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The Abnormalcy of Normal Delay

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The Abnormalcy of Normal Delay

This Comment will examine the constitutionality of delay in regulatory land-use actions. In particular, this Comment will analyze the "normalcy" standard first announced in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*[1] and propose that regulatory delays, which are protracted or involve wrongful regulatory decisions or abuse, should be recognized as takings of property requiring just compensation.

The protection of property ownership is a fundamental theme in American constitutional thought.[2] The ownership of property not only allows the individual a refuge in which to build home and family life, but is also a vehicle whereby man is able to realize other inalienable rights.[3] The Fifth Amendment of the Constitution, specifically the Takings Clause, reflects this ideal by providing a self-executing mechanism whereby, when property is taken, the natural law principle of full-indemnification is realized.[4]

Although James Madison hinted at the idea that property could be taken indirectly, regulatory takings did not gain constitutional dimension until the landmark decision in *Pennsylvania Coal Company v. Mahon*.[5] Justice Holmes,

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1. 482 U.S. 304 (1987); *see* discussion *infra* Part II.

2. The philosophy of William Blackstone is embedded in the framers' construction of property protections. *See* DUKEMINIER & KRIER, PROPERTY 1102 (4th ed. 1998) (quoting 1 WILLIAM BLACKSTONE COMMENTARIES *139: "[S]o great . . . is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.").

3. *See* Douglas W. Kmiec, *Property and Economic Liberty as Civil Rights: The Magisterial History of James W. Ely, Jr.*, 52 VAND. L. REV. 737, 753 (1999) ("The private nature of property is protected not because ownership is a good in itself, but because it fulfills higher goods, including: the security against theft, civil disorder, and violence; the incentive to work and to find worth in that work and the efforts of others; and the development of neighborhoods that fulfill a deep and natural human yearning for community in both a social and political sense.").

4. *See* U.S. CONST. amend. V (proclaiming that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation"); *see also* Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) (holding that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change"); Alfred R. Gould, Jr., *First English Evangelical Lutheran Church v. County of Los Angeles: Compensation for Temporary Takings*, 48 LA. L. REV. 947, 959 (1988) (explaining that the "self-executing" nature of the compensation means that "[t]he right to compensation is absolute once it has been determined that a taking has occurred").

5. 260 U.S. 393 (1922). At issue in *Pennsylvania Coal* was the Kohler Act, a 1921 statute which prohibited the underground mining of anthracite coal. *See id.* at 412. The prohibition only applied where the mining and subsurface interests were in separate ownership. *See id.* at 413. Pennsylvania Coal argued that the Act was unconstitutional because when they sold the surface rights to the Mahon's they obtained a waiver of all claims arising due to subsidence of the surface. *See id.* at 412. The Kohler Act, Pennsylvania Coal argued, nullified this waiver. *See id.* Justice Holmes held that with the right to the coal implicitly attached the right to mine. *See id.* at 414. As such, the Kohler Act's prohibition on mining stripped Pennsylvania Coal of a property interest in mining the coal. *See id.* at 414-15; *see also* William

writing for the majority, ushered in reinvigorated Fifth Amendment takings claims to the modern Court when he held, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[6] Holmes held that when a regulation went "too far," compensation must be paid.[7] Regulations which went "too far" were seen to interrupt the rights of property ownership that were part of the original bundle–that is, they had the potential to effect possession, use, and disposal of property.[8] Consequently, the police power, although broad, is not immune from the strictures of due process.[9]

The High Court has attempted to solve the takings puzzle by proposing a series of categorical tests. However, the fundamental inquiry focuses on whether a landowner is being disproportionately singled out.[10] The Court has read the Fifth Amendment, therefore, "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[11] The Court's test for measuring this burden is summarized in *Agins v. City of Tiburon*[12] as a two-part formula assessing whether "the ordinance does not substantially advance legitimate state interests, *or* denies an owner economically viable use of his land."[13] The Court has struggled in applying

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Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of* Mahon, 86 GEO. L.J. 813, 814 (1998). Professor Treanor stated:

> When courts and commentators discuss *Pennsylvania Coal Co. v. Mahon*, they use the same word with remarkable regularity: famous. *Mahon* has achieved this fame in part because it was the occasion for conflict between judicial giants, and because the result seems ironic .... The *Mahon* decision is also famous because it has become a virtual surrogate for the original understanding of the Takings Clause. Even though it is generally accepted that the Takings Clause was originally understood to apply only to physical seizures of property, the case law has now firmly established that it applies to government regulations as well.

(Footnotes omitted). *But cf.* Douglas W. Kmiec, *The Coherence of the Natural Law of Property*, 26 VAL. U. L. REV. 367, 380 (1991). Professor Kmiec suggests that "[i]t has been amply demonstrated that the states had little need for the parchment barrier of the Fifth Amendment so long as the natural law origin of property was openly admitted."

6. *Pa. Coal*, 260 U.S. 393, 416 (1922).

7. *See id.* at 415.

8. *See* Kmiec, *supra* note 3, at 754 (stating, "property is more than economic value; it also consists of a right of disposition and control. In other words, the right to exclude") (footnote omitted).

9. *See* Frank R. Strong, *On Placing Property Due Process Center Stage in Takings Jurisprudence*, 49 OHIO ST. L.J. 591, 599 (1988).

10. *See* U.S. CONST. amend. V (stating "nor shall private property be taken for public use, without just compensation"); *see also* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) ("The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.").

11. Armstrong v. United States, 364 U.S. 40, 49 (1960).

12. 447 U.S. 255 (1980).

13. *Id.* at 260 (emphasis added). The *Agins* court made reference to Nectow v. City of Cambridge, 277 U.S. 183 (1928), which states:

> The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.

City of Cambridge, 277 U.S. at 188.

the *Agins* formula, concentrating almost all attention on the second "denial of economic viability" or "deprivation" prong. The focus of this Comment, however, is on the first part of *Agins*. It will argue that the regulatory taking standards set out in Part I below are inadequate to compensate landowners who are left with some economically viable use, but who nevertheless have been unconstitutionally singled out by regulations which fail to further substantial governmental interests.

Part I of this Comment thus introduces regulatory taking jurisprudence generally, examining four categories or circumstances where constitutional compensation is possible.[14] Part II will demonstrate the inadequacy of these established standards in the context of addressing disproportionate burdens associated with regulatory delay, error, or abuse.[15]

I. REGULATORY TAKINGS GENERALLY

The U.S. Supreme Court has enunciated four circumstances whereby aggrieved landowners can prove a taking requiring just compensation: 1) where the regulation results in the physical occupation of property;[16] 2) where the regulation deprives an owner of *all* economic use of property;[17] 3) where the regulation requires an unconstitutional concession of a property interest;[18] or 4) where the regulation satisfies the ad hoc inquiry set forth in *Pennsylvania Central Transportation Co. v. City of New York*.[19]

A. *Physical Occupation of Property*

The Court in *Loretto v. Teleprompter Manhattan CATV, Corp.*[20] held that "a permanent physical occupation authorized by the government is a taking without

14. *See infra* notes 16-43 and accompanying text.

15. *See infra* notes 44-155 and accompanying text.

16. *See* Loretto v. Teleprompter Manhattan CATV, Corp., 458 U.S. 419, 426 (1982); *see also* discussion *infra* Part I.A. and notes 20-24.

17. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015-16 (1992); *see also* discussion *infra* Part I.B. and notes 25-28.

18. *See* Nollan v. Ca. Coastal Comm'n, 483 U.S. 825, 831-37 (1987); Dolan v. City of Tigard, 512 U.S. 374, 394-95 (1994); *see also* discussion *infra* Part I.C. and notes 29-35.

19. 438 U.S. 104, 123-24 (1978); *see* discussion *infra* Part I.D. and notes 36-43.

20. 458 U.S. 419 (1982). At issue in *Loretto* was the placement of a cable television box on Mrs. Loretto's property. *See id.* at 421-22. Teleprompter Manhattan CATV, Corp. placed the box pursuant to a New York law which required landlords to provide cable services on rental facilities. *See id.* at 423. Justice Marshall, writing for the Court, held that notwithstanding the statute's compliance with the police power, the physical occupation of Mrs. Loretto's property constituted a taking of property requiring just compensation. *See id.* at 441. The Court further stated that the size of the area occupied (in *Loretto*, one and one-half cubic feet) is not a factor in determining whether there is a constitutional violation. *See id.* at 436.

regard to the public interests that it may serve."[21] The *Loretto* Court explained that a regulation, to be considered a permanent occupation, must "constitute an actual [physical] invasion of the land, amounting to an appropriation of, and not merely an injury to, the property."[22] Justice Marshall, writing for the Court in *Loretto*, recognized that "[p]roperty rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'"[23] Consequently, a physical occupation of property, according to Marshall, "is perhaps the most serious form of invasion of an owner's property interests . . . the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand."[24]

B. Deprivation of All Economic Use

The Court held in *Lucas v. South Carolina Coastal Council*,[25] that compensation is also required when the effect of regulation leaves property economically valueless.[26] The *Lucas* Court concluded that once an owner proves total economic

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21. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

22. *Id.* at 428 (*quoting*, Sanguinetti v. United States, 264 U.S. 146, 149 (1924)); *see also* Nollan v. Ca. Coastal Comm'n, 483 U.S. 825, 831 (1987):

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.

Id; but see Yee v. City of Escondido, 503 U.S. 519, 531-32 (1992) (holding that the right to exclude prohibited by a rent control ordinance was insufficient to work a taking). The Court found *Loretto* inapposite to the rent control ordinance because "there has simply been no compelled physical occupation giving rise to a right to compensation that petitioners could have forfeited." PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83-84 (1980). The *PruneYard* court held that the invasion was temporary and limited in nature, and since the owner had not exhibited an interest in excluding all persons from his property, "the fact that [the solicitors] may have physically invaded [the owner's] property cannot be viewed as determinative." DUKEMINIER & KRIER, PROPERTY 1130 (4th ed. 1998), *quoting PruneYard*, 447 U.S. at 84.

23. *Loretto*, 458 U.S. at 435 (quoting United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945)).

24. *Id.* Professor Michelman, in summarizing the case law on physical encroachments, asserted, "[t]he modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, never deny compensation for a physical takeover." Frank I. Michelman, *Property, Utility, and Fairness: Comments of the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1967). Professor Michelman continued, "[t]he one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood as to be under private ownership." *Id.*

25. 505 U.S. 1003 (1992).

26. *Id.* at 1019. The Court cited Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (holding that takings were effectuated when land-use regulations: 1) failed to substantially advance a legitimate governmental purpose, and 2) when regulations denied an owner all "economically viable" use of their land). *Cf.* Reashard v. Lee County, 968 F.2d 1131, 1136 (11th Cir. 1992) (enumerating factors to be used when determining whether a regulation has effectuated a total deprivation of all economic use: 1) the history of the property: purchase date, amount purchased for, nature of the title, and the property's original use; 2) the history of the property's development; 3) the history of the zoning regulations which have affected the property; 4) development changes during transfers of title; 5) present nature and size of the property; 6) reasonable investment-backed expectations of the landowner and of neighboring landowners; and 7) the

loss, the burden shifts to the state to prove that a "logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of [the property owner's] title to begin with."[27] This antecedent inquiry requires the government to identify a common law interest from public nuisance or property law that prohibited the requested use and, therefore, would not be a part of the owner's original bundle of rights.[28]

C. Concession of a Property Interest

The Court also recognizes takings where the regulation requires an unconstitutional concession of a property interest. In *Nollan v. California Coastal Commission*,[29] the Court determined the constitutionality of the regulation by requiring an essential nexus between regulatory means and ends. The Court reasoned that there could be a taking when regulatory means are not causally connected with regulatory ends.[30] While heightened scrutiny in this category has traditionally been limited to exactions, by affirming the application of *Nollan* in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[31] the Court effectively extended heightened scrutiny outside of the land dedication context.[32]

Subsequent to *Nollan*, the Court in *Dolan v. City of Tigard*[33] established that

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diminution in value in owner's reasonably investment-backed expectations after the enactment of the regulatory measure).

27. *Lucas*, 505 U.S. at 1027. The Coastal Commission argued that because the State maintained a "traditionally high degree of control over commercial dealings," property owners were on notice that their personal property could be rendered economically valueless. *Id.* The Court disagreed and was unwilling to extend similar reasoning to contexts involving real property. The Court maintained that:

> In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become a part of our constitutional culture.

Id. at 1027-28.

28. *See id.* at 1031. The Court noted that application of state nuisance law requires: analysis of the degree of harm to public lands and resources and adjacent property by the requested use, the social value of the claimant's requested use, suitability of the use to the locality, and the relative ease with which the harm can be avoided by the government and the landowner. The Court also stated that use which has "long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition," especially where the similarly situated landowners are allowed to continue in the use denied to the claimant. *Id.*

29. 483 U.S. 825 (1987).

30. *Id.* at 837.

31. 526 U.S. 687 (1999); *see* discussion *infra* Part II.A.1.b.ii.B. and notes 81-90.

32. The majority, however, found application of *Dolan's* rough proportionality inquiry to be "inapposite." 526 U.S. at 703.

33. 512 U.S. 374 (1994). *Dolan* was based on the conditioning of a development permit on the concession of flood-plain and bikepath easements. *Id.* at 380. The City of Tigard was unable to prove that the dedication of the flood-plain and bike path easements was "roughly proportional" to the increase in flooding and traffic that the proposed development would produce. *Id.* at 394-96. As such, the Court found

in addition to an essential nexus, that regulatory concessions must be "roughly proportional" to the proposed development.[34] While not requiring mathematical precision, the Court held that "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[35]

D. Ad Hoc Factors

When a property interest does not fall within one of the aforementioned categories, the Court has resorted to a set of ad hoc factors to determine whether a regulatory taking has occurred.[36] Precedent confirms that landowners forced to argue using the ad hoc factors have difficulty proving a taking.[37] In *Pennsylvania Central Transportation Co. v. City of New York,*[38] Justice Brennan, guided by Justice Brandeis' dissent in *Pennsylvania Coal,* substituted the established principle of conceptual severance for the theory that courts must evaluate property holistically.[39] Owners, therefore, are deprived of legal, separately recognized property interests merely because they can be amalgamated with others. The three

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a taking. *Id.* at 396.

34. *Id.* at 391.

35. *Id.*

36. *See* Pa. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (stating that the Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons") (quoting United States v. Eureka Mining Co., 357 U.S. 155, 158 (1958)).

37. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Prior to *Euclid,* courts recognized the concept of "compensatory zoning." *Id.* at 369-70. Compensatory zoning provided compensation to private landowners when the government, acting within its police power, adversely effected private land. Sharon A. Woodard, *Constitutional Law–Is Time Running Out for the Government to Dispute Regulatory Takings?*–First English Evangelical Lutheran Church v. City of Los Angeles, 10 CAMPBELL L. REV. 275, 280 (1988) (recognizing that the holding in *Euclid* clearly forsakes the concept of "compensable zoning" and instead illustrates the Court's reluctance to find a taking using the ad hoc factors). In *Euclid,* property owners argued that they were entitled compensation because a city zoning ordinance substantially lowered their property value. 272 U.S. at 371. The Court reasoned that because the landowners maintained some value in the land, there was no taking. *Id.* at 387. *See also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 493 (1987) (recognizing "the heavy burden placed upon one alleging a regulatory taking"); Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 ("The greatest weight is given to the judgment of the legislature . . ."); *but see* Florida Rock Industries v. United States, 45 Fed. Cl. 21, 23 (Fed. Cl. 1999) (finding a regulatory taking after analyzing "economic impact, . . . reasonable investment-backed expectations, and the character of the governmental action" following the denial of a permit application to mine limestone on the subject property).

38. 438 U.S. 104 (1978).

39. *See id.* at 130-31. This issue is far from settled, however, as Justice Scalia's footnote reference in *Lucas* indicates:

> Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured . . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court.

Lucas, 505 U.S. at 1016 n.7.

"ad hoc" factors by which regulatory takings are evaluated under *Pennsylvania Central* are: 1) economic impact–whether the property owner has been left with economic use of his property;[40] 2) reasonable investment-backed expectations–whether the owner has a reasonable expectation in the desired use (looking to state property law to determine whether the owner maintained a "vested property right" in his original bundle);[41] and 3) character of the governmental action–whether the governmental action is regulatory or physical in nature, as well as whether the action is harm-preventing or benefit-conferring.[42]

Pennsylvania Central in application is ungenerous to property owners. However, municipalities and other land use regulators had long evaded compensatory obligation for regulatory measures by an additional practical expedient–dragging their feet. Should a regulation border on invalidity or actually be held invalid, something only slightly less intrusive could always be devised. The unfairness of this practice invited the Court's decision described below, dealing with "temporary takings."[43]

II. WHAT IS "NORMAL DELAY"

The Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*[44] addressed the compensation requirement in temporary taking actions.

In 1978, a flood destroyed twelve acres of Lutheran Church's property, "Lutherglen."[45] Following the 1978 flood, Los Angeles County adopted an interim ordinance, subsequently made permanent, prohibiting both construction and reconstruction of structures in the flood protection area.[46] The Lutheran Church's property was located within the regulated area.[47] The Church alleged that the regulatory ordinance denied them all use of the property and brought an inverse condemnation action against the county alleging a taking of property.[48] Chief Justice Rehnquist, writing for the Court, held that "temporary takings, as here, [which] deny a landowner all use of his property, are not different in kind from

40. *See Pa. Central*, 438 U.S. at 124.

41. *Id. But see* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (refusing compensation in the face of a Pennsylvania statute which indicated a reasonable investment-backed expectation in a property use being extinguished by the regulation).

42. *Pa. Central*, 438 U.S. at 124.

43. *See generally* First English Evangelical Church of Glendale v. County of Los Angeles , 482 U.S. 304 (1987); *see also infra* text accompanying notes 44-55.

44. 482 U.S. 304 (1987).

45. *Id.* at 307.

46. *Id.*

47. *Id.*

48. *Id.* at 308.

permanent takings, for which the Constitution clearly requires compensation."[49]

The Court, in finding a temporary taking, however, "limit[ed] [the] holding to the facts presented, and . . . [did] not deal with the quite different questions that would arise in the case of *normal delays* in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us."[50] The Court continued, "we must assume that the Los Angeles County ordinance has denied appellant all use of its property for a considerable period of years . . . invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy."[51]

The alleged taking in *First English* was based on an allegation of deprivation of all use; however, what if some use or value remains but the regulatory process is extended, or worse, infected by wrongful assertions of regulatory authority? This Comment will argue that in applying *First English*, state and lower federal courts are now employing Chief Justice Rehnquist's benign acceptance of normal delays in a manner that frustrates, indeed conflicts, with the Court's summation of the exact taking standard in *Agins*–that a taking can be found *either* "if the ordinance does not substantially advance legitimate state interests, . . . *or* denies an owner economically viable use of his land."[52]

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49. *Id.* at 318; *see also* Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630, 1656 (1988) ("Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable. Nor does the temporary reversible quality of a regulatory 'taking' render compensation for the time of the 'taking' any less obligatory." Temporary and permanent takings necessarily employ the same constitutional inquiry. Professor Kmiec explains, "This Court more than once has recognized that temporary reversible 'takings' should be analyzed according to the same constitutional framework applied to permanent irreversible 'takings.'"). *San Diego Gas & Elec. v. City of San Diego*, 450 U.S. 621, further depicts the Court's hesitancy to disallow compensation for temporary takings when governmental error can be corrected by reversal. Justice Brennan declared "that 'reversibility' does not in itself yield immunity from the just compensation requirement." *See* Kmiec, *supra* note 49, at 1656 n.140; *see also* Linda Bozung & Deborah J. Alessi, *Recent Developments in Environmental Preservation and the Rights of Property Owners*, 20 URB. LAW. 969, 1016 (1988). Professors Bozung and Alessi state:

> The phrase "temporary taking," however, is a label given to a remedy. It is simply a way to describe the option of rescission given to governing authorities once it has been determined that a regulation effects a taking. If the government wants to keep the ordinance in effect, it must pay compensation reflecting a permanent loss. If, however, the government wishes to reduce the amount of compensation due, it may abandon the ordinance and pay only for the time while the now rescinded ordinance took property.

Id. at 1016.

50. *See First English*, 482 U.S. at 321 (emphasis added).

51. *Id.* at 322.

52. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (emphasis added). The Court relied on *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928), and *Pennsylvania Central Transportation Co. v. New York City*, 438 U.S. 104, 138 n.36 (1978). *See also* Del Oro Hills v. City of Oceanside, 31 Cal. App. 4th 1060, 1074 n.9 (Cal. Ct. App. 1995) (noting that the Supreme Court in *First English* did not have to decide whether the two *Agins* prongs can be rightly read in the disjunctive, that is, "if [the] establishment of one part of the test will suffice to show a taking" because the ordinance in *First English* failed under both *Agins* inquiries); Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735, 770 (1988). Berger argued that because *First English* was a pleading case, the Supreme Court "assumed the truth of the facts alleged in the complaint.

The first prong of the *Agins* inquiry has gone largely ignored by courts in assessing the constitutionality of delay in regulatory taking challenges.[53] The clearest application of *First English* is naturally where a landowner can prove that a wrongful regulatory decision denied him all use for a temporary taking.[54] However, the initial *Agins* prong suggests that takings claims are also possible where the wrongful regulation leaves the landowner with "some" use or value but, nevertheless, fails to advance a legitimate state interest.[55] Such temporary taking challenges seem especially warranted in two contexts: 1) where the regulatory process is particularly protracted, or 2) where litigation has successfully voided regulatory error or abuse, even if some economic value remains in the property during the entire time.

