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Sharon L. Browne

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I. INTRODUCTION

The Takings Clause of the Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation."[1] Since the United States Supreme Court decision in *Pennsylvania Coal v. Mahon* in 1922,[2] land use regulations can violate the Takings Clause if the use of property is so severely restricted as to effectively usurp private ownership rights.[3]

The law of regulatory takings laid virtually dormant for more than half a century after its inception in *Pennsylvania Coal.* Since 1978, however, the United States Supreme Court has reviewed land use regulations challenged under the Takings Clause on 14 occasions,[4] sparking

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* Senior Attorney, Zumbrun, Best & Findley, Sacramento, California. B.A., University of California at Davis; J.D., McGeorge School of Law. Ms. Browne was lead attorney for the plaintiff in *Healing v. California Coastal Commission.* Helpful comments, suggestions, and assistance in the development of this article were provided by R. S. Radford.

1. U.S. CONST. amend. V. For an overall analysis of how the Takings Clause and its interpretation have changed over time, reflecting the Supreme Court's attitude toward the relationship between individuals, society and the environment see Michael Niederbach, *Transferable Public Rights: Reconciling Public Rights and Private Property,* 37 BUFF. L. REV. 899, 899 (1988-89).

2. 260 U.S. 393 (1922) (holding that a Pennsylvania statute designed to prevent mine subsidence was an unconstitutional use of police power).

3. "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. However, Justice Holmes never indicated when a regulation went too far and became a taking. Niederbach, *supra* note 1, at 904.

4. *See* Dolan v. City of Tigard, 114 S. Ct. 2309 (1994); Lucas v. South Carolina

intense interest in this previously obscure field of constitutional law.[5]

The Supreme Court's core analytical rule for regulatory takings was set forth in *Agins v. City of Tiburon*:[6] a property regulation violates

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Coastal Council, 112 S. Ct. 2886 (1992); Pennell v. City of San Jose, 485 U.S. 1 (1988); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); Hodel v. Irving, 481 U.S. 704 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Federal Comm. Comm'n v. Florida Power Corp., 480 U.S. 245 (1987); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986); United States v. Riverside Bayview Homes, 474 U.S. 121 (1985); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

5. *See, e.g.*, R. S. Radford, *Land Use Regulation and Legal Rhetoric: Broadening the Terms of Debate*, 21 FORDHAM URB. L.J. 413 (1994); Richard C. Ausness, *Wild Dunes and Serbonian Bogs: The Impact of the Lucas Decision on Shoreline Protection Programs*, 70 DENV. U. L. REV. 437 (1993); AFTER LUCAS: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION (David L. Callies, ed. 1993); 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 B.Y.U. L. REV. 827 (1993); James S. Burling, *Property Rights, Endangered Species, Wetlands, and Other Critters: Is It Against Nature to Pay for a Taking?*, 27 LAND & WATER L. REV. 309 (1992); Steven J. Eagle & William H. Mellor, III, *Regulatory Takings After the Supreme Court's 1991-92 Term: An Evolving Return to Property Rights*, 29 CAL. W. L. REV. 209 (1992); R. S. Radford, *Regulatory Takings Law in the 1990s: The Death of Rent Control?*, 21 SW. U. L. REV. 1019 (1992); Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases*, 70 NEB. L. REV. 186 (1991); Bruce W. Burton, *Predatory Municipal Zoning Practices: Changing the Presumption of Constitutionality in the Wake of the "Takings Trilogy"*, 44 ARK. L. REV. 65 (1991); Catherine R. Connors, *Back to the Future: The "Nuisance Exception" to the Just Compensation Clause*, 19 CAP. U. L. REV. 139 (1990); Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735 (1988); William A. Falik & Anna C. Shimko, *The "Takings" Nexus—The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 HASTINGS L.J. 359 (1988); Norman Karlin, *Back to the Future: From Nollan to Lochner*, 17 SW. U. L. REV. 627 (1988); Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630 (1988); Craig A. Peterson, *Land Use Regulatory 'Takings' Revisited: The New Supreme Court Approaches*, 39 HASTINGS L.J. 335 (1988); Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1; James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust Doctrine and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENVT'L. L. 171 (1987); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Bernard H. Siegan, *The Anomaly of Regulation under the Taking Clause, reprinted in* PLANNING WITHOUT PRICES 1 (1977).

6. 447 U.S. 255 (1980). In *Agins*, the plaintiffs challenged the validity of two local ordinances, which limited the number of homes that could be built on their land. *Id.* at 258.

the Takings Clause if it fails to advance a substantially legitimate state interest or denies the owner all economically viable use of the property.[7]

This two-part test has been frequently reiterated in regulatory takings decisions since *Agins*,[8] and the High Court has struck down land use regulations for offending *either* prong of the *Agins* standard. In *Nollan v. California Coastal Commission*,[9] the Supreme Court invalidated a regulation that failed to substantially advance legitimate interests without regard to its economic impact on the property owners.[10] Conversely, in *Lucas v. South Carolina Coastal Council*,[11] the Court held that a landowner was entitled to compensation if an admittedly legitimate regulation deprived him of economically viable use of his land.[12]

Despite the Supreme Court's efforts to lay down minimum uniform standards for regulatory takings law, the state courts have followed widely divergent paths in applying these teachings.[13] To the disappointment and frustration of property owners, the California courts—despite being pointedly reversed by the Supreme Court in both *Nollan* and *First English Evangelical Lutheran Church v. County of Los Angeles*[14]—remain among the most hostile to private ownership rights.[15]

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7. *Id.* at 260. For a further discussion of the *Agins* test, see generally Ausness, *supra* note 5.

8. *See Lucas*, 112 S. Ct. at 2893-94; *Pennell*, 485 U.S. at 18; *Nollan*, 483 U.S. at 834; *Keystone*, 480 U.S. at 484; *Riverside Bayview Homes*, 474 U.S. at 126; *San Diego Gas*, 450 U.S. at 641 (Brennan, J., dissenting).

9. 483 U.S. 825 (1987). In *Nollan*, the plaintiffs challenged the California Coastal Commission's condition on their permit that required the plaintiffs to convey an easement to the state granting public access to the entire beach area of the plaintiffs' lot, which was approximately one-third of their land. *Id.* at 828.

10. *Id.* at 839. For a further discussion of the *Nollan* decision, see generally Timothy Bittle, *Nollan v. California Coastal Commission: You Can't Always Get What You Want, But Sometimes You Get What You Need*, 15 PEPP. L. REV. 345 (1988) and articles, *supra* note 5.

11. 120 L. Ed. 2d 798 (1992) (determining whether a South Carolina statute that prevented almost any building on beachfront property was unconstitutional and a regulatory taking). For a further discussion of the *Lucas* decision see generally Eagle & Mellor, *supra* note 5.

12. *Lucas*, 112 S. Ct. at 2895.

13. *See, e.g.*, Radford, *Land Use Regulation and Legal Rhetoric*, *supra* note 5, at 417-18.

14. 482 U.S. 304 (1987).

15. *See* DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION 11 (1993) (naming California as the "near unanimous"

Nollan and *Lucas* eroded the state courts' ability to uphold restrictive land use regulations on their merits.[16] Some California courts, however, responded to this development by invoking novel procedural requirements to impede the prosecution of regulatory takings claims by injured landowners.[17]

In a line of decisions handed down in the wake of *Nollan*, the California Court of Appeals held that property owners may not seek compensation for regulatory takings unless they first establish that the offending regulation is invalid.[18] This requirement reflects profound confusion at both doctrinal and procedural levels. Doctrinally, the California courts have blurred the two independent prongs of the *Agins* standard. At the same time, actions for inverse condemnation (the procedure for seeking compensation) have been conflated with petitions for administrative mandamus (the most common procedure for invalidating a regulation).[19]

The potential procedural chaos arising from the merger of these two distinct causes of action is of critical importance to property owners. In California, administrative mandamus is a limited judicial proceeding that must be brought promptly upon the enactment or decision that gives rise to a taking.[20] The State of California has taken the position that an adverse ruling in the mandamus proceeding (*i.e.*, upholding the validity of the regulation) should foreclose any liability for a regulatory taking.[21] If an injured property owner cannot establish the invalidity of a regulation via the limited forum of administrative mandamus, she would be barred from seeking compensation by way of inverse condemnation. Thus, by failing to recognize the essential distinctions between inverse condemnation and administrative mandamus, the California courts devised a rule that foreclosed to many citizens their constitutional right to just compensation for regulatory takings.

On July 25, 1994, the California Supreme Court addressed the procedural requirements of regulatory takings claims for the first time in

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choice of land use specialists as the state least likely to protect owners' constitutional rights).

