Just Compensation for Permanent Takings of Temporal Interests

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Introduction

This article examines the beguiling, but ill-defined phrase "temporary regulatory taking." After a discussion of compensation for temporary takings generally, and an argument in favor of the proposition that the interest taken must be defined and just compensation provided, under traditional real property law and takings principles, this paper reaches a few conclusions about temporary regulatory takings. First, it concludes that the phrase "temporary regulatory taking," indeed refers to a constitutional taking and not to a constitutional tort. Additionally, this paper concludes that the government's power to alter a taking itself shapes the interest taken and hence, must be taken into account in determining just compensation.

I. Underlying Takings Principles

A. Eminent Domain and Inherent Property Rights

Any explication of temporary takings must begin with an examination of the premises underlying constitutional protection of property rights. These arose from the common law view of the inherent and pre-political nature of property,[1] an understanding shared by the Framers:

> Perhaps the most important value of the Founding Fathers of the American constitutional period was their belief in the necessity of securing property rights. In this they were neither crass nor materialistic. Their view was that of John Locke, the principal source of American revolutionary thought, who defined property broadly to include "Life, Liberty and Estate." Locke held that a man was "born . . . with a Title to perfect Freedom," and that he had a right to self-preservation. "[E]very man," he said, "has a

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[1] *See, e.g.*, Entick v. Carrington, 19 Howell's State Trials 1029, 1066 (C.P. 1765) ("The great end, for which men entered into society, was to secure their property."). For another version of the case, see 95 Eng. Rep. 807, 816–17 (K.B. 1765) (not including verbatim quotation).

> *Property* in his own *Person*." "The Labour of" his Body, and the *Work* of his Hands, we may say, are properly his." Madison extended this right to the products of his mind: man had not only rights in property, but also a property in his rights. These natural rights of life, liberty and estate were intimately connected. Perhaps Hamilton expressed it more clearly than any of his contemporaries: "Adieu to the security of property[,] adieu to the security of liberty."[2]

The *Virginia Declaration* provided for "the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."[3] Similar declarations in other states "referenced the natural, essential and inherent rights of 'acquiring, possessing and protecting property.'"[4] In *Gardner v. Village of Newburgh*,[5] probably the leading early decision, Chancellor Kent required compensation for the diversion of a stream away from the plaintiff's farm. He explained that an owner could not be deprived of property except by due process of law, citing the Magna Carta,[6] as well as natural equity and English common law.[7]

The Takings Clause of the Fifth Amendment[8] implicitly recognizes that eminent domain is an inherent attribute of both the national and state governments.[9] American courts regularly explained eminent domain by reference to natural law principles until about the time of the Civil War.[10] In England and the United States, an important alternate source of the power was derived by John Locke from the consent of the people as delegated to the legislature.[11] The Takings Clause limits the exercise of eminent domain by

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[2] Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1136–37 (1980) (citations omitted).

[3] VIRGINIA DECLARATION OF RIGHTS 1776 (P. Force, ed. 1846), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 234–36 (Leon Friedman et al. eds., 1971).

[4] Douglas W. Kmiec, *The Coherence of the Natural Law of Property*, 26 VAL. U. L. REV. 367, 369 (1991) (discussing early state charters in Pennsylvania, Vermont, Massachusetts, and New Hampshire).

[5] 2 Johns. Ch. 161 (N.Y. Ch. 1816); *see also* James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 334 (1999).

[6] Ely, *supra* note 5, at 334.

[7] *Id.*

[8] U.S. CONST. amend. V.

[9] *See* Kohl v. United States, 91 U.S. 367, 371 (1875).

[10] *See* J.A.C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 71–81 (1931).

