the remedy in regulatory ones. It explicitly disapproved the California Supreme Court’s *Agins I* holding, with typical understatement: “[T]he California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment.”²⁶

This article provides a more detailed history of the *Agins* controversy and deals with other factors that should be of interest to students of eminent domain, but which may not be obvious to the

23. For contemporaneous cases holding that the remedy is compensation, see *Village of Willoughby Hills v. Corrigan*, 278 N.E.2d 658, 665 (Ohio 1972); *State v. Mayhew Prods. Corp.*, 281 N.W.2d 783, 786 (Neb. 1979). In particular, compare the New Hampshire Supreme Court’s “out of hand” rejection of the California *Agins I* remedial approach as being contrary to the law of New Hampshire since “at least” 1872. *Burrows v City of Keene*, 432 A.2d 15, 20 (N.H. 1981).

24. The preexisting U.S. Supreme Court law was quite clear that no such application was required before bringing a lawsuit challenging the constitutionality of land-use regulation. See *Euclid v. Ambler Realty*, 272 U.S. 365, 386 (1926). But *Euclid* was neither distinguished nor overruled by the court; it was simply cited without discussion in spite of the fact that its holding on this point was explicitly cited (and quoted in oral argument). See *infra* note 50 and accompanying text for the pertinent quote from the *Agins II* oral argument (pp. 51–52).

25. See *Agins II*, 447 U.S. at 263. Because of this lack of clarity in Supreme Court opinions, it was not until six years later (in *Williamson County Reg. Plan. Agency v. Hamilton Bank*, 473 U.S. 172 (1985)) that it dawned on the takings bar that a complex ripeness doctrine—applicable only to takings cases—was being haphazardly developed case by case. For a critical reaction to *Williamson County* immediately upon its decision, see Michael M. Berger, *Anarchy Reigns Supreme*, 29 WASH. U. J. URB. & CONTEMP. L. 39 (1985). For an analysis of the complexities in the ripeness doctrine as it developed in the Supreme Court and lower courts tried to make sense of it, see Berger, *Ripeness Mess*, INST. ON PLAN., ZONING, & EMINENT DOMAIN (1991). As this is being written, the Supreme Court has granted certiorari in a case specifically to re-examine the validity of *Williamson County*’s mandate that state court litigation was needed to “ripen” a federal takings claim. See *Knick v. Township of Scott*, no. 17-647. But that is another story for another day.

26. *First English*, 482 U.S. at 311.

casual reader of the *Agins* opinions, particularly the U.S. Supreme Court opinion, and of the vast scholarly commentary that they inspired.

Perhaps the most remarkable aspect of this judicial “march up the hill” and its subsequent “march down,” was that the *First English* case in which the court eventually did reach the merits and overruled *Agins I*, was no more ripe than *Agins*. Both cases presented the courts with appeals from judgments of dismissal. In *Agins I*, California courts sustained a general demurrer to the plaintiffs’ complaint. In *First English*, they ordered the complaint stricken. In other words, they dismissed both cases on the pleadings, without permitting any evidence.²⁷ In neither case did the property owners apply for a building permit, which *Agins II* held to be indispensable to consideration of the regulatory taking claim on the merits.

What we got during the seven years of the Court’s evasion of the issue of remedies brought to it was a situation in which one could not tell whether the pertinent law of remedies was “up or down,” even as fortunes in land values and litigation expenses were frittered away while awaiting the Court’s decision on the merits.

The *Agins* Controversy in Context

It took Bonnie Agins thirty years of litigation and ongoing harassment by the city of Tiburon plus a half-million dollars in municipal fees to build three homes on her five-acre parcel of land ostensibly zoned for as many as five homes.²⁸ That effort also involved an

27. An explanation of these inconclusive cases may lie in the passage of time and all those marches up and down the hill. Although one might say abstractly that *Agins* and *First English* were procedurally alike (in that both were dismissals on the pleadings), it is clear that the Court decided *First English* on the merits because it had tired of the game of watching all those troops unceremoniously—albeit unsuccessfully—marching up and down the hill. See *supra* note 4. In any event, it became pretty clear with time that the battle lines had been drawn inside the Court. As the Court recessed for the summer in June 1986, it handed down the 5-4 decision in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986). By a one vote margin, the court again held a regulatory taking case not yet ripe for decision. However, it was clear from the four-Justice dissent authored by Justice Byron White that a sizeable bloc of the court had had enough and was prepared to decide the remedies question, leaning strongly in the direction of a compensatory remedy. See *id.* at 353. As soon as the Justices returned from their summer recess they noted probable jurisdiction in *First English* and set it for briefing and argument.

28. Philip Hager, *Courting a Dream: 20-Year Fight to Build Tiburon Home Not Over Yet*, L.A. TIMES (Aug. 3, 1987). By the time Ms. Agins received permission to build three homes, she could no longer afford to live in any of them. Interview of Bonnie Agins by one of the authors. Given the years of hearings and studies that precede adoption of general (or comprehensive) plans and zoning ordinances, we have often wondered why property owners are not allowed simply to rely on the results of those plans and studies and proceed to build what the local officials have

inconclusive trip to the United States Supreme Court, with stops at three levels of state courts along the way. To put it in perspective, we note that thirty years is five times the period of time it took to fight and win World War II.

Welcome to California where, as a wit put it, everything is legal between consenting adults, except developing real estate.²⁹

In 1968 Bonnie Agins and her husband Donald bought a five-acre parcel of land in Tiburon, an upscale community located just north of San Francisco on a ridge overlooking San Francisco Bay. It had views of the San Francisco Bay, the Pacific Ocean, and the Golden Gate Bridge. The Agins parcel was aptly described by the *Washington Post* as:

The Tiburon ridge stretches out in a long golden curve, rocky and bright with wildflowers. To the east, one can see small sailboats cutting lines through the blue-grey stillness of San Francisco Bay. To the west, lit by the sun when the fog burns away, the Golden Gate Bridge spans the whitewater where the bay meets the Pacific.³⁰

In a word, it was “magnificent.”

The Agins intended to build five homes on the five acres (for which the land was zoned at the time of its purchase) in order to sell four of them and live in the fifth. But the City of Tiburon had other ideas. It too appreciated the beauty of the subject property, which was described in the *Agins* complaint as one of the most valuable

formally declared to be appropriate, rather than trying to figure out what lesser level of development might actually be acceptable to the municipal mothers and fathers. See Michael M. Berger, *State and Local Planning Programs Have Had Quite an Impact: Perhaps It Is Time for a Rest*, in *PLANNING REFORM IN THE NEW CENTURY*, 262 (Daniel Mandelker ed., 2004). In *MacDonald*, 477 U.S. at 352 n.9, the U.S. Supreme Court suggested that a developer whose plan for a residential subdivision was rejected needed to try again with a lesser development on pain of having his vision—wholly in keeping with the existing planning and zoning—dubbed “exceedingly grandiose,” even though the record did not indicate what sort of development the owner had in mind. See Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 39 *URB. LAW.* 307 (1998).

29. Speaking from the bench during oral argument in *First English*, Justice Sandra Day O’Connor characterized the *Agins* saga as a “horror story.” *First English*, reporter’s transcript of oral argument, p. 56. For additional horror stories, see notes 111–20 *infra* and accompanying text.

30. Fred Barbash & Cynthia Gorney, *Two Views: Suit by Landowners Scares Nature Lovers*, *WASH. POST*, June 8, 1980, at A1. It must be noted, however that the *Washington Post*’s assertion that “both sides” expressed a belief that “a decision in favor of the Agins could deal a devastating blow to environmental and land-use process across the nation” was flatly untrue. The Agins and their counsel believed no such thing. What the Agins wanted was to develop their land exactly as zoned by the city when they bought it, thus relying on their “reasonable, investment-backed expectations.”

parcels of land in California,³¹ and decided to acquire it for open space. To that end, it retained consultants who studied the area and the city's financial options and recommended that the *Agins* parcel be so acquired. Accordingly, the City adopted a condemnation resolution authorizing the taking and filed an action in eminent domain. This is where the fun began.

Under California law and practice, eminent domain cases are usually tried within a year of filing, because thereafter—unless the condemnor deposits the estimated compensation into court for the owner—the date of value shifts from the date of filing to the date of trial.³² In California, that usually means that the land's value goes up during the delay.³³ Also, once filed, eminent domain cases have trial priority.³⁴ But these procedural advantages were for some reason insufficient for Tiburon, which successfully moved for an even more accelerated trial setting. Shortly before the case was to go to trial, however, the city abruptly abandoned the condemnation and dismissed its action without explanation. In spite of our inquiries, we were unable to learn what motivated the city to go through this on-again, off-again performance. We can only speculate that the city's motives were not wholesome.

Simultaneously, the city amended its ordinance changing the zoning from one house per acre to a complex system whereby allowable density would be anything between the original one house per acre to only one house per the entire five-acre parcel. The determination—which of these densities would be permitted—would be discretionary with the city. In other words, no particular density would be permitted as of right. The would-be builder would have to file an application for a proposed development, and the city would then decide whether or not to permit it.

Given what went on up to that point in the permitting process and the rapidly evolving anti-property-rights regime in California courts, the prospects for approval looked slim, except perhaps for the extreme option of building one house on five acres, which at the time (the 1970s) *Agins* believed to be economically infeasible. So would proposing several densities seriatim—a prohibitively costly

31. See *Agins*, 598 P.2d at 32 (Clark, J., dissenting).

32. See CAL. CIV. PROC. CODE § 1263.130.

33. See, e.g., *Saratoga Fire Prot. Dist. v. Hackett*, 97 Cal. App. 4th 895 (2002) (property worth \$2 million when the complaint was filed was worth \$3.2 million a year later).

34. CAL. CIV. PROC. CODE § 1260.010.

process.³⁵ This sort of thing, not unheard of in zoning law,³⁶ became common. James Longtin, the city attorney of Thousand Oaks, cynically counselled his fellow city attorneys to engage in such “legal preventive maintenance” to frustrate property owners’ plans and their constitutional rights with impunity. And then:

If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don’t worry about it. All is not lost. One of the extra ‘goodies’ contained in the recent [California] Supreme Court case of *Selby v. City of San Buenaventura*, 10 Cal.3d 110, appears to allow the City to change the regulation in question, *even after trial and judgment*, make it more reasonable, more restrictive, or whatever, and everybody starts over again.³⁷

We find it remarkable that, in spite of this undenied factual record, the U.S. Supreme Court’s *Agins II* opinion blandly characterized the on-again, off-again condemnation of the Agins parcel as “good faith planning.” To begin with, there was no evidence supporting such a conclusion, no judge made any such finding,³⁸ and this course of conduct by the city was anything but in “good faith.” Its on-again, off-again condemnation of the Agins land reeked of bad faith.³⁹ After a total of 100 years of joint eminent domain

35. To see the seriatim process in full cry, see the discussion of the *Del Monte Dunes* case, *infra* note 45, with its five year “planning process” that included five different development applications and nineteen different site plans in an effort to satisfy the local officials. The effort, though enormously costly, went for naught. All plans were rejected.