16. *See infra* notes 105-08 and accompanying text.

17. *See infra* notes 75-91 and accompanying text.

18. *See* California Coastal Comm'n v. Superior Court, 258 Cal. Rptr. 567, 570 (Ct. App. 1989); Rossco Holdings, Inc. v. State, 260 Cal. Rptr. 736, 744 (Ct. App. 1989), *cert. denied*, 494 U.S. 1080 (1990). See *infra* Section III for a review of these decisions and their progeny.

19. *See infra* notes 29-51 and accompanying text.

20. *See infra* notes 29-44 and accompanying text.

21. *See, e.g.*, Healing v. California Coastal Comm'n, 27 Cal. Rptr. 2d 758, 762 (Ct. App. 1994).

fifteen years in *Hensler v. City of Glendale*.[22] On the surface, *Hensler* dealt only with the narrow issue of whether a developer has complied with the appropriate statute of limitations in challenging a restrictive city ordinance. In fact, however, the *Hensler* decision substantially revised the procedural guidelines for litigating regulatory takings claims in California.

Justice Baxter's unanimous opinion in *Hensler* skillfully weaved together an assortment of appellate decisions and unified them under the rubric of long-standing Supreme Court doctrine and constitutional mandates. A crucial element in this elaborate reconciliation was the *Hensler* court's citation—and strong endorsement—of a recent decision of the Second Appellate District, *Healing v. California Coastal Commission*.[23] As the California Attorney General loudly complained, *Healing* was not even decided until after most of the briefing had been submitted in *Hensler*.[24] Nevertheless, the state supreme court recognized that the *Healing* decision held the key to imposing stringent procedural restrictions on regulatory takings claims while still maintaining the protections guaranteed to property owners under the Takings Clause.

This article will review in greater depth the distinctions in purpose and scope between actions for inverse condemnation and petitions for administrative writs,[25] trace the blending of these two very different instruments by the California courts,[26] and show how this policy has subverted constitutional rights in California.[27] Special attention will then be turned to the key California Court of Appeal decision in *Healing* and its role in shaping the doctrine of the California Supreme Court as revealed in *Hensler*.[28]

II. INVERSE CONDEMNATION AND ADMINISTRATIVE MANDAMUS ARE FUNDAMENTALLY INCOMPATIBLE PROCEEDINGS

The issue of whether a regulatory takings claim must be raised by way of administrative mandamus involves more than mere legal form.

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22. 876 P.2d 1043 (Cal. 1994).

23. 27 Cal. Rptr. 2d 758 (Ct. App. 1994).

24. Amicus letter brief of the State of California dated August 9, 1994, urging the California Supreme Court to grant rehearing or modification of *Hensler* to delete references to *Healing*.

25. *See infra* notes 29-51 and accompanying text.

26. *See infra* notes 52-97 and accompanying text.

27. *See infra* notes 98-127 and accompanying text.

28. *See infra* notes 128-174 and accompanying text.

Inverse condemnation actions and administrative mandamus proceedings pursue entirely different ends. Administrative mandamus looks to the legitimacy of a regulatory agency's decision.[29] The proceeding focuses on such questions as the nature of the hearing, whether discretion was abused and whether the agency acted improperly under state law. Inverse condemnation, in contrast, is an action brought by an owner "to recover damages for injury to his property from [the government]."[30] In other words, administrative mandamus seeks to have a regulatory action struck down as invalid, while inverse condemnation seeks compensation for the effect of the regulation on the property owner's rights, whether or not the regulation is valid.

A. Administrative Mandamus

In California, a challenge to the validity of a land use regulation must be brought by either a declaratory relief action or a petition for mandamus, depending on whether the regulation is challenged on its face or as applied. To bring a facial challenge to a legislative enactment, an aggrieved property owner must seek declaratory relief.[31] In the far more common instance of challenging an action or decision as applied to a particular plaintiff, however, a writ of administrative mandamus is the only route to invalidation.[32] The aggrieved party must normally file a writ petition within ninety days following the final administrative decision (commonly the denial or conditioning of a discretionary permit).[33] In some circumstances, however, the applicable statute of limitations is even shorter.[34]

Administrative mandamus is an extremely narrow statutory procedure designed to "attack, review, set aside, void or annul" adjudicatory decisions of state or local governmental bodies.[35] Judicial review is

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29. 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 987 (1988) (defining administrative mandamus as "[a]ttacks on the validity of a resolution").

30. 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 1057 (1988); *see also* BLACK'S LAW DICTIONARY 845 (6th ed. 1990) (inverse condemnation: "[a] cause of action against a government agency to recover the value of property taken by the agency").

31. *See* State v. Superior Court, 524 P. 2d 1281, 1290 (Cal. 1974) (citing McCarthy v. City of Manhattan Beach, 264 P.2d 932, 933-34 (Cal.), *cert. denied*, 348 U.S. 817 (1954)).

32. *Id.*

33. *See* Patrick Media Group, Inc. v. California Coastal Comm'n, 11 Cal. Rptr. 2d 824, 833 (Ct. App. 1992). *See, e.g.*, CAL. GOV'T CODE § 66499.37 (West 1983); CAL. CIV. PROC. CODE § 1094.6(b) (West 1980 & Supp. 1994).

34. When the California Coastal Commission is the agency whose decision or action is challenged, the writ petition must be filed within 60 days after the decision becomes final. CAL. PUB. RES. CODE § 30801 (West 1986 & Supp. 1994).

35. CAL. CIV. PROC. CODE § 1094.5 (West 1980 & Supp. 1994). *See also* Youngblood

available only to establish the regulatory agency's abuse of discretion. This requires a showing that the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.[36]

In determining whether the regulatory body abused its discretion, the reviewing court normally applies a *substantial evidence* standard of review. Under this criterion, great deference is extended to the regulators. The court merely determines whether (1) substantial evidence exists to support the agency's findings and (2) the findings are legally sufficient to uphold the challenged decision.[37] The decision will be struck down only if the court determines that the findings are not supported "by substantial evidence in the light of the whole record."[38] All reasonable doubts are resolved in favor of the agency;[39] the court will not apply its own judgment in place of the regulators'.[40]

Only when a regulation substantially affects a fundamental vested right does the *independent judgment* standard apply.[41] Under this standard the court carries out its normal fact-finding procedures of weighing the evidence and reaching its own conclusion. Unfortunately, the independent judgment test is not available in most land use disputes because California courts do not regard the development of private property as a fundamental vested right.[42]

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v. Board of Supervisors, 586 P.2d 556, 559 n.2 (Cal. 1974).

36. CAL. CIV. PROC. CODE § 1094.5(b) (West 1980 & Supp. 1994).

37. *See* Topanga Ass'n for a Scenic Community v. County of Los Angeles, 522 P.2d 12, 14 (Cal. 1974); McMillan v. American Gen. Fin. Corp., 131 Cal. Rptr. 462, 466 (Ct. App. 1976).

38. CAL. CIV. PROC. CODE § 1094.5(c) (West 1980 & Supp. 1994).

39. *See Topanga*, 522 P.2d at 16; Paoli v. California Coastal Comm'n, 223 Cal. Rptr. 792, 795 (Ct. App. 1986).

40. *See McMillan*, 131 Cal. Rptr. at 466.

41. *See* Strumsky v. San Diego County Employees Retirement Ass'n, 520 P.2d 29, 33 (Cal. 1974) (fundamental vested rights are any rights which have been "legitimately acquired" and are economically or otherwise "importan[t] . . . to the individual in the life situation"); Bixby v. Pierno, 481 P.2d 242 (Cal. 1971) (when a person already possesses something of value, he has a "fundamental vested right" which requires judicial oversight in the form of independent judgment review); 301 Ocean Ave. Corp. v. Santa Monica Rent Control Bd., 279 Cal. Rptr. 636, 640 (Ct. App. 1991); *see also* Berlinghieri v. Department of Motor Vehicles, 657 P.2d 383 (Cal. 1983); Drummey v. State Bd. of Funeral Directors and Embalmers, 87 P.2d 848 (Cal. 1939).