[11] *See* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 566–68 (1972).

providing that "nor shall private property be taken for public use without just compensation."[12]

In modern times, the Supreme Court has recognized that "a fundamental interdependence exists between the personal right to liberty and the personal right in property,"[13] and that "[i]ndividual freedom finds tangible expression in property rights."[14] As it acknowledged in *Lucas v. South Carolina Coastal Council*,[15] "the notion . . . that title [to land] 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 part of our constitutional culture."[16]

Because the Takings Clause is rooted in basic liberties, it is "self executing."[17] The failure of government to institute eminent domain proceedings does not change the "essential nature" of the landowner's constitutional claim nor does it preclude relief.[18]

B. The Temporal Division

The Supreme Court, in *Penn Central Transportation Co. v. City of New York*,[19] emphasized that takings law must view the "parcel as a whole."[20] However, the very notion of a *temporary* taking implicitly recognizes temporal segmentation. The concept of temporal segmentation was resisted by Justice Stevens in his dissent in *First English Evangelical Lutheran Church v. County of Los Angeles*.[21] Stevens asserted that "[r]egulations are three dimensional," and that the amount of property affected, the intensity of the restrictions, and the duration of the restrictions all should be considered within the *Penn Central* ad hoc balancing test.[22]

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[12] U.S. CONST. amend. V.

[13] Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (holding that government could not annul contractual rights under War Risk Insurance Act without police power justification).

[14] United States v. James Daniel Good Real Prop., 510 U.S. 43, 61 (1993).

[15] 505 U.S. 1003 (1992).

[16] *Id.* at 1028.

[17] United States v. Clarke, 445 U.S. 253, 257 (1980) (quoting 6 P. NICHOLS, EMINENT DOMAIN § 25.41 (3d rev. ed. 1972)).

[18] Jacobs v. United States, 290 U.S. 13, 16 (1933).

[19] 438 U.S. 104 (1978).

[20] *Id.* at 131.

[21] 482 U.S. 304 (1987).

[22] *Id.* at 330 (Stevens, J., dissenting).

Notwithstanding its enunciation of the parcel as a whole approach in *Penn Central*, the Supreme Court has never rejected severance as a legitimate form of analysis in regulatory takings cases. Expounding upon this point for the Federal Circuit in *Florida Rock Industries, Inc. v. United States*,[23] Judge Plager has declared that "[n]othing in the language of the Fifth Amendment compels a court to find a taking only when the Government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests."[24] Additionally, Judge Plager stated that "[n]othing in the Fifth Amendment limits its protection to only 'categorical' regulatory takings . . . . Thus there remains . . . the difficult task of resolving when a partial loss of economic use of the property has crossed the line from a noncompensable 'mere diminution' to a compensable 'partial taking.'"[25]

C. Permanent Physical Takings

Until the creation of heightened aspirations for government during the Progressive Era[26] and the rise of the modern administrative state,[27] governmental takings were predominantly for the construction of permanent physical improvements, such as roads, forts, and post offices. It is no surprise, then, that takings law developed around permanent government occupations.

In 1872, in *Pumpelly v. Green Bay Co.*,[28] the Supreme Court made it clear that the constitutional requirement for just compensation is triggered not by government deprivation of a private owner's title, but rather by irreparable and permanent injury to the landowners' rights.[29] In *Pumpelly*, the construction of a public dam had permanently flooded private lands upstream.[30] In

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[23] 18 F.3d 1560 (Fed. Cir. 1994).

[24] *Id.* at 1568.

[25] *Id.* at 1570.

[26] *See, e.g.*, Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 461 (1916) (asserting a reorientation of American ideals from a "government of laws and not of men" to "[d]emocracy and social justice").

[27] *See* Jonathan R. Macey, *Property Rights, Innovation, and Constitutional Structure*, *in* PROPERTY RIGHTS 202–07 (Ellen Frankel Paul et al. eds., 1994); *see also* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

[28] 80 U.S. (13 Wall.) 166 (1872).

[29] *Id.* at 177–78 (finding compensation due where private lands were permanently submerged behind a newly-constructed public dam).