36. “One common practice, if the municipality lost the decision, was to rezone the property . . . and in effect invite [the property owner] to bring another lawsuit. If, for example, the plaintiff wanted C-commercial for property zoned single-family (R-1), the municipality would reclassify the land to duplex (R-2).” RICHARD BABCOCK & CHARLES SIEMON, *THE ZONING GAME REVISITED* 288 (1985). As Professor Mandelker has concluded about this ploy: “Delay, cost inflation and sheer weariness may accomplish what the zoning ordinance did not achieve. The frustrated landowner may give up.” DANIEL R. MANDELKER, *ENVIRONMENT AND EQUITY* 17 (1981).

37. James Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, 38B NIMLO MUN. L. REV. 175, 192 (1975) (emphasis added). In a celebrated dissent, laying out the jurisprudential basis for regulatory taking compensation, Justice Brennan had quoted this piece of advice from Mr. Longtin as an illustration of the excesses brought about when there is no compensation for regulatory takings. *San Diego Gas & Elec. Co v. City of San Diego*, 450 U.S. 621, 636–61 (1981) (Brennan, J., dissenting on behalf of himself and three other Justices); *see also id.* at 633–34 (Rehnquist, C.J., agreeing with the substance of Brennan’s analysis). This dissent later provided the underpinning for *First English*. *See* 482 U.S. at 315, 316 n.9, 318.

38. Compare *Tahoe-Sierra*, where the Court based its opinion on the absence of bad faith on an express trial court finding that the agency had acted in good faith. 535 U.S. at 334.

39. See the preexisting California case of *Klopping v. City of Whittier*, 8 Cal. 3d 39 (1972) where similar on-again, off-again condemnation was deemed to be unreasonable municipal conduct requiring compensation for the resulting damages.

practice, we have seen all sorts of questionable governmental behavior,⁴⁰ but this saga does not come close to being an Oscar winner.

This description of the *Agins* litigation would be incomplete without also informing the reader about what transpired after the U.S. Supreme Court's decision. These events are probably best summarized by their depiction in the amicus curiae brief filed in 1987 by the Pacific Legal Foundation on behalf of Bonnie Agins in *First English*,⁴¹ as follows:⁴²

The Agins have been trying to get governmental permission to develop their land ever since this court ruled in 1980 that their case was not ripe. Pursuant to this Court's finding that the Agins could build up to five houses on their property, the Agins went back to the Tiburon City Council and applied for permission to subdivide their parcel into five buildable lots. The city held more than two years of public hearings in order to decide that it would permit only three lots. As conditions of approval the city required dedications of open space, improvement and dedication of a hiking trail, the construction of an off-site road to the property, an environmental impact report, a traffic study, a soils study, and the payment of various in lieu fees, impact fees, inspection fees, and utility connection fees. The Agins estimate that they spent approximately \$560,000 just obtaining approval of the three lots. The Agins finished making the improvements required by the city in August, 1985. A few weeks later, in October 1985, the city council adopted a city-wide building moratorium temporarily banning construction by the Agins and other Tiburon property owners. The moratorium has been extended by initiative until at least April, 1988, with a provision allowing an indefinite extension thereafter. Thus, after expending all these years of time and physically and emotionally draining effort, and paying over one-half million dollars in fees and costs, the Agins now sit unable to use their property and uncertain as to when or if they will be allowed to build their home.

This inspired the following exchange with the County's lawyer in the *First English* oral argument:

QUESTION [by Justice O'Connor]: . . . There are horror stories out there of local governments intentionally running these things through the mill indefinitely in a jurisdiction like California, with full recognition that if they lose one

40. Cf., e.g., Gideon Kanner, *Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts*, 25 LOY. L.A. L. REV. 81 (1991) (dealing with misconduct of counsel); Gideon Kanner, *Sic Transit Gloria: The Rise and Fall of Mutuality of Discovery in California Eminent Domain Litigation*, 6 LOY. L.A. L. REV. 447 (1973) (dealing with condemnors' abuses of discovery); Michael M. Berger, *You Can't Win Them All—Or Can You?*, 54 CAL. STATE BAR J. 16 (1979) (dealing with special rules applied to the California Coastal Commission); Michael M. Berger, *The State's Police Power Is Not (Yet) the Power of a Police State*, LAND USE L. & ZONING DIG., May 1983, at 1, 4 (dealing with regulatory abuse).

41. That brief explained to the Supreme Court what had happened to the Agins upon their return to Tiburon in 1980, after the Supreme Court's decision in their case. See Transcript of Oral Argument at 58, *First English*, 482 U.S. 304 (No. 85-1199).

42. Brief for Pacific Legal Foundation as Amici Curiae Supporting Appellant, *First English*, 482 U.S. 304 (No. 85-1199).

they can make a minor modification of the requirement and go again and effectively deprive people forever of any use.

Now, what's an owner to do?

MR. WHITE [Counsel for Los Angeles County]: Well, Justice O'Connor, I don't know of any horror stories.

QUESTION [by Justice O'Connor]: Well, the Agins come pretty close, don't they?

MR. WHITE: Well, the Agins, I don't know what happened after the Agins decision was decided [sic]. But this Court held that there was no taking in the Agins case.⁴³

The Court was provided with an example of the sort of “horror story” that Justice O'Connor alluded to when the *Del Monte Dunes* case appeared twelve years later. There, the would-be builder was forced to go through five permit applications and nineteen plot plans,⁴⁴ only to be told at the end of six years of what purported to be the permitting process that he would not be permitted to build anything on his 37.6 acre parcel ostensibly because an endangered butterfly *that had never been seen on or near the subject property* might like it as its habitat should it ever wander onto it.⁴⁵ At least in *Del Monte Dunes*, the land owner prevailed, after the city's counsel was subjected to harsh questioning by court members during oral argument.⁴⁶

43. Transcript of Oral Argument, *supra* note 41, at 55–56. Some of the “horror stories” that the Court knew about but which had escaped the notice of the city's counsel are discussed *infra*, notes 111–120 and accompanying text. This exchange brings to mind the famous line of Captain Renault in the film *CASABLANCA*, professing to be shocked—shocked!—to learn that there was gambling going on in the back of Rick's saloon. See *CASABLANCA* (Warner Bros. Pictures 1942).

44. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 526 U.S. 687 (1999). A scholarly observer took the city's lawyer at his word and agreed that the land use permitting process described in this opinion was “not atypical.” Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 *YALE L.J.* 203, 227 (2004).

45. This summary really fails to do justice to what the city put these owners through. As shown in the Supreme Court's opinion, the property had been planned and zoned for many years to allow multifamily housing at a density of twenty-nine units per acre. Don't bother with the math; it comes out to more than 1,000 units for the property. But the owners only presented a plan for 344 single family homes. That was rejected as too dense—for the 1000-unit zoning [sic]—with the planning commission suggesting they re-draw the plans for 264 homes. When the owners did so, that was also denied. This time, the planning commission suggested 224 homes. That too was denied. As was the next recommendation for 190 homes. This occupied five years and a not-so-small fortune. That is when litigation finally ensued.

46. At the outset of the Supreme Court argument, the city's counsel tried to downplay the enormity of the mistreatment his client had meted out to the property owner through the multiple application and site plan demands, all of which were denied even when they conformed precisely to what the city had demanded. He began his argument by urging that “[t]his case is not atypical” Transcript of Oral Argument at 4, *Del Monte Dunes*, 526 U.S. 687 (No. 97-1235). Justice Scalia immediately jumped on him because of the number of applications: “This was the fifth plan presented, right? Each one was successively rejected . . . And this is typical, you say?” *Id.* Then Justice Kennedy stepped in, surprising counsel with a

The *Del Monte Dunes* case is hardly unique. In *Healing v. California Coastal Commission*,⁴⁷ the property owner who tried to build a single house for his family was subjected to what the Court of Appeal sharply characterized as a “long-term nightmare,”⁴⁸ lasting some seventeen years. But that is not even the worst. To the best of our knowledge, the current California champion in such matters is the unfortunate land owner who was subjected to thirty years of administrative proceedings and litigation, only to be told by the California Court of Appeal that his case was not yet ripe.⁴⁹

Finally, since the court disposed of the Agins controversy on the basis of lack of ripeness, because—so it said—the Agins had not applied for a building permit, it seems appropriate to let the readers in on a court-counsel exchange that took place during the rebuttal phase of the *Agins II* oral argument:

MR. KANNER: A most remarkable argument. This is a case in which a demurrer was sustained, thereby giving rise to the traditional Anglo-American issue of pure law. Yet virtually all we have been arguing about is facts.

QUESTION [Chief Justice Burger]: Well, that's perhaps because of the way you undertook to set this litigation in motion, instead of asking for what is provided under the city's ordinance, an opportunity to get five sites, and passed that opportunity to get five sites, and you passed that opportunity and plunged right into the total litigation.

MR. KANNER: Well, may I respectfully point out and call to the Court's attention the basic American seminal case, *Euclid v. Ambler*, 272 U.S. at page 385, [where] that very issue was presented and this court said, “A motion was made in the court below to dismiss the bill on the grounds that because the complainant had made no effort to obtain a building permit or apply to the zoning board of appeals for relief as it might have done under the terms of the ordinance, the court [case] was premature. The motion was properly overruled. The effect of the allegations of the bill is that the ordinance on its own force operates

question based on a part of the record that had not been brought to the Supreme Court by the parties. As Justice Kennedy put it, “Well, could you—suppose you told the jury, the issue for you to decide is, was the decision based on reason? Did it substantially advance a legitimate public goal? Could the jury answer that question?” When counsel hesitated, Justice Kennedy continued, “Well, that was your argument to the jury. I've read the record.” *Id.* at 5. Later, Justice Scalia summed the case up this way: “But where you have a consistent process, as is alleged here, of turning down one plan, the next plan, the next plan, okay, I'll do this to satisfy you, isn't there some point at which, although there's a rational basis for the fifth decision, a rational basis for the fourth and the third and the second and the first, you begin to smell a rat[?]” *Id.* at 17. Eventually, even Justice Souter got into the act, asking whether, in light of the history of the city's actions toward this property owner, “an element of bad faith plays a part in the decision?” *Id.* at 18.