And the complaint alleged that the regulation took 'all use' of the property .... The opinion talks in terms of a taking of 'all use' because that was the only allegation before the Court." *Id.* Thaddeus R. Ailes, Comment, *Not in My Backyard: A Critique of Current Indiana Law on Land Use Moratoria*, 72 IND. L.J. 809, 827 (1997) (forwarding an unnecessarily narrow holding of *First English* as exclusively applying to regulations which deny an owner of all economic use of the property).

53. *See* Douglas W. Kmiec, *How Closely Should Courts Examine the Regulatory Means and Ends of Legislative Applications?*, 22 ZONING & PLAN. L. REP. 97, 98 (1999) ("In *Agins v. City of Tiburon*, . . . the Court got the essentials right. A landowner is improperly singled-out contrary to the Fifth Amendment Taking Clause *either* when he is confronted with regulation that does not substantially advance a legitimate governmental interest *or* when regulation deprives him of all economically viable use. There are litigable issues aplenty imbedded in both of these elements of general regulatory taking law, but it is useful at the outset to state plainly what some regulatory advocates forget and what some state courts continue to confuse: *Either* element is sufficient to raise the taking issue."); *see also* Dwight H. Merriam, *What is the Relevant Parcel in Takings Litigation?*, SC43 ALI-ABA 505, 520-21 (1998) (recognizing that the "substantially advance" prong of the *Agins* inquiry went largely ignored until the Court's decision in *Nollan*); *cf.* Robert K. Best, *Evolution and Thumbnail Sketch of Takings Law*, SB14 ALI-ABA 1, 8 (1996) (alleging that the "vague line between constitutional and unconstitutional temporary restrictions on the use of land is part of the 'great uncertainty' of takings jurisprudence.").

54. *See* Reahard v. Lee County, 968 F.2d 1131, 1136 (11th Cir. 1992) (enumerating factors to be used when determining whether a regulation has effectuated a total deprivation of all economic use, including: 1) the history of the property: purchase date, amount purchased for, nature of the title, and the property's original use; 2) the history of the property's development; 3) the history of the zoning regulations which have affected the property; 4) development changes during transfers of title; 5) present nature and size of the property; 6) reasonable investment-backed expectations of the landowner and of neighboring landowners; and 7) the diminution in value in owner's reasonably investment-backed expectations after the enactment of the regulatory measure); *see also* William J. Brady, *The Emergence of 'Temporary Takings Damages' for Unconstitutional Restrictions on Land Use*, 1987 DET. C. L. REV. 1095, 1118-19 (1987) (arguing that "all use" means less than total deprivation. The author contends that deprivation of "all use" can occur when a regulating agency denies a landowner the right to construct. Moreover, "[s]ince previous case law does not require complete denial of literally all use of the property, it is likely the Court will recognize temporary takings damages in future cases in which a regulation goes too far, but not all the way.").

55. This prong received most attention in *Nollan* and *Dolan* where concessions apply. However, the Court's recent decision in *City of Monterey* (*see* discussion *infra* at notes 81-88) makes plain that the prong has application outside the concession context.

A. *"Abnormal" Delay: Two Challenges*

Takings challenges based on delay in the regulatory process can be usefully analyzed in two principle categories: first, landowners who challenge the length of regulatory delay as beyond the *First English* standard of "normalcy"; and second, challenges following the successful invalidation of regulatory error or abuse.

1. Challenging the Excessive Length of Delay as "Abnormal"

The Court in *First English* left unanswered the question of how long a delay must be before compensation is required. In other words, the Court failed to define what is other than "normal"–that is, abnormal.[56] Consequently, there are no ascertainable standards to assist regulatory agencies in fashioning a "normal" regulatory process.[57] An examination of lower court decisions confirms that compensation is generally not required even for protracted delay.[58] In short, regulatory agencies are usually able to rely upon the deferential rational basis standard applicable to economic legislation generally, which allows courts to infer the minimal rationality necessary to justify virtually any period of regulatory review.[59] Nevertheless, claims based on delay proliferate either as: 1) challenges to zoning moratoria or, less frequently, 2) direct challenges to regulatory action as unreasonably long.

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56. The Supreme Court, however, assumed that a denial of economically viable use for close to six years would be sufficient to sustain a claim for compensation. *See First English*, 482 U.S. at 319-22.

> "Normal" may turn out to have been a poor choice of words. If it "normally" takes ten years for a slow-moving municipality to process simple development requests, it would seem out of step with the Court's thinking to grant immunity to municipalities from the compensation requirement simply because ten years is claimed to be normal in that locale. The question should be whether ten years is reasonable.

Bozung & Alessi, *supra* note 49, at 1018.

57. *See The Supreme Court-Leading Cases, 1986 Term*, 101 HARV. L. REV. 240, 246 (1987) (recognizing that questions left unanswered by *First English* will result in local and state governmental agencies facing the possibility that courts will hold regulatory delay as a taking); *see also* David Schultz, *The Price is Right! Property Valuation for Temporary Takings*, 22 HAMLINE L. REV. 281, 298 (1998) (stating that, "[e]quity and due process suggest that some time limits or threshold once crossed should translate into a per se . . . taking.").

58. *See* Bozung & Alessi, *supra* note 49, at 1018-19. The authors gave as examples: where delay arises when a municipality creates or modifies a comprehensive plan or where the regulatory agency is charged with studying a particular land-use problem. *Id.*

59. Where there is a legitimate governmental purpose for a temporary restraint on land use, and when the restriction is not indefinite, many regulators assert that because the regulation does not effectuate a total deprivation in value, that the public interests forwarded by the regulation should outweigh the landowner's private interests. "In essence, this should be regarded as a 'normal delay' in the right to develop property of the type that must be expected in a regulated society." *See* Jack R. White, *The First English Evangelical Lutheran Church Case: What Did it Actually Decide?*, C317 ALI-ABA 1215, 1236 (1988).

a. Zoning Moratoria

In *S.E.W. Friel v. Triangle Oil Co.*[60] the court held that a nine-month temporary zoning moratorium[61] enacted while the County completed revisions on its comprehensive plan did not effect "unreasonable delay."[62] Similarly, in *Zilber v. Town of Moraga*,[63] a one-and-a-half year moratorium on development to allow for the preparation of a comprehensive planning scheme was "neither unreasonable nor, standing alone, sufficiently burdensome to require compensation."[64] The court reasoned that the length of the moratorium was not facially sufficient to constitute a taking.[65] The court further noted that "[m]ere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership.' They cannot be considered as a 'taking' in the constitutional sense."[66]

b. Length of Delay

i. Delays of less than three years

In *Guinnane v. City and County of San Francisco*,[67] the city's more than one-year delay in acting on a development permit was held to be a normal delay and therefore, non-compensable.[68] "[T]he interim delay which occurred herein while the city studied the possible acquisition of plaintiff's property as an open space area did not constitute a compensable taking."[69] Similarly, in *Dufau v. United States*,[70] the court held that a sixteen-month permit processing lapse was insufficient for classification as an "extraordinary delay."[71] Directly illustrating