[30] *Id.*

Penn Central, the Court asserted that no set formula existed to determine whether there was a taking, and that "essentially ad hoc, factual inquiries" were required.[31] One factor deemed of particular significance in such inquiries "is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[32] Building upon this language, the Court concluded, in *Loretto v. Teleprompter Manhattan CATV Corp.*,[33] that even minimal permanent physical occupations categorically are takings:

> [W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" not only is an important factor in resolving whether the action works a taking but also is determinative.[34]

D. Permanent Regulatory Takings

The fact that government does not physically occupy land does not preclude the possibility of a compensable taking; there are regulatory takings as well. It is conventional to date regulatory takings law from Justice Holmes' enigmatic 1922 opinion in *Pennsylvania Coal Co. v. Mahon*.[35] There, Holmes juxtaposed two observations: "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law"[36] and "[t]he general rule at least is

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[31] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[32] *Id.* (citation omitted).

[33] 458 U.S. 419 (1982) (holding the government-mandated installation of a small cable TV junction box and lines constituted a compensable taking).

[34] *Id.* at 426.

[35] 260 U.S. 393 (1922) (holding that an ordinance imposing subsidence liability on owners of mineral and support estates gave rise to compensable takings). Courts have found regulations to constitute deprivations of due process of law, and hence compensable, long before *Pennsylvania Coal*. *E.g.*, Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418 (1890) (holding that there is a due process right to judicial review of rate regulations to ensure a fair return); Gardner v. Village of Newburgh, 2 Johns. Ch. 162 (N.Y. Ch. 1816). For an argument that substantive due process analysis has been pivotal in past property deprivation cases but has been undervalued in recent decades, see Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 989–1005 (2000).

[36] *Pa. Coal*, 260 U.S. at 413.

that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[37] The question of how far is too far has been debated by lawyers, judges, and scholars ever since.

The Court has developed many takings rules since *Pennsylvania Coal.* The most comprehensive rule remains that of *Penn Central,* under which courts make ad hoc determinations based primarily on three factors: (1) the economic impact the regulation has on the claimant; (2) the extent to which the regulation has interfered with the claimant's distinct investment-backed expectations; and (3) the character of the government's action.[38] In two types of cases, review of the three *Penn Central* factors is not required and the regulation is categorically a taking. The first occurs when there is a permanent physical occupation.[39] The second occurs when the regulation results in the complete deprivation of all economically beneficial use, which the Court in *Lucas* suggested was "the equivalent of a physical appropriation."[40] Alternatively, in *Agins v. City of Tiburon,*[41] the Court deemed regulations to constitute a taking if they do not "substantially advance legitimate state interests" or deny an owner "economically viable use of his land."[42] While the first *Agins* prong sounds more in substantive due process than in takings, the Supreme Court has rebuffed the federal government's attempt to force an explication of why substantial advancement is, or ought to be, a takings test.[43] Finally, in *Dolan v. City of Tigard,*[44] the Court held that, where government imposes an exaction of property as a condition for the issuance of a development permit, the exaction must be roughly proportional to the harm resulting from development and must be calculated through an individualized determination.[45] In summary, if a plaintiff has a valid property interest,

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[37] *Id.* at 415.

[38] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (citation omitted).

[39] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982). For discussion, see *supra* text accompanying note 33.

[40] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017 (1992).

[41] 447 U.S. 255 (1980).

[42] *Id.* at 260 (citing Nectow v. Cambridge, 277 U.S. 183, 188 (1928); *Penn Cent. Transp.*, 438 U.S. at 138).

[43] *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 704 (1999). For an analysis of this point, see Steven J. Eagle, *Del Monte Dunes, Good Faith, and Land Use Regulation,* 30 ENVTL. L. REP. 10100, 10107 (2000).

[44] 512 U.S. 374 (1994).

[45] *Id.* at 391.