47. 22 Cal. App. 4th 1158 (1994).

48. *Id.* at 1162.

49. *Peeling v. Harris*, No. D071552, 2018 WL 523442 (Cal. Ct. App. Jan. 24, 2018); see also *Monks v. Rancho Palos Verdes*, 167 Cal. App. 3d 263 (2008) (noting moratorium imposed in 1978; case remanded in 2008 with directions “to determine an appropriate remedy” and an admonition to the city to act in good faith).

greatly to reduce values of appellees' land and destroy their marketability for investor or commercial and residential use. . . ."⁵⁰

Nonetheless, this holding of the *Euclid* case, directly on the point raised by the Chief Justice, went without discussion in the *Agins II* opinion which, by an *ipse dixit* statement, held to the contrary.

In sum, it was clear at the time, and it remains clear with the benefit of hindsight, that the court was reluctant to address the issue of remedies⁵¹ and that the *Agins* case was a precursor (or if you prefer, the tip of an iceberg) of what has become the legendary California legal environment in land-use cases, as described in more detail in the next section. One could also speculate (since the Justices' thought-process is a closely guarded secret) that at the time of the *Agins* oral argument the court was not prepared to tackle the issue of regulatory takings with the degree of acuity one might have wished for. In any event, the U.S. Supreme Court's failure to nip the resulting legal anomaly in the bud, so to speak, exacted a heavy price in confusion, delay, and waste of time and resources—all of which had to be rectified years later in the *First English* and *Lingle* cases.

The California Supreme Court's Holy War Against Property Rights

In the late 1970s, the legal climate in California became openly hostile to the constitutional rights of property owners, particularly in the context of regulatory takings. That much is not open to serious dispute, even if the legal basis for it remains unclear.⁵² The U.S.

50. Transcript of Oral Argument at 51–52, *Agins II*, 447 U.S. 255 (No. 79-602). See *supra* text accompanying note 42 (describing the impact of the Tiburon ordinance on the utility [or more accurately, the lack thereof] of the subject property).

51. We offer, for such enlightenment as it may provide, the following exchange between the *Agins*' counsel and Justice White during oral argument:

QUESTION [By Justice White]: "You can't cram issues down our throat [] that we don't need to decide.

MR. KANNER: That would be beyond my meager powers." Transcript of Oral Argument, *supra* note 50, at 53–54.

Of course, Justice White's belief that this issue did not "need" deciding, only raised the uncomfortable question of why the court took the case if it thought there was no need to decide the tendered issue on the merits. If, indeed, *Agins* did not "need" to be decided, one is entitled to wonder why the Court did not just issue a DIG order, i.e., an order dismissing certiorari as improvidently granted. In any event, Justice White proved to be mistaken—the Court did "need" to decide this issue, and eventually realized that when after a half-dozen years of delay, confusion in the law, and king's ransoms wasted on repetitive, pointless litigation, it came to its senses and reaffirmed the preexisting decisional law (*Hurley*) that had been on the books since 1932.

52. Or, one could simply take the California Supreme Court's words at face value and ascribe the hostility to the purely fiscal motive of preserving the governmental fisc. See *Agins I*, 598 P.2d at 30–31. This is no speculation on our part; that was the court's explicitly stated policy. In *People v. Symons*, 54 Cal. 2d 865 (1960) that court

Supreme Court's clear holdings notwithstanding, the California Supreme Court insisted on marching to the beat of its own Fifth Amendment drummer. Indeed, its holdings were so off-kilter that they had become the subject of a drumbeat of criticism and, at times, derision by commentators on both sides of the issue around the country. They have aptly characterized California's attitude toward land owners as "more hostile . . . than any other high court in the nation."⁵³ They concluded that California's attitude was "extreme,"⁵⁴ "onerous [and] draconian"⁵⁵—in short, "the most restrictive state in the country with respect to land use."⁵⁶ Even commentators outspokenly sympathetic to government regulators concede that California's courts have applied this anti-property owner bias "consistently" and that it "pervades the body of California zoning law generally."⁵⁷

candidly stated that it deemed it to be its duty to keep condemnees' compensation down, lest "an embargo" on public projects be declared. In 1976, the California legislature repealed the *Symons* rule (CAL. CIV. PROC. CODE § 1263.420), but, unsurprisingly, no "embargo" ensued. For extended discussion of this type of pursuit of the free lunch, see Berger & Kanner, *supra* note 18, at 742–53.

53. Joseph DiMento et al., *Land Development and Environmental Control in the California Supreme Court: The Deferential, the Preservationist, and the Preservationist-Eratic Eras*, 27 UCLA L. REV. 859, 872 (1980). This article was written by eight highly knowledgeable authors, including the late UCLA law professor Donald G. Hagman, widely regarded as the leading land use legal thinker and analyst of his time and noted for his balanced position on the issues.

54. FISCHEL, *supra* note 16, at 226. The author is a professor at Dartmouth College and a highly regarded land economist of national stature. His simple conclusion was that "[t]he California Supreme Court in the late 1960s and early 1970s actively reduced the development rights of landowners[.]" *id.* at 218, to the point where "the California court stopped development at every turn," *id.* at 227.

55. David Callies, *The Taking Issue Revisited*, 37 LAND USE LAW & ZONING DIG. July 1985, at 6, 7. The author, a professor of law at the University of Hawaii, was co-author of one of the most influential books on land use—one that was unequivocally written with a pro-regulation orientation. See FRED BOSSELMAN, DAVID CALLIES, & JOHN BANTA, *THE TAKING ISSUE* (Council on Environmental Quality 1973). Professor Callies once summarized the California situation this way: "We all know the California courts won't let landowners/developers build anything!" David Callies, *Land Use Controls: An Eclectic Summary for 1980–1981*, 13 URB. LAW. 723, 724 (1981). As another academic expressed it, the California Supreme Court imposed "a uniform, antidevelopment state legal standard." FISCHEL, REGULATORY TAKINGS, at 230.

56. Gus Bauman, *The Supreme Court, Inverse Condemnation, and the Fifth Amendment*, 15 RUTGERS L.J. 15, 70 (1983). The author has sat on both sides of the issue, having served, at different times, as litigation counsel to the National Association of Home Builders and as Chairman of the Maryland-National Capital Park and Planning Commission (regulating land use in Montgomery County, Md.). Using almost the same words, Dartmouth economics professor William Fischel concluded that "the California court became the most antidevelopment in the nation." FISCHEL, *supra* note 16, at 226.

57. 1 NORMAN WILLIAMS, *AMERICAN LAND PLANNING LAW* § 6.03, at 115–16 (1974). Others openly gloated. See *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 655 n.22 (1981) (Brennan, J., dissenting) (quoting Longtin, *supra* note 37, at 192–93, with disapproval). Although dissenting, Justice Brennan expressed the substantive views of five Justices. See *id.*

The year 1987 was something of a watershed period for the U.S. Supreme Court in takings law. Having ducked four opportunities in preceding years to straighten out the compensation issue, the Court decided to deal with some of the pending issues in regulatory takings. In both *First English* and *Nollan*, it plainly intended to set California back on the path trod by the rest of the country. As the Court put it in *First English*: “[T]he California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment.”⁵⁸

Two weeks later, the Court decided *Nollan*. There, striking down as “extortion”⁵⁹ a standard California Coastal Commission permit condition (repeatedly applied and judicially approved in California), the Court said: “Our conclusion on this point is consistent with the approach taken by *every other court* that has considered the question, with the exception of the California state courts.”⁶⁰ As one commentator noted, *First English* “brought California, always at the fringe, in line with most other states.”⁶¹

One would have thought that this double-barreled message would have been clear and that the California judiciary would have responded by providing the protection demanded by the U.S. Supreme Court and the Constitution—and most other states. But everyone who thought that was disappointed. The California courts continued as though it were “business as usual.” A poll of land-use experts on both sides of the issue taken five years after *First English* found “California was [still] a near unanimous choice as the state least likely to protect landowner rights. California municipalities . . . are accustomed to meeting little resistance from the state courts.”⁶² This merely confirmed what others had known already: California had long since become the target of sarcasm in the national land use community. People elsewhere, it was said, “have joked about why a developer would sue a California community when it would cost a

58. 482 U.S. at 311.

59. 483 U.S. at 837.

60. *Id.* at 839 (emphasis added) (collecting cases from around the country).

61. Dwight Merriam, *A Planner's View of Dolan*, in 10 TAKINGS: LAND DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 211 (1996). The author is a noted pro-regulation advocate and a past president of the American Institute of Certified Planners. Another commentator summed it up thus: “Indeed, the Court’s opinion in *First English* responded directly to the position taken by two of the most influential state courts in the country—the California Supreme Court and the New York Court of Appeals—both of which had explicitly rejected money damages as a remedy for an unconstitutional land use regulation . . .” Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 *YALE L.J.* 203, 245 (2004).

62. DENNIS J. COYLE, *PROPERTY RIGHTS AND THE CONSTITUTION* 11 (1993).

lot less and save much time if he simply slit his throat.”⁶³ In a more serious vein, these two knowledgeable commentators⁶⁴ went on to observe that, “[i]n California, the courts have elevated governmental arrogance to a fine art.”⁶⁵ And so they had.

The upshot of “elevat[ing] governmental arrogance to a fine art” was that California regulators did as they pleased. After all, with a compliant judiciary that was willing to shield them from accountability to the Constitution, even if it meant defying the U.S. Supreme Court’s pronouncements, they believed that they had little to fear.⁶⁶ The foreseeable result was more draconian regulation⁶⁷ that inspired more litigation. A lot of it. Our review of takings cases decided by the U.S. Supreme Court shows that land use cases arising in California account for almost as many of the Supreme Court’s decisions as all other jurisdictions combined.⁶⁸ Many of the household names

63. RICHARD BABCOCK & CHARLES SIEMON, *THE ZONING GAME REVISITED* 293 (1985).

64. The late Richard Babcock was, at the time, the recognized dean of the Nation’s land use bar and—significantly—a vigorous defender of expansive government regulatory control.

65. *Id.* at 263.