42. *See* Whaler's Village Club v. California Coastal Comm'n, 220 Cal. Rptr. 29 (Ct. App. 1985); City of Chula Vista v. Superior Court, 183 Cal. Rptr. 909, 918 (Ct. App. 1982). There have been rare exceptions to this general rule. *See, e.g.*, Goat Hill Tavern v. City of Costa Mesa, 8 Cal. Rptr. 2d 385 (Ct. App. 1992) (owner has vested

Under no circumstances will the issues adjudicated at an administrative hearing receive a trial *de novo* in the reviewing court.[43] Regardless of the standard of review, the only evidence normally received in an administrative mandamus proceeding is the administrative record.[44]

B. Inverse Condemnation

Unlike the statutorily created mandamus proceeding, inverse condemnation is a constitutionally-based action to obtain just compensation for a taking.[45] The inverse condemnation action is based on the Takings Clause of the Fifth Amendment,[46] which is "self-executing" with respect to compensation.[47]

The only issues in an inverse condemnation action are whether a plaintiff's property was taken by excessive regulation and if so, what "just compensation" is required. Whether a taking has occurred is a mixed question of law and fact to be determined by a trial judge.[48] The amount of compensation that should be awarded is entirely a factual issue to be determined by a jury.[49]

Historically, invalidation of the offending regulation has not been an issue in inverse condemnation since the cause of action is designed "to secure compensation in the event of *otherwise proper* interference

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fundamental right to continue operating tavern under conditional use permit); 301 Ocean Avenue Corp. v. Santa Monica Rent Control Board, 279 Cal. Rptr. 636 (Ct. App. 1991) (landlord has fundamental vested right to control use of property for assigned parking).

43. Continuing Education of the Bar, *California Administrative Mandamus* § 4.121 (2d ed. 1989).

44. *Id.* This record may be augmented only in two limited instances: (1) when relevant evidence is offered that, in the exercise of reasonable diligence, could not have been produced at the hearing, or (2) when relevant evidence was improperly excluded at the hearing. CAL. CIV. PROC. CODE § 1094.5(e) (West 1980 & Supp. 1994).

45. *See supra* note 30 and accompanying text. *See generally* 29 CAL. JUR. 3D Eminent Domain § 301-40 (1986). The underlying purpose of the Takings Clause is "to distribute throughout the community the loss inflicted upon the individual by the making of public improvements." 29 CAL. JUR. 3D Eminent Domain § 303 (1986).

46. 29 CAL. JUR. 3D (REV.), Eminent Domain § 302 (Gene A. Noland et al. eds., 1986). The Takings Clause has been applied to the states through the Fourteenth Amendment since Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897). The California Constitution has a similar provision requiring just compensation for the taking of property by the government. CAL. CONST., art. I, § 19. The state provision includes compensation for "damaging" as well as "taking" private property. *Id.* This difference has been construed to protect property interests to a greater degree than federal law. Varjabedian v. City of Madera, 572 P.2d 43, 51 (Cal. 1977).

47. First English Evangelical Lutheran Church v. Country of Los Angeles, 482 U.S. 304, 315 (1987).

48. *See, e.g.*, People v. Ricciardi, 144 P.2d 799, 805 (Cal. 1943).

49. *Id.*

amounting to a taking."[50] Moreover, invalidation has traditionally been considered a remedy for *due process* violations;[51] the remedy for a taking—pursued via inverse condemnation—is compensation. Similarly, questions of abusing discretion, exceeding jurisdiction and complying with state law do not arise in inverse condemnation because they have been perceived as irrelevant to the inquiry of whether compensation is due.

III. INTO THE QUAGMIRE: THE DEVELOPMENT OF A FLAWED DOCTRINE BY THE CALIFORNIA COURTS

A. Veta/Agins/First English

The confused merger of administrative mandamus and inverse condemnation in California began innocently enough.[52] Nearly twenty years ago, in *State v. Superior Court (Veta)*,[53] the California Supreme Court drew a procedural distinction between facial and as-applied challenges to the constitutionality of government regulations.[54] The *Veta* court acknowledged that declaratory relief is an appropriate vehicle for facial challenges to statutory enactments.[55] When the validity of an administrative action or decision is at issue, however, *Veta* held that relief must be sought via administrative mandamus under Code of Civil Procedure section 1094.5.[56] Although *Veta* did not involve an inverse condemnation claim, it laid the groundwork for a series of decisions that would dramatically affect the rights of property owners throughout the state.

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50. *First English*, 482 U.S. at 314 (emphasis added).

51. *See, e.g.*, Susan M. Denbo, *Development Exactions: A New Way to Fund State and Local Government Infrastructure Improvements and Affordable Housing?*, 23 REAL. EST. L. J. 7, 15 n.52 (1994); William W. Merrill, III & Robert K. Lincoln, *Linkage Fees and Fair Share Regulations: Law and Method*, 25 URB. LAW 223, 242-43 n.89 (1993).

52. Bringing a regulatory taking claim to trial in California involves an administrative 'shell game' and a judicial 'minefield' to trap the unwary practioner. For a general overview of the trial court procedures in California in permit cases as of 1992, see generally Sharon Browne, *Mandamus or Inverse Condemnation?—Special Problems in Permit Cases*, C730 ALI-ABA 35 (1992).

53. 524 P.2d 1281, 1290-93 (Cal. 1974).

54. *Id.*

55. *Id.* at 1293.

56. *Id.* at 1290.

Five years later, in *Agins v. City of Tiburon*,[57] the California Supreme Court drew on *Veta* to bar a landowner from challenging a confiscatory zoning ordinance by bringing an inverse condemnation suit.[58] The *Agins* court held that owners could seek to *invalidate* such regulations under the Fifth Amendment, but a claim for compensation via inverse condemnation was not available as a remedy.

> [A] landowner alleging that a zoning ordinance has deprived him of substantially all use of his land may attempt through declaratory relief or mandamus to invalidate the ordinance as excessive regulation in violation of the Fifth Amendment to the United States Constitution and article I, section 19, of the California Constitution. He may not, however, elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid.[59]

In reaching this conclusion, *Agins* recognized that inverse condemnation suits for invalidation are two different legal responses to excessive regulation.[60] However, the court seemed to imply that a constitutionally valid regulation can never trigger the just compensation requirement of the Takings Clause by depriving an owner of beneficial use of his property. The *Agins* court apparently devised a Catch-22 whereby a suit for compensation through inverse condemnation could never succeed. By the logic of *Agins*, if a challenged regulation is unconstitutional, it is *ipso facto* invalid. But if the measure is invalid, the proper remedy is not compensation but invalidation via administrative mandamus (or declaratory relief, for a facial challenge).[61]

The *Agins* opinion was quickly applied throughout California's judicial system to deprive property owners of their constitutional remedy of just compensation for regulatory takings.[62] At times, it seemed as if a gauntlet had been thrown. As one appellate panel put it, "While the United States Supreme Court may eventually conclude that California cannot limit the remedy available for a taking to nonmonetary relief, it has not yet done so, and this court is obligated to follow *Agins*."[63]

This tension came to a head in *First English Evangelical Lutheran*

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57. 598 P.2d 25 (Cal. 1979).

58. *Id.* at 28-32.

59. *Id.* at 28.

60. *Id.* See *supra* notes 29-51 for a discussion of the differences between inverse condemnation and administrative mandamus, which is a suit for invalidation.

61. *Agins*, 598 P. 2d at 28.

62. *See, e.g.*, Guinnane v. City & County of San Francisco, 241 Cal. Rptr. 787, 788 (Ct. App. 1987); Walter H. Leimert Co. v. California Coastal Comm'n, 196 Cal. Rptr. 739, 745 (Ct. App. 1983); Gilliland v. County of Los Angeles, 179 Cal. Rptr. 73, 77 (Ct. App. 1981); Liberty v. California Coastal Comm'n, 170 Cal. Rptr. 247, 251 (Ct. App. 1980).

63. Aptos Seascape Corp. v. County of Santa Cruz, 188 Cal. Rptr. 191, 196 (Ct. App. 1982).

Church of Glendale v. County of Los Angeles.[64] In *First English*, the California Court of Appeal, in an unpublished opinion, held that allegations of a regulatory taking did not state a cause of action for inverse condemnation.[65] In a challenge to a building moratorium brought by a Glendale church, Los Angeles County moved to strike the church's allegations that it had been denied all economically viable use of its land. The trial court granted the motion and was upheld on appeal, reasoning that *Agins* rendered such issues "entirely immaterial and irrelevant [with] no bearing upon any conceivable cause of action herein."[66] The California Supreme Court denied First English's petition for review.

B. The Supreme Court's Response

The United States Supreme Court granted certiorari in *First English*[67] and tossed a bombshell into the California judiciary. Reversing the state court of appeal, the High Court carefully spelled out the role of the Takings Clause and inverse condemnation in the tension between property rights and the regulatory state: "[The Takings Clause] does not prohibit the taking of private property, but instead *places a condition* on the exercise of that power."[68]

That condition, the Court continued, is the "constitutional obligation to pay just compensation" for governmental takings of private property rights.[69] The compensation requirement was underscored by the Court's emphasis that the Fifth Amendment is not a mechanism for invalidating regulations.[70] Rather, an injured property owner is *entitled* to bring an action in inverse condemnation as a result of "the self-executing character of the constitutional provision with respect to compensation."[71]

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64. Unpublished disposition, California Court of Appeal (1986), *rev'd*, 482 U.S. 304 (1987).