"[t]he government . . . 'takes' [that interest] by destroying, physically occupying, or excessively regulating it for a public purpose."[46]

E. Temporal Physical Takings

While the Supreme Court emphasized in *Penn Central* that takings law must view the "parcel as a whole,"[47] it is well established that a temporary physical occupation of private property by government is a compensable taking under the Fifth Amendment. It was easy for the Court to conceptualize that government arrogation of possession for a term constituted a compensable taking. After all, the leasehold estate is a traditional and frequently employed interest in land. It routinely is alienated and is regarded as a freestanding interest of the lessee.

United States v. Dow,[48] decided in 1958, clearly enunciated that a temporary taking begins at the time that the government entity begins its physical occupation, not the subsequent time when it institutes condemnation proceedings.[49] As the Court explained, use of the later filing date would not clearly disclose the value of the property at the time the government took possession.[50] Also, it would permit manipulation of the condemnation process by government officials who have the discretion to submit eminent domain filings or by landowners who could consolidate or change the form of their interests between the time that government possession began and the time of filing.[51]

In one of the leading temporary physical takings cases, *United States v. General Motors Corp.*,[52] the Court quickly rejected the notion that an interest of shorter duration than a fee simple was unworthy of constitutional protection:

> When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers term the individual's "interest" in the thing in question. That interest may comprise the group of rights for which the shorthand term is "a fee simple" or it may

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[46] Boyle v. United States, 200 F.3d 1369, 1374, 53 U.S.P.Q.2d 1433, 1436 (Fed. Cir. 2000).

[47] Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 131 (1978).

[48] 357 U.S. 17 (1958).

[49] *Id.* at 23.

[50] *Id.* at 24.

[51] *Id.* at 25.

[52] 323 U.S. 373 (1945).

> *be the interest known as an "estate or tenancy for years", as in the present instance.* The constitutional provision is addressed to every sort of interest the citizen may possess.[53]

In *General Motors*, the U.S. Attorney General, at the behest of the Secretary of War, instituted condemnation proceedings of warehouse space for a period of about a year, ending on June 30, 1943.[54] The condemnee was the long-term tenant in possession.[55] Similarly, in another leading case, *Kimball Laundry Co. v. United States*,[56] the government filed a petition to condemn a commercial laundry for a term of almost a year, also ending on June 30, 1943.[57] In both cases there were unilateral renewals by the government until dates in 1946. The issue was the amount of the condemnation award.

The government argued in *General Motors* that the proper measure of damages was the market value of a long-term lease on an empty building.[58] It asserted that, where the sovereign takes the fee, the condemnation award would not include such consequential damages as the cost of removing the condemnee's fixtures and personal property and goodwill.[59] The Supreme Court accepted the validity of this argument.[60] However, the respondent offered to prove that its actual moving expenses exceeded $46,000, and that it lost over $31,000 by dint of destruction and removal of fixtures and fixed equipment.[61] Furthermore it would be liable to pay about $40,000 in rent for the year.[62] Against these costs, the condemnation award was $38,597.86.[63]

Justice Roberts, writing for the Court in *General Motors*, refused to apply in a mechanical fashion the rules governing the amount of the award developed in connection with the condemnation of a fee simple:

> The question posed in this case then is, shall a different measure of compensation apply where that which is taken is a right of temporary occupancy of a building equipped for the condemnee's business, filed with his commodities, and presumably to be reoccupied and used, as before, to the end of the lease term on the termination of the Government's use? The right to occupy, for a day, a month, a year, or a series of years,

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[53] *Id.* at 378.

[54] *Id.* at 375.

[55] *Id.*

[56] 338 U.S. 1 (1949).

[57] *Id.* at 3.

[58] *Gen. Motors*, 323 U.S. at 376.

[59] *Id.*

[60] *Id.* at 379.

[61] *Id.* at 381.