66. Professor Coyle observed that “the basic message of the [California Supreme] court was ‘Do what you want.’” COYLE, *supra* note 62, at 156. In many ways, that translated into doing what the loudest part of the crowd demanded. We assume that everyone familiar with the land use control process knows that NIMBY stands for “Not in my back yard!” an expression used to characterize the cry of neighbors opposed to proposed development. True, a few decades ago the advantage in such confrontations went to developers funding the elected officials seeking reelection, and perhaps it still does in places. But, as the late Richard Babcock was fond of observing, today’s reality is that in such controversies you have a blueprint-toting developer and his lawyers facing a crowd of scores or hundreds of agitated neighbors demanding that the city council “Save our neighborhood!” or some such. In such a context, observed Babcock, the outcome is not in much doubt. RICHARD F. BABCOCK, *THE ZONING GAME* (1966); see William A. Fischel, *Voting, Risk Aversion, and the NIMBY Syndrome: A Comment on Robert Nelson’s “Privatizing the Neighborhood,”* 7 GEO. MASON L. REV. 881, 881–83, 888 (1999); Michael M. Berger, *Property, Democracy & The Constitution*, 5 BRIGHAM-KANNER PROPERTY RTS. CONF. J. 45, 61–63 (2016).

67. It has been noted by another leading scholar, Professor Bernard Frieden, then Chairman of the Planning Department at M.I.T., that California land use laws have been freely abused so that, while paying lip service to “good planning,” they were in fact applied to advance the narrow, parochial self-interest of local suburbanites. BERNARD FRIEDEN, *THE ENVIRONMENTAL PROTECTION HUSTLE* (1979).

68. See, e.g., *San Remo Hotel L.P. v. City & Cnty. of S.F.*, 125 S. Ct. 2491 (2005); *Tahoe-Sierra Preservation Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999); *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725 (1997); *Ehrlich v. City of Culver City*, 114 S. Ct. 2731 (1994); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Lake Country Estates v. Tahoe Reg. Plan. Agency*, 440 U.S. 391 (1979).

Professor Sterk confirmed this, concluding that “[i]t is no accident that California cases were at the center of the resurgence of the U.S. Supreme Court’s regulatory

in Fifth Amendment takings law arose in California. And this catalogue only those cases in which the Supreme Court asserted plenary review. Only the Court's file keepers know how many unsuccessful petitions lie buried in the Court's vaults.

We wish that we could report that, chastened by the double reversal the U.S. Supreme Court administered in 1987 via *First English* and *Nollan*, California returned to the constitutional fold. But it was not to be. Examining California cases after *First English* shows that the California courts have returned to their old ways and have essentially taken California once again out of the mainstream and into its own realm of constitutional jurisprudence.⁶⁹ For a time, this led to a bitterly divided four-to-three California Supreme Court that provided little, if any, protection to property owners. The dissenting opinions made no bones about this, repeatedly calling out the majority for ignoring paramount U.S. Supreme Court regulatory taking opinions.

The primary spokesperson for the dissenters was Justice Janice Rogers Brown. She put it bluntly, but accurately: “[I]n California, at least for now, *Lucas* [v. *S.C. Coastal Council*, 505 U.S. 1003 (1992)] is a dead letter.”⁷⁰ This was based on the California majority's “conviction that more than a decade of reinvigorated [United States Supreme Court] takings jurisprudence has changed nothing,”⁷¹ a conviction born of the “evident” fact that the California “majority is unwilling to come to terms with the true meaning and operative effect of *Lucas* and *First Lutheran*.”⁷²

Justice Marvin Baxter, in a lengthy and scholarly discussion of the U.S. Supreme Court's takings jurisprudence, demonstrated that

takings jurisprudence; a grossly disproportionate number of the Court's takings cases since 1980 have involved takings claims rejected by the California courts.” Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 *YALE L.J.* 203, 265 (2004) (collecting cases).

69. We recognize that, on remand of *First English*, the California Court of Appeal ruled against the property owner, finding that there was no taking. *First English Evangelical Lutheran Church v. Cnty. of L.A.*, 210 Cal. App. 3d 1353 (Cal. Ct. App. 1989), cert. denied, 58 U.S.L.W. 3468 (U.S. Jan. 22, 1990) (No. 89-826), holding that, as a matter of law, the right to pitch tents and build campfires was an economically viable use. Plainly, that is contrary to *Lucas*, where the Court held that the right to build a deck and hold picnics was not sufficient to defeat a takings claim. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). That the Supreme Court refused to grant a second round of review to *First English* in no way validates the substance of the lower court ruling. See, e.g., *United States v. Carver*, 260 U.S. 482, 490 (1923) (noting that certiorari denial “imports no expression of opinion upon the merits of the case”).

70. *Landgate, Inc. v. Cal. Coastal Comm'n*, 953 P.2d 1188, 1212 (Cal. 1998) (Brown, J., dissenting).

71. *Santa Monica Beach v. Superior Court*, 968 P.2d 993, 1040 (Cal. 1999) (Brown, J., dissenting).

72. *Landgate*, 953 P.2d at 1211 (Brown, J., dissenting).

the California majority simply refused to follow the Court's decisions.⁷³ Unmasking the majority's effort to disguise its handiwork⁷⁴ as seemingly in compliance with Supreme Court teachings, Justice Baxter concluded simply that "[t]he assumption of the majority that just compensation need not be paid . . . finds no support in the authorities on which they rely."⁷⁵ "Two centuries of jurisprudence since *Marbury v. Madison* . . . have escaped notice."⁷⁶

With respect to the seminal decision in *First English*, which established that the constitutional remedy for a regulatory taking is compensation and held that temporary takings are entitled to the same constitutional protection as permanent takings, Justice Ming Chin demonstrated that the California position not only ignored the federal holding, but actually embraced the *dissent* in *First English*.⁷⁷

It is hard to improve on Justice Brown's observation that

when [the United States Supreme Court] has made an attempt to resolve definitively a difficult point of constitutional law that is applicable to the very issue before us, we ought either to respect its judgment or provide a reasoned basis for refusing to do so. To do otherwise, in Charles Fried's words is "judicial impudence."⁷⁸

To see California's open rebellion, one need go no further than to compare the U.S. Supreme Court's 1987 analysis in *First English* with the California Supreme Court's decision a decade later in *Landgate*. In *First English*, the Court reviewed—and rejected—California's rule that the remedy for a regulatory taking was to invalidate the regulation. Rather, the Court held that compensation was constitutionally mandated.⁷⁹ When it overruled California's unconstitutional rule, the Court did so precisely because California refused to permit compensation for the period *before* judicial invalidation when a regulation kept private property from being put to economically productive use. The California rule that the Court consigned to the constitutional scrap heap in 1987 is precisely what the California

73. *Santa Monica Beach*, 968 P.2d at 1013–36 (Baxter, J., dissenting).

74. Such subterfuge is an old California tactic in this field. As the U. S. Supreme Court noted in *First English*, "the California Supreme Court may not have *actually disavowed*" the constitution's Fifth Amendment mandate, but its holdings "truncated the rule" (emphasis added). Here, the words may be different, but the tune is the same. *First English Evangelical Lutheran Church v. Cnty. of L.A.*, 482 U.S. 304, 317 (1987).

75. *Santa Monica Beach*, 968 P.2d at 1026.

76. *Id.* at 1033.

77. *Landgate*, 953 P.2d at 1205–06 (Chin, J., dissenting); *see also id.* at 1209 (Brown, J., dissenting).

78. *Id.* at 1205–06 (Brown, J., dissenting) (citation omitted). Sadly for California, Justice Brown was elevated to the position of Circuit Judge on the U.S. Court of Appeals for the D.C. Circuit (often viewed as the second most powerful court in the country). Her trenchant dissents have been missed on the left coast.

79. *First English*, 482 U.S. at 315, 322.

Supreme Court resuscitated eleven years later in *Landgate*. The deliberate nature of California's intellectual insurrection is apparent when one reads *First English*. The Court could not have been more clear in its opening paragraph, which left no doubt as to the issue before it, the correct rule, and California's disregard of it:

In this case the California Court of Appeal held that a landowner who claims that his property has been 'taken' by a land-use regulation may not recover damages *for the time before* it is finally determined that the regulation constitutes a 'taking' of his property. We disagree, and conclude that in these circumstances the Fifth and Fourteenth Amendments to the United States Constitution would require compensation *for that period*.⁸⁰

First English thus holds that, once the regulatory action is *administratively* final (i.e., before litigation testing its validity), compensation is constitutionally compelled for the period *during litigation that determines the invalidity of the regulation* when its impact is to prevent all economically productive use of the regulated land. California, however, has simply nullified that teaching. It has defiantly re-established pre-*First English* law by holding that the aggrieved landowner must first sue to invalidate the regulation, and that such a litigational period is merely part of the "normal delay" in the "planning process" and cannot—regardless of the illegality of the regulation and its effect on the property owner—result in a constitutional taking that requires compensation.⁸¹ Once again, California has "truncated the [constitutional] rule"⁸² by refusing compensation for this period. And now it has done so knowingly, in spite of three dissenters forcefully demonstrating the conflict with *First English*.

This California attitude has continued into the twenty-first century, although three decades have now passed since *First English* was presumed to have returned California to the constitutional fold. Recently, the Court of Appeal considered a case in which the trial court had issued an injunction requiring the property owner to open beach access over his property to the general public.⁸³ The court felt that it had to agree that such a de facto infliction of an easement over private property would be a per se taking. The law was

80. *Id.* at 306–07 (emphasis added).

81. *Landgate*, 953 P.2d at 1189. This idea that litigation is simply a part of the planning process was expressly rejected by the Wisconsin Supreme Court on the ground that it is directly contrary to *First English*. *Eberle v. Dane County Bd. of Adjustment*, 595 N.W.2d 730, 742 n. 25 (Wis. 1999).

82. *First English*, 482 U.S. at 317.

83. *Surfrider Found. v. Martins Beach 1, LLC*, 221 Cal. Rptr. 3d 382 (2017), *cert. denied*, 139 S. Ct. 54 (2018); *but see Kaiser/Aetna v. United States*, 444 U.S. 164 (1979) (holding that when government orders the opening of privately owned land to the public as an easement that is a taking).

too clear to ignore.⁸⁴ But the court (by ignoring *First English*) concluded that it could deny protection to the property owner by holding that a mere “temporary” physical invasion is not automatically a taking. Forgotten was the *First English* conclusion that the Fifth Amendment covers *all* takings, whether physical or regulatory, permanent or temporary. The injunction on its face did not say that it was temporary, so where did that come from (assuming any validity to the distinction between permanent and temporary occupations, which there is not)? It was only temporary, said the court, because the owner could apply to the California Coastal Commission for permission to close the easement and the possibility that the Commission might grant permission to close the road was sufficient to make the easement temporary and thus beyond the protection of the takings clause. In a word, nonsense. California has returned to the pre-*First English* days when its courts construed their way around U.S. Supreme Court opinions (not exactly disavowing, but truncating, as the High Court said in *First English*).