65. *Id.*

66. *Id.* at 308.

67. 482 U.S. 304 (1987). For a further discussion of the *First English* decision see generally *supra* note 5.

68. *First English*, 482 U.S. at 314.

69. *Id.* at 315 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

70. "This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English*, 482 U.S. at 315.

71. *Id.* (quoting United States v. Clarke, 445 U.S. 253, 257 (1980)).

As if fearful that its point would be missed, the *First English* Court reviewed the origin of and constitutional basis for inverse condemnation:

> [Inverse condemnation] suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. *That right was guaranteed by the Constitution.* The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary . . . . *Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States.*[72]

A clear implication of *First English* is that inverse condemnation cannot be used to invalidate governmental intrusions on property. *Agins* was doctrinally sound on this point when it held that the proper tools for *invalidating* governmental acts under the Fifth Amendment are mandamus and declaratory relief.[73] However, the California courts erred in applying *Agins* to foreclose inverse condemnation where *compensation* for a taking was at issue. On this point, the Supreme Court affirmed that inverse condemnation as a remedy for a taking is constitutionally guaranteed.[74]

C. *Back to the Bog:* Ham, Rossco *and Their Progeny*

To the dismay of the state's property owners, the California courts promptly doused *First English's* "bombshell" in a vat of ice water. Undeterred by the United States Supreme Court's ruling, the state judiciary continued to apply the conceptual framework of *Agins*. Suits seeking compensation for regulatory actions were still treated as challenges to the validity of the actions. The state courts recognized they could no longer deny the availability of inverse condemnation as a matter of law—but, in a new twist on *Agins*, a way was found to minimize the significance of inverse condemnation as a remedy.

Two years after *First English* the California Court of Appeal signaled the new direction in *California Coastal Commission v. Superior Court (Ham)*.[75] In *Ham*, the Coastal Commission approved a residential building permit subject to the exaction of a beachfront easement.[76] The property owner complied with the condition and built his home. Some time later (but within the five-year statute of limitations for inverse condem-

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72. *Id.* at 316 (quoting Jacobs v. United States, 290 U.S. 13 (1933)) (latter emphasis added).

73. *See Agins*, 598 P.2d at 28.

74. *First English*, 482 U.S. at 321.

75. 258 Cal. Rptr. 567 (Ct. App. 1989).

76. *Id.* The facts of *Ham* are virtually identical to those of *Nollan v. California Coastal Commission*, in which the Supreme Court found a regulatory taking.

nation) the owner sued, alleging that the exaction amounted to a regulatory taking of his property. The court of appeal ruled that the inverse condemnation action was barred because the owner had failed to file his inverse condemnation claim with a petition for writ of administrative mandamus.[77]

In reaching this conclusion, the *Ham* court acknowledged that in *First English*, "the Supreme Court held that an inverse condemnation remedy for a temporary taking was constitutionally mandated."[78] However, the High Court had said nothing about when the takings claim must be filed. Citing to no authority, *Ham* continued:

> Quite clearly, a property owner seeking to recover on an inverse condemnation claim against the Commission in a case such as this *must first establish the invalidity of the condition* the Commission sought to impose. An administrative mandate proceeding provides the proper vehicle for such a challenge.[79]

How the *Ham* court could consider this novel procedural rule to be "quite clear" is a lingering source of puzzlement to legal scholars. The holding has obvious roots in *Agins* and California's subsequent emphasis on invalidation instead of compensation as the sole remedy for a taking. The requirement of invalidation *as a precondition* to compensation was, however, entirely new.[80]

A few months after *Ham*, the court of appeal decided *Rossco Holdings, Inc. v. State*,[81] which involved another suit against the state and the Coastal Commission over conditions imposed on the development of plaintiffs' land. The owners in *Rossco* did not file a petition for an administrative writ, arguing that they could not be compelled to do so under the Fifth Amendment. The appellate panel disagreed, holding that the plaintiffs had waived their right to inverse condemnation by failing to pursue administrative mandamus "prior to, or in conjunction with," their claim.[82]

Like *Ham*, the *Rossco* court characterized a regulatory takings claim as an effort to invalidate an administrative act: "Regardless of whether [the

77. *Id.* at 569-70.

78. *Id.* at 570.

79. *Id.* (emphasis added).

80. Significantly, the *Ham* court was unable to provide a single citation to statutory or case law in support of its innovative procedural doctrine.

81. 260 Cal. Rptr. 736 (Ct. App. 1989).

82. *Id.* at 737. The effect is an inverse condemnation suit must be filed within the same time period allowed for filing a mandamus action. Browne, *supra* note 52, at 44.

owner] pleads its cause of action as one for inverse condemnation or as a denial of due process, *the essential underpinning of its recovery is the invalidity of the administrative action.* That action must be reviewed by petition for writ of administrative mandate."[83] *Rossco* went beyond *Ham* in proposing for the first time that an administrative mandamus hearing could provide an adequate forum not only to establish the validity of a regulation, but also to determine whether a regulatory taking had occurred.[84]

The court of appeal fully embraced this troubling suggestion in *Patrick Media Group v. California Coastal Commission.*[85] The *Patrick Media* court began by reiterating the familiar theme that an inverse condemnation action seeks to invalidate the challenged regulation or decision: "The gravamen of a challenge based upon inverse condemnation is that the administrative action was invalid *insofar as it did not provide for payment of compensation.*"[86] While reaffirming that an injured property owner must bring a claim for damages via a petition for administrative mandate, the *Patrick Media* court recast the law of takings in a startling light:

> [T]he general rule requiring a challenge to an administrative action to be raised by way of administrative mandate applies whether (1) the challenger's claim is that the action was invalid and should be cancelled, or (2) the claim is that the action resulted in a taking of property . . . . In either case, the essential underpinning of the challenge is the invalidity of the administrative action.[87]

This remarkable passage seems to imply that the constitutionally guaranteed remedy of inverse condemnation actions has been subsumed within California's administrative writ procedures. Compensation for a taking was no longer to be accorded procedural autonomy as a separate and distinct cause of action.

It was quickly demonstrated that the foregoing was not a strained interpretation of *Patrick Media.* In *Tensor Group v. City of Glendale,*[88] property owners challenged a selective building moratorium by petitioning for an administrative writ and succeeded in invalidating the measure.[89] When they followed up their success with an inverse condemnation claim, however, their complaint was dismissed on grounds of res judicata.[90] The court of appeal affirmed, holding that any evidence of

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83. *Rossco*, 260 Cal. Rptr. at 746 (emphasis added) (citing *Ham*, 258 Cal. Rptr. at 570).
84. *Id.* at 745.
85. 11 Cal. Rptr. 2d 824 (Ct. App. 1992).
86. *Id.* at 834 (citing *Rossco*, 260 Cal. Rptr. at 740).
87. *Patrick Media*, 11 Cal. Rptr. at 834 (citations omitted).
88. 17 Cal. Rptr. 2d 639 (Ct. App. 1993).
89. *Id.* at 640.
90. *Id.* at 640.

damages had to be submitted *during the mandamus proceeding.*[91] The constitutional sufficiency of the writ proceedings to dispose of an inverse condemnation claim was simply assumed without discussion.

D. Summary

The trend of California takings law over the past two decades is clear. From *Veta's* holding that mandamus is the appropriate vehicle for an as-applied challenge to an administrative act's validity, it was a short step to *Agins'* conclusion that invalidation—not compensation—is the proper remedy for a regulatory taking.[92] The state courts did not shrink from pressing this doctrine to its ultimate conclusion by foreclosing inverse condemnation to regulatory takings claimants altogether.

California's appellate courts quickly accommodated the Supreme Court's stinging repudiation of this doctrine in *First English.* In *Ham,* the court tied inverse condemnation to the short statute of limitations for administrative writ petitions,[93] and in *Rossco* it was proposed that the writ hearing could adequately dispose of the takings claim altogether.[94] This suggestion became a command in *Patrick Media,*[95] and in the *Tensor* decision it was determined that evidence relevant to compensation would be barred if not introduced in the agency proceedings and incorporated into the administrative record.[96]

Throughout this doctrinal odyssey, the courts have been guided by the goal of minimizing the exposure of California governments to financial liability for regulatory takings.[97] However, this objective has been

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91. *Id.* at 642 (emphasis added).