[62] *Id.*

[63] *Id.*

> in and of itself and without reference to the actual use, needs, or collateral arrangements of the occupier, has a value. The value of that interest is affected, of course, by the kind of building to be occupied, by its location, by its susceptibility to various uses, by its conveniences, or the reverse, and by many other factors which go to set the value of the occupancy. These were taken into consideration in fixing the market value of the floor space taken, as if that space were bare and in the market for rent.[64]

The danger, he noted was that this would "defeat the Fifth Amendment's mandate for just compensation" in all condemnations other than those in fee simple.[65] While countenancing the lack of compensation for consequential damages when the entire interest of the condemnee is taken, he added:

> It is altogether another matter when the Government does not take his entire interest, but by the form of its proceeding chops it into bits, of which it takes only what it wants, however few or minute, and leaves him holding the remainder, which may then be altogether useless to him, refusing to pay more than the "market rental value" for the use of the chips so cut off. This is neither the "taking" nor the "just compensation" the Fifth Amendment contemplates. The value of such an occupancy is to be ascertained, not by treating what is taken as an empty warehouse to be leased for a long term, but what would be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier. The case should be retried on this principle. In so ruling we do not suggest that the long-term rental value may not be shown as bearing on the market rental value of the temporary occupancy taken. It may be evidence of the value of what is taken but it is not the criterion of value in such a case as this.[66]

In *Kimball Laundry*,[67] the Court likewise distinguished between an eminent domain award had the condemnation been in fee simple, and the facts of the case, which involved the condemnation of a short-term leasehold.[68] In the former case, the award would encompass the value of the condemnee's land, building, and equipment. However, there could be no award for goodwill, which the government did not take and which the condemnee could employ elsewhere.[69] If the condemnee could find no suitable location, that would be an element of consequential damages that would be noncompensable.[70] Here, as in *General Motors*, the temporary nature of the condemnation made the general rule inapplicable:

> The Government's temporary taking of the Laundry's premises could no more completely have appropriated the Laundry's opportunity to profit from its trade routes

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[64] *Id.* at 380.

[65] *Id.* at 381.

[66] *Id.* at 382–83.

[67] 338 U.S. 1 (1949).

[68] *Id.* at 3.

[69] *Id.* at 11–12.

[70] *Id.* at 14.

> than if it had secured a promise from the Laundry that it would not for the duration of the Government's occupancy of the premises undertake to operate a laundry business anywhere else in the City of Omaha. The taking was from year to year; in the meantime the Laundry's investment remained bound up in the reversion of the property. Even if funds for the inauguration of a new business were obtainable otherwise than by the sale or liquidation of the old one, the Laundry would have been faced with the imminent prospect of finding itself with two laundry plants on its hands, both of which could hardly have been operated at a profit. There was nothing it could do, therefore, but wait. Besides, though trade routes may be capable of transfer independently of the physical property with which they have been associated, it is wholly beyond the realm of conjecture that they could have been sold from year to year or that the Laundry would have bound itself to give them up for a longer period when at any time its plant might be returned. It is equally farfetched, moreover, to suppose that they could have been transferred for a limited period and then recaptured.[71]

The Laundry was given the opportunity to establish the existence and value of its goodwill on remand.[72]

It now is black letter law that "[t]he just compensation for a permanent taking is generally the fair market value of the property taken, whereas the recovery for a temporary taking is generally the rental value of the property."[73] But this is not the end of our analysis. *General Motors* and *Kimball Laundry* made it clear that just compensation for temporary takings may not be based upon the mechanical application of rules developed for the fee simple, but rather must reflect the attributes of the property right actually taken.

II. The "Temporary Regulatory Taking"

While the Supreme Court was able to achieve a considerable measure of conceptual clarity respecting temporary physical takings, in the area of temporary regulatory takings it has groped for its way.

A. *First English* and Its Legacy of Confusion

The Supreme Court's seminal temporary regulatory takings case is *First English Evangelical Lutheran Church v. County of Los Angeles*,[74] decided in 1987. The church had developed a complex housing a camp center used for retreats and recreation for handicapped children in a canyon in Los Angeles

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[71] *Id.*

[72] *Id.* at 16.