The decision in *Lucas* has fared no better at the hands of the California court. *Lucas* held that denial of all economically beneficial or productive use of property, whether permanent or temporary, is a “categorical” or *per se* taking that requires compensation.⁸⁵ Under California’s resurrected pre-1987 rule, however, even such a drastic impact *cannot* be deemed a taking if the “development restrictions imposed on the subject property substantially advanced some legitimate state purposes⁸⁶ so as to justify the denial of the development permit.”⁸⁷

84. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 n.1 (1982) (holding that permanent physical invasion, even if minor and seemingly inconsequential, is a Fifth Amendment taking, even a taking described as being “[no] bigger than a breadbox,” borrowing a popular phrase from an early television game show).

85. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992); see *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23, 32 (2012) (noting that a taking is no less a taking when it is temporary). During World War II, the government took many properties temporarily “for the duration” of the war. These takings were compensable, see *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945), and raised only issues of the measure of compensation. Even the California Supreme Court once acknowledged this. See *Nestle v. City of Santa Monica*, 496 P.2d 480 (Cal. 1972).

86. Of course, how there can be a “legitimate” governmental purpose when an agency acts unconstitutionally and without jurisdiction (i.e., beyond the purview of its legitimate powers) no one has bothered to explain.

87. *Landgate, Inc. v. Cal. Coastal Comm’n*, 953 P.2d 1188, 1198 (Cal. 1998). *Landgate* is the key to the current California position. As a court of appeal noted, somewhat self-consciously: “*For better or for worse*, in a four-to-three decision, the [California Supreme Court] majority held that a legally erroneous decision of a governmental agency during the development approval process that results in a

But the U.S. Supreme Court has consistently held that takings are measured by the impact of the regulators' acts on the property owner, not their intentions or the professed nobility of their goals. The government can no more confiscate private property for good reasons than for bad ones. The presence of legitimate reasons does not vitiate the Just Compensation Clause—on the contrary, it triggers its applicability. Justice Stewart put it simply: “[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*.”⁸⁸

The Court of Appeals for the Federal Circuit expanded on that thought:

The purpose and function of the [Fifth] Amendment being to secure citizens against governmental expropriation, and to guarantee just compensation for the property taken, what counts is not what government said it was doing, or what it later says its intent was What counts is what the government *did*.⁸⁹

The Supreme Court has applied that bedrock constitutional philosophy repeatedly. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*,⁹⁰ the New York Court of Appeals upheld a statute as a valid exercise of the police power. But the U.S. Supreme Court reversed that state court judgment and pointed out that commendable goals, like good intentions, are no substitute for adherence to the Just Compensation Clause:

The Court of Appeals determined that §828 serves [a] legitimate public purpose . . . and thus is within the State's police power. We have no reason to question that determination. *It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid.*⁹¹

Similarly, in *Kaiser Aetna v. United States*,⁹² the Corps of Engineers had decreed that a private marina be opened to public use. The Court disagreed and, in the process, explained the relationship

delay of the permit is not a taking, as long as there is an objective, sufficient connection between the land use regulation in question and a legitimate governmental purpose.” *Buckley v. Cal. Coastal Comm'n*, 80 Cal. Rptr. 2d 562, 577 (Cal. Ct. App. 1995) (emphasis added); *see also Long Beach Equities, Inc. v. Cnty. of Ventura*, 282 Cal. Rptr. 877, 885 (1991) (“In some cases, no compensation may be required even if almost all uses are taken.”).

88. *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring).

89. *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 889 (Fed. Cir. 1983) (citing *Hughes*, 389 U.S. at 298).

90. 458 U.S. 419 (1982).

91. *Id.* at 425 (emphasis added).

92. 444 U.S. 164 (1979).

between justifiable regulatory actions and the takings clause of the Fifth Amendment:

In light of its expansive authority under the Commerce Clause, there is *no question* but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. *Whether a statute or regulation that went so far amounted to a taking, however, is an entirely separate question.*⁹³

In fact, in *every* eminent domain case, the taking is justified by being for public use (or public benefit) and serving public necessity. But that does not excuse the taker from its obligation to pay just compensation.

That concept is the underpinning for the categorical rule that, if regulation denies all economically beneficial or productive use of private land, it is a *per se* taking.⁹⁴ That is why, under *Lucas*, a taking *always* occurs when economically productive use is prevented, “*without case-specific inquiry into the public interest advanced in support of such a restraint.*”⁹⁵ In other words, for a taking to occur, it matters not whether the regulators acted in good or bad faith. What matters is the impact of their acts, not their motives.⁹⁶ Indeed, it has long been settled that courts will not inquire into the motivation of political decisions to take private property, thus making their *bona fides* judicially off limits.⁹⁷ California’s focus on the regulators’ objective good faith is thus wholly contrary to the U.S. Supreme Court’s consistent teachings. And yet, the war goes on.

This discussion could continue, but we believe the point has been made. Insofar as “the taking issue” is concerned, California’s judiciary was in open intellectual rebellion before 1987, and it remains so to this day. It is in the nature of holy wars that they do not easily dissipate. When California began this trek, it was at least candid

93. *Id.* at 174 (emphasis added) (citations omitted). In a similar vein are cases like *Preseault v. I.C.C.*, 494 U.S. 1 (1990), *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), *Dames & Moore v. Regan*, 453 U.S. 654 (1981), and the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). In each of them, the Court was faced with the claim that Congress, in pursuit of legitimate goals, had taken private property in violation of the Fifth Amendment. In each, the Court directed the property owners to the Court of Federal Claims to determine whether these exercises of legislative power, *though legitimate*, nonetheless required compensation. This bedrock principle of the law of constitutional remedies goes back to the unanimous decision in *Hurley*, where the Court held that the remedy for a taking resulting from validly constructed government works is just compensation, not judicial second guessing of valid government policies and decisions. *Hurley v. Kincaid*, 285 U.S. 95 (1932).

94. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

95. *Id.* (emphasis added).

96. *See Int'l Paper Co. v. United States*, 282 U.S. 399 (1931).

97. *See, e.g., Rindge Co. v. Cnty. of L.A.*, 262 U.S. 700, 709 (1923); *Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

in *Agins I* that the primary concern was fiscal; a straightforward application of the plain language of the Fifth Amendment's guarantee against uncompensated takings would simply cost too much for government to bear.⁹⁸ That has never been an accepted rationale in other fields, and it is owed no deference here either.⁹⁹

Finally, it bears noting, if only in passing, that the California Supreme Court's ruling in *Agins I* also disregarded state law of pleading. Modern California pleading law does not require a pleader to plead legal theories.¹⁰⁰ A cause of action must be stated by pleading ultimate facts—not evidentiary facts nor legal conclusions. All that is required is that the pleaders state concisely the ultimate facts giving rise to their cause of action, and if any cause of action arises from the well-pleaded facts, the court will grant an appropriate remedy, irrespective of what relief the pleaders ask for.¹⁰¹ Thus, the prayer for relief is not deemed a part of the complaint and, if the well-pleaded facts indicate that a remedy is available on any theory, the court will grant it.¹⁰²

But in *Agins I* the California Supreme Court held that instead of granting the plaintiffs leave to amend their complaint even once, it would dismiss the action—a procedural step right out of common law pleading that California discarded in the nineteenth century when it adopted the Field Code,¹⁰³ to say nothing of strictly followed California judicial policy liberally granting leave to amend defective pleading. Where the pleaders asked for the wrong remedy (i.e., for just compensation instead of non-monetary relief), their action should not have been dismissed. Rather, they should have been allowed leave to amend to adapt to the new law being laid down by the Supreme Court.

98. *Agins v. Tiburon*, 598 P.2d 25, 30–31 (Cal. 1979).

99. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

100. 1 BERNARD WITKIN, CALIFORNIA PROCEDURE, Pleading § 378, at 513 (5th ed. Supp. 2018); see also *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (noting that the public is entitled only to what it paid for).

101. *Boren v. State Pers. Board*, 234 P.2d 981, 983 (Cal. 1951) is directly on point: “As against a general demurrer, however, it is unimportant that plaintiff’s pleading was not in form a petition for mandamus or certiorari. All that is required is that plaintiff state facts entitling him to some type of relief, and if a cause of action for mandamus or certiorari has been stated, the general demurrer should have been overruled.” (citations omitted). Compare *Agins I*, where the court held the opposite without citing any supporting authority, 598 P.2d at 31.

102. WITKIN, supra note 100, §§ 30–31, at 95. It should also be noted that California follows the so-called “primary right” theory of pleading (*id.* § 34, at 98) under which a cause of action is deemed stated if the pleadings allege a breach of a primary right of the pleader. And, of course, the right to use one’s property is one of the owner’s primary rights that goes to the very definition of “property.” CAL. CIV. CODE § 654.

103. WITKIN, supra note 100, § 1, at 65.

Remedies for Uncompensated Takings

It is remarkable that the issue of what is the proper remedy for uncompensated takings should arise in California, much less by a purely conclusionary statement of the California Supreme Court. Before *Agins I*, California courts uniformly held that the remedy for uncompensated takings was the just compensation specified in the Constitution.¹⁰⁴ The first impression California case was *San Diego Land & Town Co. v. Neale*,¹⁰⁵ in which the California Supreme Court reversed a lower court order purporting to restore the uncompensated land owner to possession of his taken land, holding that the sole remedy was an award of damages. A series of similar holdings followed.¹⁰⁶

The same was true of the federal law. As noted *supra*, under federal law, the proper remedy for uncompensated takings has historically been the constitutionally mandated just compensation for what was taken.¹⁰⁷ Justice Louis Brandeis's unanimous 1932 opinion in *Hurley v. Kincaid* was consistently followed by the U.S. Supreme Court, with cases holding that just compensation was the aggrieved property owner's sole remedy.¹⁰⁸ That rule was unequivocally reiterated in *Ruckelshaus*. Although analyzed in the context of intellectual property, the Court made clear that it was invoking the rules developed in the real property takings context because they were the same. Property is property. Consistency, although something to be devoutly desired in the law, seems to have eluded the U.S. Supreme Court in this field. This line of cases was based on the long-settled principle that equitable (non-monetary) remedies are available only when the (monetary) remedy at law is inadequate.

In support of its pre-*Agins I* holdings on remedies, the U.S. Supreme Court also relied on a separation-of-powers rationale, explaining that courts have historically declined to superimpose corrective authority upon considered government decisions of the other branches of

104. CAL. CONST., art. I, § 14 (revised in 1976 and renumbered Art. I, § 19).

105. 20 P. 380, 380 (Cal. 1888); *accord* *Tyler v. Tehama Cnty.*, 42 P. 240, 242–43 (Cal. 1895) (holding that just compensation was the uncompensated owner's sole remedy, *notwithstanding that the taking was unauthorized*).