92. Agins v. City of Tiburon, 598 P.2d 25, 28 (Cal. 1979), *aff'd,* 477 U.S. 255 (1980), *overruled by,* First Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

93. California Coastal Comm'n v. Superior Court (Ham), 258 Cal. Rptr. 567, 570 (Ct. App. 1989).

94. Rossco Holdings v. State, 260 Cal. Rptr. 736, 745 (Ct. App. 1989).

95. Patrick Media Group v. California Coastal Comm'n, 11 Cal. Rptr. 2d 824, 834 (Ct. App. 1992).

96. Tensor Group v. City of Glendale, 17 Cal. Rptr. 2d 639, 643 (Ct. App. 1993).

97. The *Ham* court fretted that if injured citizens were allowed to pursue inverse condemnation claims for regulatory takings, "the financial burden on the state could be overwhelming." *Ham,* 258 Cal. Rptr. at 570. In *Patrick Media,* the court worried that recognizing the full statutory five-year limitations period would mean that "meaningful governmental fiscal planning would become impossible." *Patrick Media,* 11 Cal. Rptr. 2d at 836 (citations omitted). These concerns flow directly from the California Supreme Court's preoccupation in *Agins* with *"the inhibiting financial force which*

achieved at heavy expense to other, arguably more fundamental, values—notably the constitutional rights of California property owners.

IV. THE PROBLEMS: WHY ADMINISTRATIVE MANDAMUS IS CONSTITUTIONALLY INADEQUATE AS A PROCEDURE TO DETERMINE TAKINGS LIABILITY

Six years after the Supreme Court's intervention in *First English*,[98] California courts developed a doctrine nearly as onerous to property owners as their earlier refusal to recognize inverse condemnation as a remedy for a regulatory taking.[99] By 1993, inverse condemnation in such cases had been reduced to little more than a theoretical curiosity. Before compensation could be considered, injured property owners were required to seek invalidation within the ninety day (or shorter) statute of limitations for administrative mandamus.[100] The outcome of this limited proceeding would then be dispositive as to the takings issue.[101]

This policy, it should be noted, was not without supporters. A leading authority on California land use law, for example, described the rule as serving the "salutory purpose of promptly alerting the agency that its decision is being questioned and that it may be liable for inverse condemnation damage."[102] Why this burden should be placed on the individual whose property is taken is not disclosed.

As Justice Brennan once remarked, it does not seem unreasonable to expect government officials—who have constant access to specialized legal counsel at taxpayer expense—to be familiar with the content of the United States Constitution.[103] It seems especially curious to place the burden of education on the victims. While it may be true that the state finds "salutory" benefits in subordinating inverse condemnation to mandamus, these benefits must be balanced against the costs to individuals who are injured by confiscatory regulations. The heaviest of these costs is the effective forfeiture of basic constitutional protections.

The procedural quagmire created by California's appellate courts in the

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inheres in the inverse condemnation remedy." *Agins*, 598 P.2d at 31 (emphasis added).

98. *See supra* notes 67-74 and accompanying text.

99. *See supra* notes 57-59 and accompanying text.

100. Tensor Group v. City of Glendale, 17 Cal. Rptr. 2d 639, 640 n.1 (Ct. App. 1993).

101. *Id.* at 639.

102. DANIEL J. CURTIN, JR., CALIFORNIA LAND USE AND PLANNING LAW 213 (14th ed. 1994). The cited rationale is repeated almost verbatim from the *Ham* opinion. *Id.*

103. "[I]f a policeman must know the Constitution, then why not a planner?" San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting).

aftermath of *First English* rested on the premise that administrative mandamus is an acceptable procedure to determine whether citizens' rights have been violated under the Fifth Amendment.[104] In fact, mandamus proceedings are not constitutionally adequate for this purpose. This section outlines three of the chief problems with the California doctrine: plaintiffs do not receive basic due process safeguards in the administrative procedures that create the record for review in a mandamus action; this deficient record is then subjected to an inadequate standard of review; and takings claims must be rushed into court under an unduly short statute of limitations.

A. The Due Process Problem

Before a federal constitutional takings issue can be resolved against a property owner, certain fundamental requirements of due process must be met. At a minimum, the aggrieved party should be entitled to an inquiry before a judicial officer where witnesses can be subpoenaed and testify under oath, where cross-examination of witnesses is allowed, and where discovery is permitted.[105]

Under existing California law, this type of inquiry is not available in an administrative mandamus proceeding in a land use case. The administrative record—the only evidence normally before a reviewing court—is usually derived from proceedings lacking any significant due process safeguards. This record is developed not under the guidance of a neutral judge but during hearings conducted by one of the parties to the anticipated litigation. Consequently, there frequently may be little concern for the reliability of the fact-finding process.

Even granting the best of intentions to the regulating agency, it will usually be logically impossible to determine from the administrative record whether a taking has occurred. It is axiomatic that "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."[106] Yet the impact of a regulatory decision

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104. *See supra* notes 67-74 and accompanying text.

105. "Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." Hannah v. Larche, 363 U.S. 420, 442 (1960); *accord* McLeod v. Board of Pension Comm'rs of Los Angeles, 94 Cal. Rptr. 58, 61 (Ct. App. 1970).

106. MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348 (1986). A regulation that "goes too far" is considered a taking under the fifth amendment. Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922). *See supra* note 3 and accom-

or enactment with respect to any given property owner cannot be determined until after final action is taken by the government.[107] Thus, it is not possible for a trial court to resolve this issue by reviewing an administrative record developed prior to and concurrently with the final action of the agency.

The *Rossco* court tried to finesse this problem by likening a mandamus proceeding to the first phase of an inverse condemnation action.[108] The superficial resemblance—in both cases the trial judge determines as a question of law and fact whether there has been a taking—is entirely spurious. Whether a plaintiff has suffered a deprivation of her constitutional rights cannot reliably be established in a proceeding in which the court's inquiry is limited to the record developed by an adverse party, without due process safeguards, whose deliberations concluded *before* the taking occurred.

B. The Standard of Review Problem

In *Nollan v. California Coastal Commission*, the Supreme Court held that heightened scrutiny is required in evaluating regulatory takings claims.[109] The Supreme Court's decision in *Dolan v. City of Tigard* reiterated and strengthened *Nollan*'s requirement of an elevated standard of review.[110] Indeed, Chief Justice Rehnquist in *Dolan* likened the standard of review applicable to property regulations challenged under the Takings Clause to that employed in cases arising under the First Amendment.[111] Furthermore, the Court spelled out in *Dolan* what had only been implied in *Nollan*: governments enacting regulations challenged under the Takings Clause must bear the burden of proving their legitimacy.[112]

One line of California cases had repudiated *Nollan*'s requirement of heightened scrutiny for regulatory takings, much as the cases reviewed in the preceding section eviscerated *First English*.[113] However, immediate-

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panying text.

107. *Id.* at 349.

108. Rossco Holdings v. State, 260 Cal. Rptr. 736, 745 (Ct. App. 1989).

109. *Nollan*, 483 U.S. at 834-35 n.3 (overruling the rational basis test employed by the *Whaler's Village* court). *See also* Surfside Colony, Ltd. v. California Coastal Comm'n, 227 Cal. Rptr. 376 (Ct. App. 1991) (applying the substantial evidence test as the standard of constitutional review in a "takings" case).

110. Dolan v. City of Tigard, 114 S. Ct. 2309 (1994).

111. *Id.* at 2312.

112. *Id.* at 2311.

113. *See* Saad v. City of Berkeley, 30 Cal. Rptr. 2d 95, 98-99 (Ct. App. 1994) (limiting *Nollan* doctrine to "possessory" takings); Tahoe Keys Property Owners' Ass'n v. State Water Resources Control Bd., 28 Cal. Rptr. 2d 734, 743 (Ct. App. 1994) (holding that *Nollan's* heightened scrutiny applies only to physical takings); City and County of

ly following its decision in *Dolan*, the Supreme Court implicitly overruled these cases by its disposition of a petition for certiorari in *Ehrlich v. City of Culver City*.[114] *Ehrlich* involved a challenge to an exaction of more than $300,000 in fees in exchange for a building permit.[115] The court of appeal upheld the city's demands, ruling that "[m]onetary exactions compelled as a condition of approval need be only rationally related to the governmental purpose."[116] The United States Supreme Court granted Ehrlich's petition for certiorari and remanded for reconsideration in light of *Dolan*.[117] In so doing, the High Court affirmed that the heightened judicial standards mandated by *Nollan* and *Dolan* apply to the full range of intrusive land-use regulations and conditions, not just those involving a transfer of real property.