[73] Bass Enters. Prod. Co. v. United States, 133 F.3d 893, 895 (Fed. Cir. 1998).

[74] 482 U.S. 304 (1987).

County.[75] However, a forest fire denuded the hills upstream, and the complex was destroyed by floods the following winter.[76] The county consequently prohibited the construction or reconstruction of buildings within that area.[77] The church sued for damages caused by alleged negligence and also sought damages in inverse condemnation.[78]

The trial court in *First English* struck the takings claim as precluded by the California Supreme Court's decision in *Agins v. Tiburon*[79] which held that the appropriate remedy for what it deemed "excessive regulation" is invalidation, and not the award of monetary damages.[80] In his *First English* opinion striking down the California *Agins* rule, Chief Justice Rehnquist reassured that eminent domain would remain a "legislative function."[81]

Presuming that the landowner could show that it had been deprived of all use of its property for a considerable period, the Court in *First English* established three basic principles. First, "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."[82] Second, "[t]he Court has recognized in more than one case that the government may elect to abandon its intrusion or discontinue regulations. Similarly, a governmental body may acquiesce in a judicial declaration that one of its ordinances has effected an unconstitutional taking of property; the landowner has no right under the Just Compensation Clause to insist that a "temporary" taking be deemed a permanent taking."[83] Finally, "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[84] Doctrinally most important

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[75] *Id.* at 307.

[76] *Id.*

[77] *Id.*

[78] *Id.* at 308.

[79] Agins v. City of Tiburon, 598 P.2d 25 (Cal. 1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

[80] *Id.* at 28. "In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances." *First English*, 482 U.S. at 317 (quoting *Agins*, 598 P.2d at 31).

[81] *First English*, 482 U.S. at 321.

[82] *Id.* at 322.

[83] *Id.* at 317 (citation omitted).

[84] *Id.* at 321.

was Rehnquist's declaration that "'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[85]

The clarity of *First English* was somewhat diminished by Chief Justice Rehnquist's occasionally tentative language. While professing to find "substantial guidance"[86] from cases like *Dow*[87] and *Kimball Laundry*,[88] Rehnquist termed his conclusions in phrases like "interference with property rights *amounting* to a taking."[89] Similarly, when the Court spoke of *the property right taken*, it was in the context of *alteration* of that right from full ownership to temporary use.[90] Also, quotation marks surrounded the word *temporary* but not the word *permanent*.[91]

In his *First English* dissent, Justice Stevens stressed that physical and regulatory takings are very different, in that while "virtually all physical invasions are deemed takings, a regulatory program that adversely affects property values does not constitute a taking unless it destroys a major portion of the property's value."[92] This would require both that the restriction was substantial, but also that it would have "to remain in effect for a significant percentage of the property's useful life."[93]

B. Might Development Moratoria Constitute Temporary Regulatory Takings?

A recent decision by Judge Reinhardt of the U.S. Court of Appeals for the Ninth Circuit held that development moratoria cannot result in compensable takings under *First English*, even when they deprive owners of all economically beneficial use of land for extended periods.[94] The case, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[95]

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[85] *Id.* at 318.

[86] *Id.*

[87] United States v. Dow, 357 U.S. 17 (1958).

[88] Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).

[89] *First English*, 482 U.S. at 316 n.9 (emphasis added).

[90] *Id.* at 318 (quoting *Dow*, 357 U.S. at 26).

[91] *Id. passim.*

[92] *Id.* at 329 (Stevens, J., dissenting) (citations omitted).

[93] *Id.* at 331 (Stevens, J., dissenting).

[94] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764 (9th Cir. 2000).