106. *E.g.*, *Hillside Water Co. v. City of L.A.*, 76 P.2d 681, 687 (Cal. 1938); *Williams v. Merced Irrigation Dist.*, 18 P.2d 664, 665 (Cal. 1935); *Gurnsey v. N. Cal. Power Co.*, 117 P. 906, 910 (Cal. 1911); *Peabody v. City of Vallejo*, 40 P.2d 486, 497 (Cal. 1935).

107. The only exception known to us was *United States v. Lee*, 106 U.S. 196 (1882), where the Court ordered that General Robert E. Lee's family home (the Custis-Lee mansion) located on the grounds of the Arlington National Cemetery, that had been seized at the end of the Civil War, be returned to its rightful owner.

108. *See* cases collected in Michael M. Berger & Gideon Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A. L. REV. 685 (1986).

government to proceed in a way chosen by them, albeit in disregard of affected land owners' rights. In those days, the California Supreme Court held likewise and also based its holdings on the idea that where uncompensated owners have already suffered substantial impairment of their property rights, an injunction would not afford adequate relief. It would rather, to borrow the words of the late editor of the CEB Condemnation book, M. Reed Hunter, be a "tardy closure of the barn door" after the horse had already departed.

Since the issue has been one of federal constitutional law, we are unable to improve on the clear and concise way in which the Supreme Court put it in *Ruckelshaus*, the most closely contemporaneous case on point which, as it happens dealt with a regulatory taking: "Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking. The Fifth Amendment does not require that compensation precede the taking."¹⁰⁹ How much clearer could the Court have been?

When Justice Sandra Day O'Connor told government counsel in *First English* that the Court had heard "horror stories" about the impact of government regulations on property owners,¹¹⁰ she was summarizing the collective impact of the numerous *amici curiae* briefs filed on the owner's side in that case. Those briefs showed the following sorts of "horrors stories."

— *Item*: the California Building Industry Association (CBIA) noted half a dozen reported cases in which heavy regulation resulted in property owners losing their property through foreclosure.¹¹¹ Beyond that, the Court itself was aware of its own recent case of *Williamson County Regional Planning Commission v. Hamilton Bank*,¹¹² in which the property owner appearing before the Court was the bank that had taken over the subject property after foreclosing because the county's actions precluded completion of the development by the original property owner.

— *Item*: CBIA reported on various other doomed development projects, some proposed by experienced developers, others by ordinary people. *Kinzli v. City of Santa Cruz*, for example, involved a

109. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) (citations omitted).

110. See *supra* text accompanying note 43.

111. *Jacobson v. Tahoe Reg. Plan. Agency*, 566 F.2d 1353 (9th Cir. 1977); *Orsetti v. City of Fremont*, 80 Cal. App. 3d 961 (1978); *Hollister Park Inv. Co. v. Goleta County Water Dist.*, 82 Cal. App. 3d 290 (1978); *Frisco Land & Min. Co. v. State*, 74 Cal. App. 3d 736 (1977); *County of Los Angeles v. Berk*, 26 Cal. 3d 201 (1980); *Toso v. City of Santa Barbara*, 101 Cal. App. 3d 934 (1980) (cited at CBIA Amicus Brief, at 6 n.6).

112. 473 U.S. 172 (1985) [hereinafter *Williamson County*].

septuagenarian farmer's widow and her children, who lacked the skills to deal with the municipal regulatory gauntlet that she faced.¹¹³ Unable to develop the land herself, she was also unable to sell it to a developer because developers had no interest in facing hostile municipal regulations.

— *Item*: CBIA also told the Court of recent experience under a San Francisco development ordinance where permits were denied for such vague reasons as the design was not “architecturally superior” or that the city has “more than adequate space at this time.” That same brief reported on a Utah developer who had thirteen different development proposals rejected, after which he lost the property through foreclosure.¹¹⁴

— *Item*: The National Association of Home Builders (NAHB) showed the Court how municipalities in various parts of the country engaged in foot-dragging and game-playing in the evident hope of outlasting property owners whose developments were unwanted.¹¹⁵ NAHB added to the list of property owners who were eventually foreclosed because of the time delays involved.¹¹⁶

— *Item*: Donald and Bonnie Agins filed an amicus curiae brief in *First English* to update the Court on how they had been treated since the Court decided their case in 1980. In a nutshell, the Agins spent more than a half million dollars in municipal fees over a five-year period to obtain permission to build three homes on their five-acre lot that was zoned to permit five homes. And then the city enacted a moratorium prohibiting any construction.¹¹⁷

113. 620 F. Supp. 609 (N.D. Cal. 1985). Although judgment in favor of the city was reversed on appeal, the “reversal” was meaningless. The Court of Appeals held that the property owner’s claims were not ripe for adjudication. Thus, regardless of the basis for the ruling, the old farmer’s widow lost. See 818 F.2d 1449 (9th Cir. 1987). Similar stories were reported in the CBIA brief, including *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981) (blind, crippled music teacher; mayor apparently told Hernandez “I’m going to get you.”) (discussed in Babcock & Siemon, *supra* note 14, at 189); *Kollman v. City of Los Angeles*, 737 F.2d 830 (9th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985) (plaintiff died before litigation ended, leaving widow to attempt to “ripen” the case; see Judge Reinhardt’s dissent, 737 F.2d at 843–44). The CBIA amicus also referred the Court to Babcock & Siemon, *supra* note 14 at 235–54, for additional illustrations of the nightmares inflicted on ordinary citizens by overregulation.

114. See CBIA Amicus Brief, at 12.

115. NAHB Amicus Brief, at 14–15 (discussing cases such as *Township of Willistown v. Chesterdale Farms, Inc.*, 341 A.2d 466 (Pa. 1975) (multiple rezonings to preclude apartments); *Henle v. City of Euclid*, 125 N.E.2d 355 (Ohio App. 1954) (city rezones after losing lawsuit)).

116. *Klopping v. City of Whittier*, 8 Cal. 3d 39 (1972).

117. Agins Amicus Brief, at 5–6.

— *Item*: The American College of Real Estate Lawyers demonstrated how extreme forms of land use regulation end up “subsidizing certain favored citizens at the expense of others who are either excluded by the lack of housing within their means, or who pay ‘premium’ prices for the restricted housing supply which results from such regulation.”¹¹⁸ Unrestricted government regulation drives up housing cost, and the absence of a compensatory remedy aids and abets such regulation.

— *Item*: Even the Solicitor General, appearing amicus curiae in support of the County, had to concede that “[i]t is clear that restrictive land-use regulations can result in an uncompensated taking of property that is prohibited under the Takings Clause of the Fifth Amendment.”¹¹⁹ That brief asserted there was no need for a constitutional remedy for regulatory takings because Congress had enacted a civil rights remedy under 42 U.S.C. § 1983 that provided a damages remedy for actions of local government entities. Numerous citations to cases in which damages were awarded under that statute were discussed in the brief.¹²⁰

Strangely enough, during the period between *Agins II* and *First English*, the California Supreme Court essentially absented itself from the field, deciding no regulatory taking cases at all. Its absence, while California’s lower courts remained quite active in evaluating regulatory takings (while constrained by *Agins I*), was so striking that one of us wrote a short article about the Supreme Court’s “curious absence.”¹²¹ The other member of this writing duo expressed concern about poking a wild animal that is not bothering you,¹²² but the article was published anyway. To the chagrin of property owners and their counsel, the California Supreme Court came back to life.¹²³

118. Brief of American College of Real Estate Lawyers, at 24.

119. Solicitor General Amicus Brief, at 6.

120. *Id.* at 30–34.

121. Michael M. Berger, *Silence at the Court: The Curious Absence of Regulatory Takings Cases from California Supreme Court Jurisprudence*, 26 LOY. L.A.L. REV. 1133 (1993) (prepared at the instigation of the organizers of a symposium on the California Judiciary at Loyola Law School).

122. A sin that was acknowledged: “The warning is oft-repeated that one who asks the gods for intervention plays a dangerous game and may be cursed by having a wish granted. Whether one unleashes a demon, a genie or a court of last resort, the results are generally unpredictable.” *Id.* at 1143.

123. See, e.g., *Landgate, Inc. v. Cal. Coastal Comm’n*, 17 Cal. 4th 1006 (1998); *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th 952 (1999); *San Remo Hotel v. City & County of San Francisco*, 27 Cal. 4th 643 (2002); *Galland v. City of Clovis*, 24 Cal. 4th 1003 (2001); *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761 (1997); *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996).

Conclusion

It is customary for law journal authors to conclude their articles with suggestions on how legal doctrine should be made to conform to their preferred policies. Here, we have resisted the temptation to do that since we believe that awarding just compensation to owners of taken property is a remedy explicitly included in our constitutional law, so that reforms and correction in the law should focus on pruning and simplifying what “law” there is, to eliminate the at times nightmarish complexities of what now passes for controlling law. At this time, the maddening procedural mess that aggrieved property owners have to go through in an effort to achieve “ripeness” mocks them instead of providing them with relief.

What takings law needs is not more rules—it has too many as it is¹²⁴—but rather the elimination of prevailing anomalies, contradictions, and just plain bad law with which this field is replete.¹²⁵ We are content for now to describe what, with all due respect, have been acts of municipal and judicial misgovernance as the *Agins* case wended its way through the court system to its ignominious overruling in the *First English* and *Lingle* cases, producing the ongoing intellectual, economic, and moral train wreck that has been takings law in general and its impact on California housing in particular.¹²⁶

The breathtaking extremism of the now prevailing California rules makes clear that “the system” has gone too far by singling out American property owners as some sort of pariahs who are banned

124. As Fred Bosselman once put it, “[O]ur system of land use and environmental regulation [can] become so Byzantine as to deny due process of law to the participants through the sheer complexity of the system.” See DONALD HAGMAN & DEAN MISCZYNSKI, *WINDFALLS FOR WIPEOUTS* 12 (Am. Soc’y of Planning Officials 1978).

125. Case in point: in *Williamson County*, the U.S. Supreme Court held that Tennessee state law provided a remedy for regulatory takings, so the federal taking case was unripe until after the plaintiff-landowner exhausted that existing state court remedy. But this was a judicial blunder (or at least a failure of the Supreme Court’s vaunted research attorney system). At the time, Tennessee law provided no such remedy, as explained in the Tennessee Supreme Court’s decision in *B & B Enterprises v. County of Lebanon*, 318 S.W.3d 839, 845 (Tenn. 2010)—the first time the Tennessee Supreme Court had an opportunity to address the issue of remedies for regulatory takings after *Williamson County*.