The relationship between the heightened judicial scrutiny required by *Nollan* and *Dolan* and the appropriate standard of review in passing on the validity of administrative actions is problematic. It seems implausible that judges applying the substantial evidence standard in the context of a limited administrative record—the normal state of affairs in administrative mandamus hearings—could offer meaningful protection to the rights of property owners. However, it is not evident that the independent judgment standard would significantly enhance this protection, given that an adverse party to the record under litigation compiles the record with few or no constitutional safeguards, prior to the occurrence of the asserted taking. The California courts in *Ham*, *Rossco* and their progency either ignored or glossed over these problems.

C. *The Statute of Limitations Problem*

In California, the statute of limitations for bringing an action in inverse

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San Francisco v. Golden Gate Heights Inv., 18 Cal. Rptr. 2d 467, 469 (Ct. App. 1993) (holding that *Nollan*, one of the Supreme Court's leading regulatory takings cases, does not apply to regulatory takings); Blue Jeans Equities West v. City and County of San Francisco, 4 Cal. Rptr. 2d 114, 117 (Ct. App. 1992) (holding that the heightened scrutiny test in *Nollan* is limited to "possessory" rather than regulatory takings cases); *Contra* Surfside Colony, Ltd. v. California Coastal Comm'n, 277 Cal. Rptr. 371, 377 (Ct. App. 1991), (acknowledging that "Nollan . . . changed the standard of constitutional review in takings cases. Whether the new standard be described as 'substantial relationship', or 'heightened scrutiny' it is clear the rational basis test . . . no longer controls.").

114. 114 S. Ct. 2731 (1994).

115. Ehrlich v. City of Culver City, 19 Cal. Rptr. 2d 468 (Ct. App. 1993).

116. *Id.* at 475 (citing *Blue Jeans Equities*, 4 Cal. Rptr. 2d 114 (Ct. App. 1992)).

117. 114 S. Ct. 2731 (1994).

condemnation is five years.[118] In sharp contrast, petitions for administrative mandamus must be brought within ninety days or sooner following the final administrative decision.[119] Under the *Ham* line of decisions, an owner who is injured by land-use regulations is required to pursue an administrative mandamus proceeding as a prerequisite to an inverse condemnation claim.[120] Moreover, the inverse condemnation action itself may have to be filed within the time frame allowed for the mandamus action.[121]

If it is recognized that inverse condemnation is a constitutionally guaranteed remedy for regulatory takings, it is difficult to see why the five year statute of limitations should be abridged in such cases. Nevertheless, the *Ham* court ruled that failure to file a writ petition within the specified time period barred the otherwise timely inverse condemnation claim.[122] Subsequent decisions in this line of cases have been equally as harsh.

As a practical matter, there may be serious difficulties in bringing an inverse condemnation action within 90 days of the triggering event. The property owner must recognize and assess her damages, which in many cases may seem quite speculative so close on the heels of a permit denial or similar decision. Specialized counsel must often be secured,[123] and facts and evidence must be marshalled for *both* an administrative writ petition and the inverse condemnation complaint.[124]

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118. CAL. CIV. PROC. CODE §§ 318-319 (West 1994); *see also* Baker v. Burbank-Glendale-Pasadena Airport Auth., 705 P.2d 866, 869 (Cal. 1985) (citing Frustuck v. City of Fairfax, 28 Cal. Rptr. 357 (Ct. App. 1963). The period for seeking compensation for *damage* to property is three years. *See* CAL. CIV. PROC. CODE § 338(j) (West 1994).

119. *See supra* notes 33-34 and accompanying text.

120. It is interesting to note that if an agency effects a *physical* taking of private property, there is no requirement for administrative mandamus before filing an action for inverse condemnation.

121. The California courts have been inconsistent on this point. In *Golden Cheese Co.*, the court of appeal expressly held that an inverse condemnation action against an administrative agency could be brought *subsequent* to the administrative mandate action. Golden Cheese Co. v. Voss, 281 Cal. Rptr. 602, 605 (Ct. App. 1991). As noted previously however, the *Tensor* court ruled that such a sequential approach would bar the inverse condemnation claim under res judicata.

122. California Coastal Comm'n v. Superior Ct. (Ham), 258 Cal. Rptr. 567 (Ct. App. 1989).

123. In addition to the need for an attorney with expertise in inverse condemnation, there is a sound practical reason why the property owner may be unable to continue with the same counsel who represented her in the administrative proceedings. Especially in rural areas, local land use attorneys often decline to pursue takings claims against the boards and agencies before whom they must appear and with whom they must work on a regular basis.

124. The 90-day period for filing a petition for administrative mandamus can be extended if the property owner requests a copy of the administrative record within 10

Many property owners will be unable to meet these stringent deadlines. At what point do these practical hurdles become so onerous as to infringe unconstitutionally on the right to compensation for a taking? The California courts overlooked or ignored this question in their concern to assure that local governments are promptly notified that they have plundered their citizens.[125]

D. Summary

By requiring that inverse condemnation actions be brought with a petition for administrative mandate, the California courts subjected property owners to harsh limitations periods, restrictive proceedings and limited factual records which, as the cases indicate, often preclude recovery. By subsuming inverse condemnation into the procedures established for administrative mandamus, the California courts created procedural obstacles that themselves may tend to "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[126]

The rights of California property owners reached an historically low ebb in the wake of *Ham*, *Rossco* and their progeny. The first sign that the tide was about to turn came in early 1994 with a decision handed down by the Second District Court of Appeal. That case, described in the next section, is *Healing v. California Coastal Commission.*[127]

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days after the adverse administrative decision becomes final. CAL. CIV. PROC. CODE § 1094.6(d). In such cases, the time for filing the petition is extended to 30 days following delivery of the record. *Id.* Of course, to take advantage of this option the owner must be seriously considering litigation within 10 days after the administrative action—seriously enough to bear the sometimes considerable cost of preparing the record.

125. *See, e.g.*, Patrick Media Group v. California Coastal Comm'n, 11 Cal. Rptr. 2d 824, 836 (Ct. App. 1992) ("a public agency's capacity to plan its actions in the public interest and to make reasonable and responsible allocations of resources that it holds in trust for the public requires that the agency be alerted promptly both when its decisions are questioned, and when, as a result of a particular decision, the agency may be liable for inverse condemnation damages.").

126. Armstrong v. United States, 364 U.S. 40, 49 (1960) (explaining what the Takings Clause was designed to *prevent*).

127. 27 Cal. Rptr. 2d 758 (Ct. App. 1994).

V. LIGHT AT THE END OF THE TUNNEL: *HEALING V. CALIFORNIA COASTAL COMMISSION*

In 1977, Kenneth Healing bought a two and a half acre lot in the Santa Monica Mountains overlooking the Pacific Ocean. Healing planned to build a modest single-story home on the site for his family—but he failed to reckon with the California Coastal Commission.

Healing's lot seemed like an ideal homesite. The property was zoned for residential development and was located close to existing homes, paved streets, and utility hookups. Nevertheless, an owner within California's Coastal Zone may not build a home on his own property without a permit from either the Coastal Commission or a local governmental agency certified by the Commission.[128] After twelve years of delays, the Coastal Commission rejected Healing's application for a building permit on the grounds that it could not determine the impact the structure might have on the environment.[129]

In 1990, Healing filed a petition for administrative mandamus and a complaint for inverse condemnation claiming he had been deprived of economically viable use of his homesite. Shortly thereafter, Healing's attorneys moved to sever the issue of takings liability from the determination of just compensation, and to set the liability issue for trial concurrently with the administrative writ hearing. The Coastal Commission countered that takings liability had to be determined in the administrative writ proceeding itself, not at a trial in which extrinsic evidence could be admitted and subjected to independent review.[130]

The trial court agreed with the Commission, holding that the takings issues were to be resolved at the administrative mandate hearing. Denying Healing's motion to apply an independent judgment standard of review, the court examined the administrative record under the deferential substantial evidence standard and concluded there was no taking.[131]

Faced with this particularly brutal example of the consequences of California's then-existing doctrine, the court of appeal reversed and directed that Healing's petition be granted. Grappling with the underlying constitutional issues, the *Healing* court veered sharply toward a policy of greater protection for citizens subjected to expansive and predatory regulatory bureaucracies.[132]

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128. *Id.* at 760.
129. *Id.* at 762.
130. *Id.*
131. *Id.* at 762-63.
132. *Id.* at 758.