60. 543 A.2d 863 (Md. Ct. Spec. App. 1988).
61. The word "moratorium" almost has a talismanic effect, blinding courts to the economic consequences of regulatory delay. Thus, even total deprivations of use when labeled "moratorium" seem immune from taking challenges.
62. *Friel*, 543 A.2d at 867.
63. 692 F. Supp. 1195 (N.D. Cal. 1988).
64. *Id.* at 1206.
65. *Id.* at 1207. The court noted the Ninth Circuit decision in *Kinzli* (applying *Williamson*) that refused to find a taking for an eight-year delay in the development application process. *Id.*
66. *See id.* at 1207 (*quoting* Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980)).
67. 241 Cal.Rptr. 787 (Cal. Ct. App. 1987).
68. *Id.* at 791-92.
69. *Id.* at 791.
70. 22 Cl. Ct. 156 (Cl. Ct. 1990).
71. *Id.* at 163.

how the *First English* normal delay caveat ignores the first prong of *Agins*, the court gratuitously noted that for plaintiffs to prevail on the temporary taking claim, they would need to prove that "substantially all economically viable use of their property has been denied."[72]

ii. Longer delays

As the duration of regulatory delay increases, landowners have achieved a modest level of success. In *Steel v. Cape Corp.*,[73] for example, the court reasoned that in light of *Nollan*, *Dolan*, and *Lucas*, "[i]t is unlikely that the Supreme Court . . . would consider a six-year moratorium to be a normal part of the application review process."[74] As indicated below, however, the courts are equivocal.

In some cases, courts have declined to find takings. Delays in the permitting process upwards of eleven years are still seen, by some courts, as non-compensable. In *Botton v. Marple Township*,[75] the court held that an eight-year delay in the zoning permitting process was not compensable under *First English* because the landowner was not deprived all economic use of his property.[76] The court reasoned that *First English* was inapposite because the landowner *sub justice* was left with some use.[77] A more egregious delay was similarly denied compensation in *Standard Industries, Inc. v. Department of Transportation*,[78] where the court held that "[t]here must be some action, such as unreasonable delay or oppressive conduct" to find a taking.[79] The eleven-year acquisition process in *Standard Industries*, which ended with the department declining to buy the subject land, was not unreasonable delay or oppressive conduct, said the court, because the delay could be attributed to other individuals (federal authorities, surveyors, etc.) outside of the regulator's control.[80]

However, the recent U.S. Supreme Court decision in *City of Monterey v. Del*

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72. *Id.* The landowner conceded that the regulation advanced a legitimate governmental purpose and therefore, the taking claim as per *Agins* turned on whether the landowner had been denied all economic use of his property. *Id.* at 161.

73. 677 A.2d 634 (Md. Ct. Spec. App. 1996). The regulation in *Steel* furthered the legitimate governmental interest of providing adequate school facilities, thus passing the first prong of the *Agins* inquiry. *Id.* at 643. The Court, however, cited *Lucas* for the proposition that:

> regulations that leave the owner of land without economically beneficial or productive options for its use–typically, as here, by requiring land to be left substantially in its natural state–carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

Id. at 644 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1018 (1992)).

74. *Steel*, 677 A.2d at 643, n.18. Even here, the outcome may have been influenced more by a finding of deprivation of all use than the delay itself. *Id.*

75. 689 F. Supp. 477 (E.D. Pa. 1988).

76. *Id.* at 481.

77. *See id.*

78. 454 N.W.2d 417 (Mich. Ct. App. 1990).

79. *Id.* at 419.

80. *See id.*

Monte Dunes at Monterey, Ltd.[81] may provide some relief for aggrieved landowners subject to lengthy delay marked by excessive regulatory abuse. In *City of Monterey*, the claim was based on five formal development denials and nineteen different site plans over five years, coupled with the city's intensified requirements to secure the requested permit.[82] *First English*[83] had not been decided at the time the lawsuit was filed. There was, thus, no recourse for a landowner claiming a regulatory taking. Consequently, Del Monte brought a Section 1983 action alleging violations of Due Process, Equal Protection, and a taking of property without just compensation.[84] The Supreme Court affirmed a jury's general verdict for Del Monte on the taking claim and a damage award of $1.45 million, even though all value had not been siphoned from the property by the regulation.[85]

City of Monterey is an important reminder that regulatory abuse, the kind that does not substantially advance legitimate governmental interests, may still give rise to taking liability. "Certainly, landowners confronted by shifting regulatory edicts at odds with published legislative and administrative standards will argue that the decision should be given broad application."[86] However, caution is warranted here because the Court did not fully apply heightened scrutiny.[87] Although the Court affirmed application of *Nollan*,[88]

> it found the proportionality analysis of *Dolan*[89] to be "inapposite" where no formal land dedication or conveyance had been required. Be that as it may, [*City of Monterey*] creates a mechanism for vindicating sorely abused property rights before a jury of average citizens perhaps modernly sensitized to regulatory overreaching in their own lives.[90]

In the wake of *City of Monterey*, a landowner who suffered an almost twenty year delay was compensated in *Mills Land & Water Co. v. City of Huntington Beach*.[91] In 1978, landowner-Mills applied for and was denied an amendment to the general zoning plan to allow for the development of residential and commer-

81. 526 U.S. 687 (1999).
82. *Id.* at 698. "After five years, five formal decisions, and nineteen different site plans, respondent Del Monte Dunes decided the city would not permit development of the property under any circumstances." *Id.*
83. 482 U.S. 304 (1987); *see* discussion *supra* Part II.
84. *See City of Monterey*, 526 U.S. at 698.
85. *Id.* at 701.
86. Douglas W. KMIEC, ZONING AND PLANNING DESKBOOK, § 7.03[4][d][i] at 7-353 (14th ed. 2000).
87. *Id.*
88. 483 U.S. 825 (1987); *see* discussion *supra* text accompanying notes 29-32.
89. 512 U.S. 374 (1994); *see* discussion *supra* notes 33-35 and accompanying text.
90. KMIEC, *supra* note 86, at 7-353.
91. 89 Cal. Rptr. 2d 52 (Cal. Ct. App. 1999).

cial properties.[92] The City required that Mills wait for a Land Use Plan (LUP), a general plan for the coastal zone.[93] Subsequently, the City denied another proposal which was consistent with the then-existing zoning plan, but inconsistent with the LUP.[94] Again, in 1991, Mills submitted a development proposal that was held to be compatible with the LUP, but the City required that Mills, in exchange for the permit, preserve the remainder of his property as open space.[95] A series of conflicting decisions between the City and the California Coastal Commission resulted in an almost twenty year delay in developing the Local Coastal Program.[96] The Court held that the city's failure to enact zoning regulations within a reasonable time resulted in a temporary taking.[97]

Too much cannot be read into *City of Monterey* and *Mills*, but this much is clear: *Mills* established that "normal" delay does have an outer limit, and *City of Monterey* suggested that limit will be more easily found where the delay is the result of shifting regulatory requirements indicative of governmental overreaching. The significance of regulatory error or abuse is assessed separately below.

2. Challenging Regulatory Error or Abuse as "Abnormal Delay"

In theory, there is probably no more common sense case of "failing to substantially advance a legitimate governmental interest" than an instance of regulatory error or abuse. Yet, here too, property owners have faced decisions that seemingly ignore this primary aspect of *Agins*.