126. See Editorial, *California Prays to the Sun God*, WALL ST. J., May 11, 2018, at A12 (“[H]undreds of thousands of middle-class Californians are fleeing. In 2016 Arizona welcomed twice as many Californian refugees as Mexican immigrants. California’s labor force last year expanded by a mere 1% compared with 2.2% in Nevada and Arizona. Sharing a border with California is a gift that keeps on giving.”). This topic of homelessness in California and its land use implications could be the subject of several law review articles and is thus afiel from the current effort. But it cannot go without mention that California is in the midst of an increasingly catastrophic housing crisis in which thousands of homeless people are living in cars and camping out in streets and parks.

from the federal courts altogether and who are routinely denied relief in California courts. California is the largest, most populous, and most highly regulated state, so one would expect to see its share of successful regulatory takings cases. If nothing else, the law of averages would lead one to anticipate that the numbers would eventually even out. But, in fact, property owners have never won such a case in the California Supreme Court, which, as noted earlier, has gone out of its way to rule against them.¹²⁷ The *Agins* litigation went through four court levels, but—with one exception¹²⁸—every one of the twenty judges who contributed to it proved to be wrong, and the *Agins* case had to be overruled, not once, but twice. After nearly a decade of foot-dragging, the U.S. Supreme Court finally so concluded.¹²⁹

The doctrinal, economic, and ethical mess left behind by the United States Supreme Court's fits and starts engendered by *Agins* and its progeny is rooted in a basic idea that ideologues whom Professor Daniel Mandelker aptly called "police power hawks" tried to impose on American property law.¹³⁰ They meant to import into the United States the ideas underlying British post-World War II legislation¹³¹ whereby the right to develop land would cease to be private and become public.¹³² An effort to transplant it to the United States

127. At the same time, in the Orwellian mode of "all animals are equal but some animals are more equal than others," the California courts have shown a penchant for treating one government agency even more gently than others, refusing to impose liability even when imposing it on other agencies. See Michael M. Berger, *You Can't Win Them All—Or Can You?*, 54 CAL. ST. BAR J. 16 (1979) (comparing judicial treatment of the California Coastal Commission with that meted out to other government agencies on identical issues).

128. That exception was the late California Supreme Court Associate Justice William P. Clark, Jr., who dissented in *Agins I*. Not only did Justice Clark's dissent prove prescient substantively when California's *Agins I* opinion was eventually overruled in *First English*, but he also accurately predicted that the California courts' uncritical acquiescence in extreme government land-use regulations would lead to a cleavage of the California housing market into the well housed haves and the have-nots. In Justice Clark's words, "Perhaps of greater concern is the consequence that Tiburon—and many other governmental agencies enacting similar land use plans—will price properties within their control out of reach of most people." That is exactly what came about and is now adding to the hordes of homeless people living in the streets.

129. See *First English*, 482 U.S. at 311 (holding that *Agins I* was "inconsistent" with Fifth Amendment jurisprudence); *Lingle*, 544 U.S. at 540 (holding that the *Agins II* taking test was based on the wrong doctrine).

130. See DANIEL R. MANDELKER, *LAND USE LAW*, at v (1982).

131. The Town and Country Planning Act of 1947, 10 and 11 Geo. VI, ch. 51; see Arthur Shenfield, *The Mirage of Social Land Value: Lessons from the British Experience*, APPRAISAL J., Oct. 1976, at 523, 528–29; ELLEN FRANKEL PAUL, *PROPERTY RIGHTS AND EMINENT DOMAIN* 54–56 (1987).

132. See Gladwin Hill, *Authority to Develop Land Is Termed a Public Right*, N.Y. TIMES, May 20, 1973 (reporting the recommendation of the Advisory Committee

by judicial fiat also failed but only after destabilizing and confusing the pertinent law to an almost indescribable extent. At this point, litigating to demonstrate a regulatory taking is an activity de facto available only to people with fortunes in litigation budgets and a decade or so in which to pursue a convoluted procedural path said to lead to judicial relief, but in reality producing neither justice nor good law on which citizens can rely.¹³³ What we got instead is a regime of protracted litigation that as often as not fails to provide relief to the constitutionally aggrieved property owners, and confuses the law some more. Rather than good or at least reliable law, it has given us multi-factor “tests” that instead of providing predictability, permit judges to reach whatever results they want—typically favoring the government—since no one has bothered to explain the weight of each such “factor” in reaching a decision whether a taking has occurred or how many of them are essential to a finding that a taking has occurred.¹³⁴

What we thus have to deal with is a judicially created body of law that even years ago, before it reached its present nadir, was colorfully described as a “Serbonian bog.”¹³⁵ Today’s state of the pertinent law has gone even this colorful epithet one better. In 2004, we sat down and collected all the terms of invective that have been heaped on this field of law by commentators *on both sides of the issue*—and

on Environmental Quality that the private right to develop land be done away with and replaced with a “public right” to prevent it); FRANKEL PAUL, *supra* note 131, at 26–28.

133. See *Monks*, 167 Cal. App. 4th 263. For a collection of cases in which property owners were able to persevere and prevail, see Michael M. Berger, *Property, Democracy, & the Constitution*, 5 BRIGHAM-KANNER PROP. RTS. CONF. J. 45, 58 (2016).

134. It might appear, however, that a single factor—if considered serious enough by a court—could suffice. See, e.g., *Hodel v. Irving*, 481 U.S. 704, 716–17 (1987) (elimination of right to pass property by intestacy—an important stick in the property rights bundle—was enough to constitute a taking). Back in 1975, the California Supreme Court observed that judicial use of phrases like “police power regulation” or “taking” are merely shorthand labels that the courts affix to describe results of controversies before them. However, “neither hard nor easy cases are decided by such merely verbal lines.” *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 522 (1975). And yet the process continues. In its most recent foray into regulatory takings law, the U.S. Supreme Court created another amorphous multi-factor test to allow courts and litigants to determine what the relevant parcel is when trying to evaluate the impact of regulations. See *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017).

135. See Richard C. Ausness, *Wild Dunes and Serbonian Bogs: The Impact of the Lucas Decision on Shoreline Protection Programs*, 70 DENV. U.L. REV. 437, 437 n.3 (1993) (quoting “an exasperated state court judge” in *City of Austin v. Teague*, 570 S.W.2d 389, 391 (Tex. 1978), and *Brazos River Auth. v. City of Graham*, 354 S.W.2d 99, 105 (Tex. 1962)). The reference is to a legendary bog adjoining Lake Serbonis in North Africa, “where armies whole have sunk.” See JOHN MILTON, *PARADISE LOST* II:592–95.

a few frustrated judges, to boot. We quickly found forty-one epithets directed at the judicial handiwork, ranging from “deceptive” to “inherently nonsensical.”¹³⁶

In short, ideas have consequences, and bad ideas have bad consequences. We stated at the beginning of this article that we refrain here from proffering doctrinal solutions to this mess because, among other things, the record of the past thirty-eight years demonstrates that all too often such attempts fall on deaf ears or make things worse by confusing the law some more.

The doctrinal problem is that some of the debate is not being conducted in good faith. Too many government-minded actors in this never-ending drama have made it clear that what they have in mind is not improvement in the law of takings, but rather the elimination of inverse condemnation as a remedy that the Fifth Amendment to the Constitution extends to aggrieved property owners—at least in regulatory taking cases. Such a development was unsuccessfully proposed by the influential tract, *The Taking Issue*, which openly called for the elimination of this remedy.¹³⁷ So far, the U.S. Supreme Court has denied them their fondest wish of overruling *Pennsylvania Coal Co. v. Mahon*.¹³⁸ Such a development would have eliminated an important central pillar supporting America’s property rights that, in turn, are indispensable to a free society.¹³⁹ It has not extended meaningful, reliably accessible legal protection to owners of property rights.¹⁴⁰ So as one of us put it in an earlier article discussing the

136. Michael M. Berger & Gideon Kanner, *You Can’t Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 *URB. LAW.* 671, 702–03 (2004).

137. The plot to overturn *Mahon* and eliminate inverse condemnation as a remedy for regulatory takings is laid out in FRED BOSSELMAN, DAVID CALLIES & JOHN BANTA, *THE TAKING ISSUE* (1973).

138. See *Keystone Bituminous Coal Ass’n v. DeBenedictis* 480 U.S. 470 (1987). The fundamental difference between the anti-subsidence statutes at issue in *Mahon* and *Keystone* is that the former dealt with subsidence caused by mining anthracite coal, while the latter dealt with similar subsidence caused by mining bituminous coal. And yet, although the Supreme Court found a taking in the former and no taking in the latter, it found a way to distinguish *Mahon* without actually overruling it. A few months later, *Mahon* was expressly affirmed in *First English*, 482 U.S. at 316.

139. See Tom Bethell, *The Mother of All Rights*, REASON, Apr. 1994, at 41 (explaining that much of the violence and instability in the Middle East is causally related to the widespread absence of enforceable property rights); JAMES ELY, *THE GUARDIAN OF EVERY OTHER RIGHT* (3d ed. 2008).

140. To the best of our knowledge, in the thirty-eight years since *Agins II*, the Supreme Court has affirmed only one monetary award to a landowner complaining of a regulatory taking of land. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999). Much of the blame for that can be laid at the feet of *Penn Central*, which has been elevated to “polestar” status by the Supreme Court (see *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O’Connor, J., concurring)), but the only

impact of *Williamson County*, anarchy reigns supreme¹⁴¹ and, at this rate, bids fair to continue doing so.¹⁴²

Epilogue

After this article was largely completed, the Supreme Court granted certiorari in *Knick v. Township of Scott*,¹⁴³ which presents the question:

Whether the Court should reconsider the portion of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194–96 (1985) requiring property owners to exhaust state court remedies to ripen federal takings claims as suggested by Justices of this Court?¹⁴⁴

This development provides the Court with an opportunity to at least begin cleaning up the intellectual and moral mess produced by the past thirty-eight years of judicial ad hoc decision making in the takings field of law. Having done our share of marching up and down this hill, we think it is time to begin the task of rectification. As of now, this field of law has inspired a stream of invective directed

guidance it provided was to say that takings cases should be decided on the basis of a mélange of factors, rather than rules. (Although *Penn Central* noted three factors, other courts have cited as many as ten. See *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851 (Cal. 1997); *East Cape May Ass'n v. Dept. of Env. Protection*, 693 A.2d 114 (N.J. App. 1997).) The upshot of that was to put the judicial thumb firmly on the governmental side of the balance. The court confessed that it had been “simply unable” to articulate the basis for an inverse condemnation cause of action and that it decides these cases on an *ad hoc* basis. Some “polestar.” Examining the *Penn Central* line of cases, Professor Merrill noted that “a totality of the circumstances analysis masks intellectual bankruptcy.” (Thomas W Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 93 (1986)). As Professor Sterk concluded with understatement, “*Penn Central* hardly serves as a blueprint for a municipality or a court seeking to conform to constitutional doctrine.” Sterk, *supra* note 44, at 232; see also *id.* at 253 (“Whenever the Court conducts a *Penn Central* analysis of a state or local regulation, the regulation stands.”). See generally John D. Echeverria, *Is the Penn Central Three Factor Test Ready For History's Dustbin?* 52 LAND USE L. & ZONING DIG. 3 (2000). For a detailed analysis of *Penn Central*, see Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transp. Co. v. City of New York*, 13 WM. & MARY BILL RTS. J. 653 (2005); see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (When an appellate judge says that “the issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law.” Equality of treatment is then “impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated [and] judicial courage is impaired.”).