A. Legitimate Regulations Can Effect a Taking

The *Healing* opinion firmly rejected the Coastal Commission's argument that "the legitimacy of the regulation which forms the basis of a regulatory taking defeats the landowner's claim to just compensation."[133] The court elaborated on this point at length, drawing on the Supreme Court's holding in *Lucas v. South Carolina Coastal Council.*[134]

In *Lucas*, a property owner was deprived of any reasonable use of two beachfront lots by the adoption of South Carolina's Beachfront Management Act. Lucas did not contest the validity of the legislation as an exercise of the police power, but nevertheless sued for inverse condemnation. The South Carolina Supreme Court, adopting substantially the same argument employed by the Coastal Commission in *Healing*, ruled that no taking could occur if a regulation advanced a valid governmental purpose.[135] The United States Supreme Court reversed, confirming that the Takings Clause is triggered "when the owner of real property [is] called upon to sacrifice *all* economically beneficial uses in the name of the common good," even if the underlying regulation is wholly legitimate.[136]

The *Healing* court applied this holding to repudiate the Coastal Commission's argument that no cause of action for inverse condemnation can be brought against a valid regulation:

> Assuming Healing would concede the validity of the Coastal Act, he would nevertheless be entitled to pursue his inverse condemnation claim and to an opportunity to inquire into the degree of harm to public lands and resources or adjacent private property posed by his proposed three-bedroom house; the social value of his activities and their suitability to the locality in question; the relative ease with which the alleged harm can be avoided through measures taken by Healing and the Coastal Commission; the fact that a similar use has long been engaged in by at least three similarly situated owners of adjacent lots; and the nature of the estate acquired by Healing in 1977, including the restrictions then imposed on his property, to permit a determination of the nature of his estate and a finding as to whether the use he now proposes was permissible at the time he acquired title.[137]

The court also expressly recognized that invalidation or reversal of the regulation cannot moot an aggrieved owner's inverse condemnation claim. Even if Healing is ultimately allowed to build his home, the court

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133. *Id.* at 766.
134. *Healing*, 112 S. Ct. at 2895; *see supra* note 11.
135. *See* Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C. 1991).
136. *Lucas*, 112 S. Ct. at 2895.
137. *Healing*, 27 Cal. Rptr. 2d at 767-68.

noted, he can still pursue a claim for temporary damages under *First English.*[138]

B. The Right to Trial

Its formulation of the foregoing issue impelled the *Healing* court to recognize that the existence and extent of takings liability must be determined at a trial with full due process protections. Administrative review was expressly rejected as inadequate to dispose of the takings question.[139]

Focusing on regulations that deprive owners of economically viable use of their property, the court recognized the practical impossibility of establishing a taking on the record of the administrative hearings at which a permit application is denied. This impossibility stems both from the limited scope and procedures of the administrative process, and from the fact that an as-applied takings claim does not even arise until after the hearings are concluded.[140]

Noting the absence of basic due process safeguards at administrative hearings, *Healing* goes on to observe that many of the facts relevant to takings liability are irrelevant to the administrative determination of a permit application. Consequently (as was true in the *Healing* case itself), critical facts concerning the takings issue will simply not be found in the administrative record.[141]

Moreover, the Coastal Commission lacks the statutory authority to consider a wide range of evidence and issues relevant to inverse condemnation. To the contrary, "the Commission is authorized to make and enforce rules and decide whether to grant permits. It is not an adjudicatory body authorized to decide issues of constitutional magnitude."[142]

For all these reasons, *Healing* strongly affirmed that inverse condemnation liability arising from a regulatory taking by the Coastal Commission must be determined in a full evidentiary trial. An administrative writ proceeding does not provide an adequate substitute forum for those issues.

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138. *Id.* at 764 n.6; *see* First English Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304 (1987) (holding that a landowner may recover "just compensation" under the Fifth Amendment for a "temporary taking" where the land use regulation is ultimately removed).

139. *Id.* at 768. For a discussion of the inadequacies of administrative review, see *supra* notes 98-127 and accompanying text.

140. *Id.* (citing Hoehne v. County of San Benito, 870 F.2d 529, 534 (9th Cir. 1989)).

141. *Healing*, 27 Cal. Rptr. 2d at 770.

142. *Id.* at 771 (citations omitted).

C. *The Cost of Avoiding Discontinuity*

From the perspective of doctrinal consistency and judicial efficiency, it would have been better if the court had simply held that there is no requirement of administrative mandamus in cases (such as *Lucas*) where the injured owner is willing to concede the legitimacy of the regulatory act or decision except for its failure to compensate. Hoping to avoid the appearance of a radical break with precedent, however, the *Healing* panel retained the requirement of mandamus as a procedural prerequisite to inverse condemnation.

In reaching what the court may have regarded as a middle ground, *Healing* sometimes weaved a tortured course through the morass of California precedent. For example, the court could not evade *Ham's* pronouncement that a petition for mandamus is a prerequisite to inverse condemnation, but found nothing in *Ham* to support the argument that takings liability should be determined as part of the mandate proceeding.[143] Conversely, the passages of *Rossco Holdings* and *Patrick Media*, which appear to say exactly that, are dismissed as dicta.[144]

There is certainly some merit in crafting an opinion so as to do the minimum damage necessary to preexisting doctrine.[145] After having made it clear that invalidation is not required to establish takings liability, why did *Healing* retain the procedural requirement of petitioning for an administrative writ? It is possible that the court intended mandamus proceedings to resolve challenges brought under the first prong of the regulatory takings standard, to determine whether a challenged regulation fails "substantially [to] advance legitimate state interests."[146] If this was the purpose, however, it is curious that the decision's constitutional analysis focused entirely on the *second* prong, discussing remedies for deprivation of economically viable use.

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143. *Id.* at 769.

144. *Id.* at 769-70.

145. Moreover, such drafting principles may minimize the threat of depublication by the California Supreme Court. *See, e.g.*, Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 LOY. L.A. L. REV. 1033, 1045 (1993) ("Depublication shapes the law . . . by eliminating the depublished opinion from the body of precedent on which the law builds.").

146. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

D. *A Dissonant Note: Can a Legitimate Regulation Be Invalid?*

The thrust of the *Healing* decision completely repudiated the need to challenge the validity of land use regulations that effect a compensable taking. Inexplicably, however, after citing "the fallacy of the Commission's suggestion that there can be no inverse condemnation when it enforces a valid regulation,"[147] the *Healing* court went on to say:

> The rule is simple—a landowner who claims that a permit condition imposed by the Coastal Commission constitutes a taking must first establish the invalidity of the condition by way of a timely petition for a writ of administrative mandamus. If he fails to do so, he has waived his inverse condemnation claim . . . .[148]

What could this passage mean in the context of the *Healing* opinion as a whole? Barring some bizarre typesetting error, the court seemed to be saying that injured property owners must still go through the motions of seeking an invalidation remedy, even while recognizing that legitimate regulations may still give rise to an action for compensation via inverse condemnation.

Some—though by no means all—of the mystery would be resolved some five months later, when the California Supreme Court handed down its opinion in *Hensler v. City of Glendale.*[149]

VI. HENSLER: THE CALIFORNIA SUPREME COURT SPLITS THE BABY

In *Hensler v. City of Glendale*, the California Supreme Court was asked to decide whether a plaintiff's inverse condemnation claim was governed by the ninety day statute of limitations set forth in Government Code § 66499.37.[150] This statute applies to "[a]ny action or proceeding to attack, review, set aside, void or annul the decision of an advisory agency, appeal board or legislative body concerning a subdivision . . . ."[151] The property owner contended that his regulatory taking claim was properly governed by the five-year statute of limitations for inverse condemnation.[152]

In resolving this dispute, the California Supreme Court went far beyond the facts of *Hensler* and tried to weave a coherent doctrine out of the web of regulatory takings decisions handed down by the state courts in the years since *First English.* Neither property owners nor regulatory

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147. *Healing*, 27 Cal. Rptr. 2d at 767.
148. *Id.* at 769.
149. 876 P.2d 1043 (Cal. 1994).
150. *Id.* at 1046.
151. CAL. GOV'T. CODE § 66499.37 (West 1983 & Supp. 1994).
152. *Hensler*, 876 P.2d at 1047-48; *see* CAL. CIV. PROC. CODE §§ 318-19; *supra* note 118 and accompanying text.

agencies will be entirely pleased by the result.