Litigation that proves regulation to have been erroneously or wrongfully applied has proven, hopefully, an "abnormalcy" in the regulatory process. The delay should not be excused as "normal." Nevertheless, as one land use scholar has observed, some courts have categorized litigation as a "normal" part of the regulatory process, reasoning that "land use regulations and decisions . . . which, despite their ultimately determined statutory defects, are part of a reasonable regulatory process designed to advance legitimate governmental interests [and] are

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92. *Id.* at 55.
93. *Id.* at 54-55.
94. *Id.* at 59.
95. *Id.*
96. *Id.*
97. *See id.* at 53. The Court noted *Chandis Sec. Co. v. City of Dana Point*, which held:

> [A]t some point, the city's interest . . . must give way to plaintiffs' right to use their property for some economically viable purpose. . . . [Because of] the amount of effort and the length of time it takes to prepare and approve land use proposals, unnecessary delays in approving a proposed development or repetitive denials of specific plans complying with the city's general plan will amount to a taking requiring . . . compensation.

Id. at 57 (citing 60 Cal. Rptr. 2d 481 (Cal. Ct. App. 1996)); *but cf.* Calrop Corp. v. City of San Diego, 91 Cal. Rptr. 2d 792, 802 n.4 (Cal. Ct. App. 2000). While the *Calrop* court agreed with the

> *Mills Land* court that in light of the planning history any further development application would have been futile . . . the court in *Mills Land* did not consider whether, notwithstanding the futility of seeking an application while the city was processing a land use plan, the city could avoid liability by showing that the planning delay served a legitimate governmental purpose.

Id.

not takings of property."[98]

a. No taking found

In *Moore v. City of Costa Mesa*[99] a three-year delay resulting from the wrongful denial of a building permit variance, which did not deny owner of all economic use, was held to be non-compensable.[100] The court, while conceding that property rights were violated, held that "this was not an 'invasion' of sufficient magnitude to have denied . . . 'justice and fairness' guaranteed by the fifth and fourteenth amendments."[101] The Supreme Court of Alaska agreed in *Cannone v. Noey*,[102] where a landowner failed on a temporary taking claim challenging the denial of a development permit that was later deemed arbitrary.[103] Because the landowner maintained some use in the property, the court refused to find a taking.[104] Similarly, in *Chioffi v. City of Winooski*,[105] a property owner brought an unsuccessful taking action for delay resulting from the inappropriate denial of a variance.[106] Furthermore, in *Staubes v. City of Folly Beach*,[107] a property owner failed on a temporary taking claim after a building permit revocation was successfully appealed.[108] Here, the landowner did not raise his challenge under the substantially advance prong of *Agins*, but instead argued that he had been denied

98. GIDEON KANNER, CALIFORNIA JUDGES' WAR ON PRIVATE PROPERTY RIGHTS, 25 (1998); *but cf.* Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 67-68 (1995). Other land use scholars contend that where regulatory delays are claimed to be unfair, the claim should not depend upon whether the permit is ultimately granted. Nor should the inquiry turn upon whether the permit denial was proper or improper. Instead, "the procedural inquiry should focus on procedural questions, such as whether the municipality took a reasonable amount of time to decide," irrespective of the substantive outcome. *Id.*

99. 886 F.2d 260 (9th Cir. 1989).

100. *Id.* at 264.

101. *Id.*

102. 867 P.2d 797 (Alaska 1994).

103. *Id.* at 801.

104. *Id.* The court concluded that the regulatory agency's actions did not indicate malice or bad faith. *Id.* The court qualified this by stating that they "do not suggest that malice or an intent to harm necessarily is relevant to the question whether a given governmental action is a taking." *Id.* at 801 n.7.

105. 676 A.2d 786 (Vt. 1996).

106. Landowner claims taking for the period of time from the denial of the zoning variance in 1985 to the time the court reversed the denial in 1990. *Id.* at 787. Landowner claims a loss of $200,000 attributed to lost rent, increase in construction costs, attorney's fees, etc. accrued during the regulatory delay. *Id.* at 787-88. The court cited *Smith v. Town of Wolfeboro*, 615 A.2d 1252 (1992) for the proposition that "'delay inherent in the statutory process of obtaining subdivision approval, including appeals to the superior court and to this court, is one of the incidents of ownership' and cannot give rise to a takings claim." *Chioffi*, 676 A.2d at 788.

107. 500 S.E.2d 160 (S.C. Ct. App. 1998).

108. *Id.* at 162-63.

all economic use of the property.[109]

Del Oro Hills v. City of Oceanside[110] provided a similar opportunity for California courts to recognize the initial mandate of *Agins* to compensate when a governmental regulation fails to substantially advance a legitimate governmental interest. It was an opportunity not taken. A landowner in *Del Oro* challenged the validity of a residential growth control initiative.[111] After being denied the requested exemption from the initiative, Del Oro alleged that it became "practically impossible to market its property."[112] The facts raised the question, "[d]oes the invalidity of Prop. A, due to its impermissible conflicts with state planning and zoning law and the City's general plan, mean that Prop. A does not substantially advance legitimate state interests, and its enactment accomplished some kind of per se taking of Del Oro's property interests?"[113] The court initially recognized that under *Agins,* "[t]he regulation must substantially advance the state interest said to justify it; a finding that the regulation has a 'rational basis' is not enough."[114] But, because the ordinance was invalid, how could it substantially advance a legitimate governmental interest? The court justified the denial of compensation by reasoning that Prop. A was a growth control ordinance, and even if invalid, was entitled to some level of deferential review.[115] In short, the court ignored *Agins.*

Del Oro is difficult to explain. Other state and lower federal courts suggest, however, that a regulation, even when issued by a governmental agency acting ultra vires, is still able to further a legitimate governmental interest (and, therefore, be immune from a takings claim) if the agency is acting in good faith and there is an objective governmental purpose that can be identified.[116] As one might suppose, there has been much debate over the definition of "good faith." The more commonly held position is that where delay in the regulatory process is "unreasonable, excessive, or extraordinary," a taking is established.[117] The good

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109. *Id.* at 165.

110. 31 Cal. App. 4th 1060 (Ct. App. 1995).

111. *Id.* at 1064.

112. *Id.* at 1070.

113. *Id.* at 1073 (citation omitted).

114. *Id.* at 1074 (citing Surfside Colony, Ltd. v. Ca. Coastal Comm'n, 226 Cal. App. 3d 1260, 1270 (Ct. App. 1991)).

115. *Id.* at 1075.

116. *See* Merriam, *supra* note 53, at 527. Inherently flawed in this reasoning is the failure to account for the potential abuse in making post-hoc determinations. Invariably such after-the-fact evaluations will work in favor of the regulating body. If the agency is able to point to "any" governmental purpose that their decision could advance (even if it was not in mind at the time of application), the agency will be relieved from the compensation requirement. *See also* Secs. Indus. Ass'n v. Bd. of Governors, 468 U.S. 137, 143-44 (1984) (holding that post-hoc determinations by administrative agencies should be afforded "little deference" by courts).