141. See Michael M. Berger, *Anarchy Reigns Supreme*, 29 WASH. U. J. URB. & CONTEMP. L. 39 (1985).

142. See *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017).

143. Docket No. 17-647, 188 S. Ct. 1262 (2018).

144. *Id.* Petition for a Writ of Certiorari, *Knick v. Township of Scott* (No. 17-647), at 1 (citations omitted).

at the Court's handiwork by informed commentators on both sides of the issue—and some frustrated judges, as well. The stakes are simply too big, and the consequences of the present unsettled state of the law are too socially and economically destructive to permit as important¹⁴⁵ a constitutional provision as discernible and reliable legal protection of private property to drift in an *ad hoc* manner, encouraging a regime of regulatory extremism and thus contributing to a growing housing crisis.

On the one hand, we conclude by hoping for the best, or at least for a significant improvement in the state of pertinent law. On the other hand, this may be no more than yet another chapter in the saga of Charlie Brown of “Peanuts” cartoon fame, being assured by Lucy that this time, this time for sure, she will hold the football for him as he tries to kick it.

In litigating this difficult issue before a court that demands of counsel that they conform to exquisitely difficult and ever-changing standards of pleading and proof, even as it candidly confesses its own inability to articulate a coherent statement of an inverse condemnation cause of action, anything is possible.

Stay tuned.

145. The title to Professor James Ely's book about property rights says it all: JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT* (3d ed. 2008).

Epilogue, Part Deux

When we said “anything is possible,” we were not thinking about oral argument. After all, the Court had granted certiorari on an extremely limited question, i.e. whether *Williamson County* should be “reconsidered.” Crazy optimists that we are, we assumed that the Court understood what it was reconsidering and what the effect of such a reconsideration might be.

Silly us.

The facts in *Knick* are straightforward. By regulation, the township took an easement—i.e., an interest in land—across the Knick property to provide public access to an ancient graveyard. The substantive question is whether that was a taking of Ms. Knick’s property that required compensation.¹⁴⁶ The only issue was *where* Ms. Knick had to file her case, in state or federal court. We wish we could report that the Justices’ questions and comments at the *Knick* oral argument demonstrated a clear understanding of the preposterous procedural mess that *Williamson County* has made of the last three or four decades of regulatory takings litigation.¹⁴⁷ Instead, we need to begin this discussion by noting that at least some members of the Court appear to have little or no understanding of the difference between direct and inverse condemnation.

Let’s start with the Chief Justice. That seems fair for two reasons. First, when he was a lawyer, he actually argued a regulatory taking case in the Supreme Court. On behalf of the government. And he won. Against us. That was the *Tahoe-Sierra* case, one of the last cases he handled as a lawyer before taking the bench. So you’d think that he had some understanding of its core concepts. Second, he was the first Justice to ask a question. Here is what he opened with:

“Well, I thought that was the whole point of an inverse condemnation. [Pay attention here.] *They recognize that they owe her money*, and the whole point of the process, which can be fairly elaborate, is that *they’re just trying to figure out how much*. If it’s not enough, then she can bring a claim.”¹⁴⁸

No. No. No. How often must we explain this to judges? “They” (that is, government officials) recognize no such thing. On the contrary, they are defendants in an *inverse* condemnation case precisely because they *deny* that they have taken anything or that they owe

146. See *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (ordering the opening a private marina to the public held to be a taking).

147. See materials collected at note 25 *supra*.

148. Transcript of oral argument, p. 4.

any compensation. If they “recognized” a debt, there could be no litigation whether a taking has occurred. Or how about “they’re just trying to figure out how much.” But that is the question in a direct eminent domain where the taking is conceded. And the upshot? “If it’s not enough, then she can bring a claim.” Really? “A claim?” Where? For What? Isn’t such a “claim” the very thing she just litigated, only to be shortchanged?

It is in a DIRECT (not inverse) condemnation case that “they” recognize that since they have taken the owner’s property, they owe her the “just compensation” mandated by the Fifth Amendment; there they only want the court to tell them “how much.” In other words, the whole idea of a direct condemnation is that the government concedes liability, and the case is solely about how much is owed. An inverse condemnation plaintiff bears the significant added burden of proving to the court that a taking has occurred.¹⁴⁹ Only after that is the property owner allowed to claim compensation.¹⁵⁰

Justice Kagan continued in this vein about the use and purpose of inverse condemnation [notice that she starts the same way the Chief did]:

“But I thought that the question here arose from the fact that *the state has not said yet that it’s not compensating*, that, instead, *it uses the inverse condemnation proceeding to make that determination*. Is that wrong? . . . In other words, the *state had not denied liability, nor had the state conceded liability*. So this isn’t a -- a question where the state has said: Look, we deny any liability. It’s -- it’s -- the state hasn’t said one way or the other.”¹⁵¹

On the contrary. The governmental posture in defending ANY inverse case—whether regulatory or otherwise—is to claim that the government has done NOTHING compensable and owes the property owner nothing. That is what *inverse* condemnation is all about. That the underlying posture of *Knick* fit this mold was made clear during Justice Alito’s questioning of the township’s counsel.

“JUSTICE ALITO: Does the township owe Ms. Knick any money, any compensation?”

149. The Court has acknowledged this for years. *See, e.g., United States v. Clarke*, 445 U.S. 253, 255–56 (1980).

150. The Chief seemed eventually to recall some basic eminent domain law when he nailed the township’s counsel with the plain statement that “it turns out there was a violation of the constitutional right at the moment of the taking, right? That’s the whole point of interest.” Government counsel denied that interest was owed from the date of the property’s invasion (or taking), but could offer no reasoned explanation for that denial.

151. Transcript of oral argument, pp. 13, 15.

“MS SACHS: That has yet to be determined, Your Honor.

“JUSTICE ALITO: “You don’t know whether you owe her any money? . . . Are you going to go back to your office and – and think about that, and then send her a letter saying whether you owe her any money? You can’t tell me whether you owe her any money?”

“MS SACHS: The state has to tell her whether we owe her any money, Your Honor.¹⁵²

“JUSTICE ALITO: You are the state. You represent the township. The township is part of the state. So what is before us here is the Commonwealth of Pennsylvania. Does the township owe her any money? Yes or no? I don’t see how you cannot have an answer to that question.”

Of course, counsel said that she could not make such a call at this time because “that’s why” we have an inverse condemnation proceeding. But refusing to be ignored, Justice Alito continued:

“If she files an inverse condemnation proceeding, are you going to -- are you going to confess that you owe her money, at the outset?”

After some babbling, counsel came to the point: “I think the township would say there has been no taking.”

Justice Breyer provided an interesting new translation for a Latin phrase with which we are all familiar, *stare decisis*. As he put it: “But Williamson was decided 32 years ago. This is a very complicated area of law. Why not let sleeping dogs lie? It’s called *stare decisis*.” In fact, he was so taken with his witticism that he repeated it later in the proceedings. But the court is in the business of cleaning out “sleeping dogs.” In the very field that we are currently examining, the Court re-examined *Agins v. Tiburon* and eliminated it as a precedent that had been repeatedly cited for a quarter-century.¹⁵³

Justice Breyer had another interesting—if less humorous—jurisprudential thought: “there’s no reason in history that federal courts have to be open to every federal claim. I mean, *sometimes they are. Sometimes they’re not.*” We don’t intend to belabor the point.¹⁵⁴ We will note only two things. First, in the classic 1946 case of *Bell v. Hood*¹⁵⁵ (and its progeny), the Court held directly that “the party who brings a suit is master to decide what law he will rely upon.” So if the plaintiffs rely on federal law, they are entitled to a federal forum for trial if that is what they also choose. Second, as the Court

152. This concept of “the state” having to do something lies at the heart of the Williamson County problem. See *supra* note 25.

153. See *Chevron v. Lingle*, 544 U.S. 528 (2005).

154. See the amicus brief that one of us filed in *Knick* on behalf of the Institute for Justice, Owners Counsel of America and Professor Daniel R. Mandelker.

155. 327 U.S. 678 (1946).

emphasized in *Mitchum v. Foster*,¹⁵⁶ among many others, the point of 42 USC § 1983 was to “interpose the federal courts between the States and the people, as guardians of the people’s federal rights.” You can’t do that if you compel suits to be brought or tried in state courts. That would nullify § 1983.

But wait; there’s more. As if there were not enough to chew on, we ought to note that *Knick* was argued before Justice Kavanaugh was sworn in, so that there were only eight Justices considering the case. One month after the *Knick* argument, the Court issued a Delphic order, which reads in its entirety:

“This case is restored to the calendar for reargument. The parties and the Solicitor General are directed to file letter briefs, not to exceed 10 pages, addressing petitioner’s alternative argument for vacatur, discussed at pages 12-15 and 40-42 of the transcript of oral argument and in footnote 14 of petitioner’s brief on the merits. The briefs are to be filed simultaneously with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, November 30, 2018. Reply briefs, not to exceed 4 pages, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 21, 2018.”

Time and space limit our ability to even attempt to analyze the meaning of this order. Perhaps it will become apparent when the opinion is finally written.

We leave any of you with academic connections with this thought from Justice Breyer, following up on whether to let sleeping dogs lie or to overturn thirty-plus year old precedents: “Maybe it will be a boon to law schools that have courses to catch property lawyers up on what’s going on.”

156. 407 U.S. 225 (1972).