The *Hensler* court expressly ruled that California's five-year statute of limitations for inverse condemnation applies only to *physical invasions*, not to regulatory takings.[153] Regulatory takings claims must be brought within the ninety day (or shorter) period specified in Government Code section 66499.37, Code of Civil Procedure section 1094.6, and comparable statutes.[154] The rationale for this holding rested squarely on the government's economic interests. Allowing damages for regulatory takings to accrue over a five-year period, the court implied, could threaten local governments with "insolvency."[155]

The *Hensler* opinion was less clear on why injured property owners should be forced to seek an *invalidation* remedy—the only relief provided under the cited code sections—when the *legitimacy* of the regulation may be conceded by the owner from the outset. The court's general theme on this point seemed to be the circular argument that a regulation that effects a taking cannot be *valid* unless it also provides for compensation.[156] This results in a somewhat contradictory statement of the objective of an invalidation proceeding: the property owner may collect damages if it is shown that the regulation is "*statutorily permissible* and constitutes a compensable taking."[157]

Until now, it had not been suggested that a writ of administrative mandamus is required to remedy *permissible* governmental actions. Another departure from the traditional understanding of mandamus is that, under *Hensler*, governmental agencies may respond to the writ by *either* rescinding their "invalid" action *or* retaining it and paying compensation.[158]

Having granted this much to the regulators, however, the *Hensler* court turned to the plight of property owners forced into mandamus proceedings without due process protections or adequate standards of review. At this point the court virtually merged the *Healing* opinion into

153. *Hensler*, 876 P.2d at 1058.

154. *Id.* at 1046-47. *See* CAL. GOV'T CODE § 66499.37 (West 1983 & Supp. 1994); CAL. CIV. PROC. CODE § 1094.6 (West 1980 & Supp. 1994).

155. *Hensler*, 876 P.2d at 1054.

156. *Id.* at 1051. In contrast, the court does not suggest that the government's physical invasions of property are invalid unless compensation is paid. In such cases property owners have five years within which to sue for damages; no claim for invalidation is required. *Id.*

157. *Id.*

158. *Id.* at 1051-52.

its own analysis,[159] ruling that "an administrative agency is not competent to decide whether its own action constitutes a taking and, in many cases, administrative mandate proceedings are not an adequate forum in which to try a takings claim."[160]

In which cases will administrative mandamus provide an inadequate forum? The court was quite specific:

> If the administrative hearing is not one in which the landowner has a full and fair opportunity to present evidence relevant to the taking issue, one in which witnesses may be sworn, and testimony presented by means of direct and cross-examination, the administrative record is not an adequate basis on which to determine if the challenged action constitutes a taking [*Healing*].[161]

This description arguably encompasses every land-use board and agency in the state of California! Whenever such conditions exist, *Hensler* gives property owners the right to litigate their takings claim in an inverse condemnation trial *joined with* the administrative hearing, in which extrinsic evidence is admitted and subjected to heightened review.[162]

The procedures set forth in *Hensler*, in short, require injured property owners to rush their regulatory takings claims into court under the short statutes of limitations applying to administrative mandamus and comparable actions.[163] Once through the courthouse door, however, plaintiffs in most land-use cases will be able to litigate their claims under the full evidentiary procedures and heightened standards appropriate to inverse condemnation.[164]

VII. California Takings Law After *Healing* and *Hensler*: Unanswered Questions

The merging of inverse condemnation with administrative mandamus, and the eventual subsumption of the former into the latter, emerged from a line of California decisions stretching over nearly two decades. Even with the recent clarifying influence of *Healing* and *Hensler*, the procedural nuances of litigating regulatory takings claims will have to be honed on a case-by-case basis over the coming months and years.

The question in greatest need of clarification surrounds the *substantive* role—if any—of administrative mandamus proceedings when joined with inverse condemnation actions. In both *Healing* and *Hensler*, the courts treated the administrative writ petition as little more than a for-

159. *Id.* at 1052-53.
160. *Id.* at 1052.
161. *Id.* at 1052 (citing *Healing*, 27 Cal. Rptr. 2d at 767-68).
162. *Id.* at 1053.
163. *Id.*
164. *Id.*

mality to force regulatory takings claims into court promptly. Once the petition is filed, *Healing* frankly conceded that a mandamus hearing is not an adequate forum to determine takings liability,[165] and *Hensler* gave the plaintiff in virtually any land-use case the right to proceed *as if* she were trying the case as inverse condemnation.[166] The overwhelming impression is that administrative writ petitions are required in name only, wholly for the purpose of imposing a short statute of limitations on regulatory takings claims.

There is at least one other plausible alternative, however, as suggested by the following passage:

> Time has shown, we think, that although a landowner may be required to exhaust his administrative remedies by giving the Commission an opportunity to take the appropriate action, and to pursue a petition for a writ of mandate *to afford the court an opportunity to declare a condition or a permit denial invalid*, neither of those procedures provides a satisfactory substitute for an evidentiary trial on the takings issues.[167]

Did the *Healing* court regard invalidation as a sort of "ripeness" requirement, comparable to administrative exhaustion?[168] Whether or not by design, this purely formal function may turn out to be the only effective role of administrative mandamus in future regulatory takings cases.

Unfortunately, whatever the plaintiff's intentions, any facts reviewed in a mandamus proceeding may be barred by the doctrine of collateral estoppel from being relitigated in a subsequent takings trial.[169] Presumably, most future litigants will avoid res judicata problems by conducting the writ hearing and the inverse condemnation trial concurrently, as the plaintiff proposed to do in *Healing*.[170] If this is not a practicable option in a given instance, however, the property owner will proceed at her peril.

If regulatory takings cases are to be pursued in anything resembling conventional writ hearings, future courts will have to resolve formally the question of the proper standard of review. Since *Healing* focused on the right to a trial to determine takings liability, the court of appeal did

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165. *Healing*, 27 Cal. Rptr. 2d at 770.

166. This point is reaffirmed in *Hensler*, 876 P.2d at 1043.

167. *Healing*, 27 Cal. Rptr. 2d at 770 (emphasis added).

168. *See generally* Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1 (1992) (addressing the Supreme Court's application of the ripeness doctrine to constitutional property rights claims).

169. *See Healing*, 27 Cal. Rptr. 2d at 771.

170. *Id.*

not directly comment on the standard of review to be employed in the writ proceeding.[171] However, the *Healing* panel's language may be interpreted as an endorsement of the independent judgment standard, *insofar as takings-related issues arise at the writ hearing*:

> To win its case on the taking issue (as opposed to what it takes to prove that it properly denies a permit in the first instance), the Coastal Commission would have to do more than proffer the legislature's declaration that the use Healing desires is inconsistent with the public interest, or the conclusory assertion that Healing's proposed use might somehow injure the land of another. The Commission, just because it says so, cannot transform private property into public property without compensation.[172]

If this passage applies to the writ proceeding itself, it rather plainly rejects the deferential standard of review applied by the trial court in *Healing*. On the other hand, if the cited language applies to the inverse condemnation trial, it seems to harken back to the heightened scrutiny requirement enunciated by the Supreme Court in *Nollan*.[173] In any event, the subsequent strengthening of *Nollan's* standards by the Supreme Court in *Dolan v. City of Tigard*[174] will make it difficult for any court to justify continuing to apply minimal scrutiny to land use regulations challenged as takings, regardless of the formal cause of action.

VIII. CONCLUSION

From the time of its drafting, the Takings Clause has been a focal point in the tension between individual freedom and governmental authority. With the emergence of the modern regulatory state, this tension has increasingly focused on regulations restricting the development and use of private property.

California courts have traditionally resolved this tension in favor of the state. Public agencies have been given wide latitude to impose restrictive land use measures, while injured property owners have been virtually deprived of the compensation remedy supposedly guaranteed by the Takings Clause. Unfortunately, as Justice Holmes foresaw, such a policy encourages the continual extension of regulation until all meaningful rights of private ownership are extinguished.[175]

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171. *Id.* Similarly, the California Supreme Court neglected to deal directly with this issue in *Hensler*. *See Hensler*, 876 P.2d at 1043.

172. *Healing*, 27 Cal. Rptr. 2d at 768.

173. *See supra* note 109.

174. *See supra* notes 110-12.

175. *See* Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1992) ("When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears.").

Healing v. California Coastal Commission may mark a turning point in California law, foreshadowing a return to greater protections for individual property rights. By affirming the right to a trial to establish liability for regulatory takings, *Healing* recognized and implemented the fundamental constitutional rights proclaimed by the United States Supreme Court in *First English.* The incorporation of *Healing's* key holdings into the *Hensler* decision gave explicit statewide protection to rights that were, at best, only vaguely implied in prior opinions of the California Supreme Court.

The rules for bringing a successful regulatory takings case in California are still subject to broad differences in interpretation. For the first time in many years, however, there are grounds for hope that the California judiciary has recognized what Justice Holmes aptly noted more than seventy years ago: "[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."[176]

176. *Pennsylvania Coal,* 260 U.S. at 416.