117. *See* John M. Groen & Richard M. Stephens, *Takings Law, Lucas, and the Growth Management Act*, 16 U. PUGET SOUND L. REV. 1259, 1320 (1993); *see also* William C. Leigh & Bruce W. Burton, *Predatory Governmental Zoning Practices and the Supreme Court's New Takings Clause Formulation: Timing, Value, and R.I.B.E.*, 1993 BYU L. REV. 827, 852 (1993) (stating that "[p]redatory municipal gamesmanship is quite another matter for purposes of Takings Clause analysis."). Leigh and Burton cite

faith of the regulatory agency determines whether delay is unreasonable or extraordinarily long.[118]

In *Tabb Lakes, Inc. v. United States*,[119] good faith of the regulatory agency foreclosed the possibility of compensation for a property owner who challenged the wrongful characterization of his property as wetlands.[120] Here, the landowner obtained a judicial determination that the Army Corps acted ultra vires when they asserted jurisdiction over the property.[121] The landowner contended that this lack of jurisdiction necessarily proved unreasonable delay.[122] The Court disagreed, acknowledging that while the Corps did not have jurisdiction over the lot, the assertion of authority was nevertheless "reasonable under the circumstances."[123] The Court held that whether "th[e] plaintiff successfully challenged the Corps' jurisdiction renders the initial assertion of jurisdiction neither unreasonable nor extraordinary."[124] Therefore, absent a showing of bad faith, a landowner who successfully challenges a regulating agency's wrongful jurisdiction cannot prove a taking.[125]

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the following cases where municipal agencies' actions result in the destruction of private property rights "as part of a deliberate plan to acquire property rights for a public purpose": *San Antonio River Auth. v. Garrett Bros.*, 528 S.W.2d 266, 274 (Tex. App. 1975); *Nemmers v. City of Dubuque*, 716 F.2d 1194, 1197-1200 (8th Cir. 1983); *Archer Gardens, Ltd. v. Brooklyn Ctr. Dev. Corp.*, 468 F. Supp. 609, 614 (S.D.N.Y. 1979). *See also* Stein, *supra* note 98, at 68 n.233 (stating that "[i]ntentional delays might merit such treatment"); *Standard Indus. v. Dept. of Transp.*, 454 N.W.2d 417, 419 (Mich. Ct. App. 1990) (although plaintiff failed to prove that the regulatory agency deliberately delayed the acquisition process, the Court held that unreasonable conduct or oppressive delay under other facts can give rise to a taking claim); *cf.* United States Supreme Court Official Transcript, 1998 WL 721087, at *16-17, Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996), *cert. granted*, 118 S. Ct. 1359, 66 U.S.L.W. 3639 (1998) (No. 97-1235). According to the transcript, Justice Scalia stated, "The landowner here essentially thinks that it was getting jerked around . . . isn't there some point at which . . . you begin to smell a rat, and at that point can't we say, . . . this is simply unreasonable." *Id.* at *19. Justice Kennedy continued, "Even if the property has value, if the city is unreasonable and there is bad faith, isn't the city still liable in damages for that unreasonable treatment of the landowner?" *Id.*

118. Groen & Stephens, *supra* note 117, at 1320. The authors suggest that although good faith on the part of the planning authority is presumed,

> if the local government establishes unrealistic or unattainable . . . standards, new development[s] can be unfairly delayed or completely foreclosed without a good faith or realistic attempt to solve the underlying problem. The . . . issue then becomes merely an excuse for preventing some owners from being able to make use of their property. This should result in a temporary taking under First Church and Lucas.

Id. (footnotes omitted).

119. 26 Cl. Ct. 1334 (Cl. Ct. 1992).

120. *Id.* at 1354.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

Similarly, in *Steinbergh v. City of Cambridge*,[126] property owners challenged as a temporary taking an ordinance–subsequently held ultra vires–that restricted the right to sell individual condominium units.[127] Landowners here argued that *Agins* was not met, and a regulating agency acting without jurisdiction could not substantially advance a legitimate governmental purpose.[128] The Court held that "[t]he facts [sic] that the regulation (here, a rent control ordinance) was ruled to be beyond the city's authority to enact and that the plaintiffs suffered a financial loss because they could not sell individual condominium units while their judicial challenge was in process do not amount to a denial of substantive due process."[129] The Court implied that if the landowner was able to prove bad faith or "some other improper animus" a taking could be found.[130]

Two additional cases that challenged wrongful assertions of jurisdiction by the California Coastal Commission serve to further illustrate the difficulty of proving a taking based on a regulatory agency acting outside the scope of their jurisdiction. In *Landgate, Inc. v. California Coastal Commission*,[131] a landowner alleged that the California Coastal Commission's (Commission) wrongful assertion of authority that resulted in a two-year development delay amounted to a compensable regulatory taking.[132] The Commission denied the requested permit when they deemed the landowner's lot line adjustment to be illegal.[133] In an action by the landowner, the court determined that the Commission lacked jurisdiction over the lot-line determination.[134] Therefore, both the California trial and appeals courts found a temporary taking for the two-year period, construing the jurisdictional dispute as unreasonable and defining the delay as "ar[ising] out of a 'jurisdictional spat with the County of Los Angeles combined with a desire to prevent Landgate from building on its parcel.'"[135] The California Supreme Court, by a narrow 4-3 margin, reversed. The court likened the wrongful assertion of authority to an aborted condemnation proceeding when they held that "the mistaken assertion of jurisdiction over a development is part of the development approval process, and development delays that result therefrom may be imposed on the developer rather than the general taxpayer without violating the United States Constitution."[136] The

126. 604 N.E.2d 1269 (Mass. 1992).
127. *Id.* at 1271-72.
128. *Id.*
129. *Id.* at 1277-78.
130. *Id.* at 1278.
131. 953 P.2d 1188 (Cal. 1998).
132. *Id.* at 1195.
133. *Id.* at 1192.
134. *Id.* at 1192-93.
135. *Id.* at 1198. The court continued, "this is not a case of bureaucratic bungling, but the declaration of war between governmental behemoths in which the inevitable casualty was to be a noncombatant, Landgate." *Id.* at 1194.
136. *Id.* at 1197 (footnote omitted). The proper inquiry, said the court, is to make a determination whether there is an "objectively, sufficient connection between the land use regulation in question and a legitimate governmental purpose so that the former may be said to substantially advance the latter." *Id.* at 1198.

majority continued, "We must determine not whether a sinister purpose lurked behind the Commission's decision, but rather whether the development restrictions imposed on the subject property substantially advanced some legitimate state purposes so as to justify the denial of the development permit."[137] Justice Chin, in vigorous dissent, contended that "[w]hen a regulatory agency prohibits all use of a particular property, and the property owner is forced to sue the agency to get it to change its position, its stonewalling is not fairly characterized as a 'normal delay' in the permit approval process."[138] Similarly, Justice Janice Brown dissented, citing the majority's reasoning that clashed with the principles of *Lucas* and *First English*.[139] Justice Brown concluded that when wrongful assertions of jurisdiction that leave property economically valueless "can be converted into 'the recognition that a judicial determination of the validity of certain preconditions to development is a normal part of the development process,' then, in California, at least for now, *Lucas* is a dead letter."[140]

The California Coastal Commission's wrongful assertion of jurisdiction was again brought under scrutiny in *Buckley v. California Coastal Commission*.[141] In *Buckley*, the players were familiar to California land-use jurisprudence: the California Coastal Commission, the County of Los Angeles, and an aggrieved Malibu landowner. California statute section 30610.1 granted coastal permit exemptions to landowners whose property was located in single-family construction areas.[142] Because the Buckleys' lot was within the exemption area, the Commission forfeited control over the whole lot.[143] Nevertheless, the Commission asserted jurisdiction over the rear portion of the lot, alleging that the sensitive environmental area on the rear portion effectively withdrew the total exemption.[144] The Buckleys consequently fell prey to the jurisdictional squabbling between Los Angeles County and the Coastal Commission. In an action for declaratory relief from the Commission's repeated efforts to stop development of the property, the

137. *Id.* at 1198. The court made reference to the deferential review of land use regulations which do not require a property concession. Application of *Nollan's* intermediary standard of review in *City of Monterey* could recast the court's reasoning in future cases resembling *Landgate*.

138. *Id.* at 1205. *See also* Michael M. Berger, *Making the Takings Issue Argument*, SD14 ALI-ABA 995, 998-99 (1998).

139. *See id.* at 1041.

140. *Id.* at 1043 (internal citation omitted). "[W]hen the government denies all economically viable use of property, even temporarily, it may not achieve its ends 'by a shorter cut than the constitutional way of paying for the change.' In these limited circumstances, government must turn square corners–except in California." *Id.* (internal citation omitted); *cf.* KANNER, *supra* note 98, at 47-48.

141. 80 Cal. Rptr. 2d 562 (Cal. Ct. App. 1988), *cert. denied*, 120 S. Ct. 54 (1999).

142. *Id.* at 570.

143. *Id.* After reviewing the legislative history of the statutes at issue, the court determined that once the Commission placed any portion of a lot within the designated "single-family construction area" the entire lot was immunized from the jurisdiction of the Commission. *Id.*

144. *Id.* at 567.

trial court held that the Commission did not have jurisdiction over the lot.[145] Similar to the argument raised in *Landgate*, the Buckleys argued that a regulating agency acting without jurisdiction cannot substantially advance a legitimate governmental interest and, therefore, fails *Agins'* first prong.[146] Applying *Landgate*, the California Court of Appeals held that even though the Commission lacked jurisdiction over the property, the Commission's purpose in denying the permit (protection of the environmentally sensitive area) was both objectively and sufficiently connected to the regulation.[147] Further, the court reasoned that the reality of the application process is that, on occasion, disputes will lead to judicial proceedings. However, so long as such proceedings are not brought on by the arbitrary or capricious acts of the governmental agency, the delay in approval occasioned by judicial proceedings is simply an unfortunate part of the normal process.[148] Consequently, the court of appeals reversed, refusing to find either a permanent or temporary taking.[149]

b. Taking found

The U.S. Supreme Court decision in *City of Monterey*,[150] however, may provide the needed incentive for lower courts to recognize that an agency's erroneous or ultra vires decisions can be compensable. In *Eberle v. Dane County Board of Adjustment*,[151] the Wisconsin Supreme Court boldly refused to follow California's *Landgate*[152] majority, which held that an agency's erroneous actions

145. *Id.* at 568. The trial court ruled that the Commission's prohibition against grading: 1) did not advance a legitimate governmental interest; and 2) denied all economic use of the property. *Id.* at 571. The trial court held that the Commission's actions worked a per se permanent taking of the Buckley's property. *Id.*

146. *Id.* at 577.

147. *See id.* at 575.

148. *Id.*

149. *Id.*

150. *See* discussion *supra* notes 81-90 and accompanying text.

151. 595 N.W.2d 730 (Wis. 1999).

152. *See* discussion *supra* notes 131-40 and accompanying text.

are not compensable.[153] The Eberles claimed that the Board's improper denial of a special exception permit denied all access to their property and therefore acted to extinguish all use.[154] The Wisconsin court held that "reversal of an agency action by a court [does not] convert[] an action which otherwise might have been actionable as a taking into one which is not."[155] *Eberle* thus supports the position that ultra vires authority can lead to temporary takings, notwithstanding *Landgate* and *Buckley*. *Eberle* is not the perfect case for fully employing *Agins*, however, as deprivation of all use led to the taking challenge. Notwithstanding, *Eberle* provides superior logic to *Landgate* and *Buckley*, which also alleged deprivations of all use for a temporary period of time. Accordingly, wrongful assertions of authority that do not result in the deprivation of all use may not *ipso facto* lead to the finding of a regulatory taking, but at a minimum should lead to a more careful matching of regulatory means and ends.

III. CONCLUSION

Lower courts are reluctant to fully implement the full taking standard articulated in *Agins v. City of Tiburon*. Perhaps this hesitation stems from a desire to not return to the *Lochner*-era of courts second-guessing legislative policy. This distress, however, is unwarranted because the first prong of *Agins* does not require a court to scrutinize the ends of regulations, but rather simply requires a timely, proper, and even-handed implementation of stated regulatory standards. This Comment demonstrates that only in limited circumstances have courts used the first prong of *Agins* to justify compensation for aggrieved landowners. The

153. Eberle, 595 N.W.2d at 742 n.25. The court noted that the majority's reasoning in *Landgate* mirrored Justice Stevens' dissent in *First English*. *Id.* The argument, said that court, "was clearly considered and rejected by the United States Supreme Court." *Id.* The Wisconsin court overruled its previous decision in *Reel Enters. v. City of LaCrosse*, 431 N.W.2d 743 (Wis. Ct. App. 1988), to the extent that it "suggest[s] that a decision by a governmental entity which is reversed by a court is not a legally imposed restriction which could be cognizable as a taking." *Id.* at 743. The court advanced the following hypothetical:

> [I]magine a decision by a governmental entity which constitutes an unconstitutional taking of land .... Now imagine that the landowner succeeds in getting a court to overturn the entity's decision. In the absence of *Reel*, the effect of the court's decision is to place an ending date on the temporary taking period, and thus, help to determine the amount of just compensation due the landowner. Under *Reel*, however, the effect of the court's decision is to convert the taking, after the fact, into something which was *not* a taking, and thereby wipe out the landowner's ability to recover any just compensation.

Id.

154. *Id.* at 740. The Wisconsin court stated, "Certainly, under the circumstances of this case, a complete lack of legal access to a piece of land constitutes a deprivation of 'all or substantially all practical uses' of that land. The Eberles could hardly be expected to parachute onto their property in order to use it." *Id.*

155. *Id.* at 742.

Court's decision in *City of Monterey,* however, may invite expanded application of *Agins.*

This Comment has also shown that landowners who directly challenge the length of regulatory delay as "abnormal" under the *First English* standard are generally not compensated. *Mills,* however, established an outer limit for delay. Application will be narrow, though, because most regulatory challenges do not rise to the level of histrionic delay that justified the compensation award in *Mills.* So, while providing a welcome bookend, courts are not likely to extend compensation for challenges premised upon lesser time periods.

Agins should be applied in its entirety. Protracted delay, wrongful regulatory decisions, and abuse are not "incidents of ownership" any more than deprivations of all use. *City of Monterey* provides some hope, at least where the regulatory process is infected with both delay and abuse. Here, courts are able to balance the length of delay against the level of regulatory abuse. As the length of delay increases, the severity of the regulatory abuse needed to justify compensation should be lessened. Similarly, when abuse is particularly egregious, the required standard for length of delay to find a taking can be correspondingly relaxed. *City of Monterey,* therefore, breathes some life into the dormant first prong of *Agins,* and in so doing, returns us to the avoidance of disproportionate burdens intended by the Fifth Amendment Takings Clause.

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156. J.D., Pepperdine University School of Law, 2001.