[95] 216 F.3d 764 (9th Cir. 2000).

is the most recent in a long string of decisions[96] involving attempts by landowners to build vacation or retirement homes on lots they owned near a pristine alpine lake that has extended for almost twenty years.[97]

In *Tahoe-Sierra*, the district court had ruled that the agency's temporary moratorium had worked a compensable temporary taking.[98] It stressed that the regulation denied plaintiffs all economically viable use of their property. Furthermore, although the regulation "was clearly intended to be temporary, since it was adopted pending the enactment of a new regional plan, there was no fixed date for when it would terminate."[99] In addition, the court expressed skepticism about whether development moratoria remained legitimate planning tools after *First English*.[100] Although some courts have upheld such moratoria, the district court considered these possibly consistent with the Supreme Court's allowance for "normal delays."[101] It distinguished moratoria like those in *First English*, which had no expiration date, from the interim planning moratorium, which is enacted with a deadline and usually extends for a short period.[102] In the latter case, the government's culpability would be less. However, in the present case, "[e]nacting an unconstitutional ordinance with no plans to end it is different than simply putting a hold on development for a few months while trying to formulate a plan under which development will be possible."[103]

Judge Reinhardt's Ninth Circuit opinion attacked the district court's basic premise:

> It is true that *First English* holds that, when a taking has occurred, the government must compensate property owners, even if the taking is "temporary." Contrary to the plaintiffs' suggestion, however, the Court's holding in *First English* was not that temporary moratoria are "temporary takings." In fact, the opposite is true. The *First*

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[96] *See id.* at 768–69 (noting the Ninth Circuit's three prior published decisions, lower court decisions, and other aspects of the litigation).

[97] This discussion is based largely on an earlier critique of *Tahoe-Sierra*. Steven J. Eagle, *Temporary Regulatory Takings and Development Moratoria: The Murky View From Lake* Tahoe, 31 ENVTL. L. REP. 10224 (2001).

[98] Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1251 (D. Nev. 1999).

[99] *Id.* at 1250.

[100] *Id.* at 1249.

[101] *Id.* (citing Santa Fe Vill. Venture v. City of Albuquerque, 914 F. Supp. 478, 483 (D.N.M. 1995); Zilber v. Town of Moraga, 692 F. Supp. 1195, 1206–07 (N.D. Cal. 1988)).

[102] *Id.*

[103] *Id.*

> *English* Court very carefully defined "'temporary' regulatory takings [as] those regulatory takings which are ultimately invalidated by the courts."[104] What is "temporary," according to the Court's definition, is not the regulation; rather, what is "temporary" is the taking, which *is* rendered temporary *only* when an ordinance that effects a taking is struck down by a court. In other words, a permanent regulation leads to a "temporary" taking when a court invalidates the ordinance after the taking.[105] The Court's definition, therefore, does not comprehend temporary moratoria, which from the outset are designed to last for only a limited period of time. In short, we reject the plaintiffs' contentions that *First English* applies to temporary moratoria and that it works a radical change to takings law by requiring that property interests be carved up *into finite temporal segments.*[106]

The Ninth Circuit opinion discussed at some length the court's rejection of "conceptual severance" of parcels, citing Professor Margaret Jane Radin for the proposition that "[a] planning regulation that *prevents the development* of a parcel for a temporary period of time is conceptually no different than a land-use restriction that permanently denies all use on a discrete portion of property, or that permanently restricts a type of use *across all of the parcel.*"[107] Each of these three types of regulation will have an impact on the parcel's value, because each will affect an aspect of the owner's *use* of the property—by restricting when the use may occur, where the use may occur, or how the use may occur. However, Judge Reinhardt's Ninth Circuit opinion did concede that

> were a temporary moratorium designed to be in force so long as to eliminate all present value of a property's future use, we might be compelled to conclude that a categorical taking had occurred. We doubt, however, that a true temporary moratorium would ever be designed to last for so long a period.[108]

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[104] Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 778 (9th Cir. 2000) (quoting First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 310 (1987)). A footnote remarked that "[t]he [*First English*] Court was careful to include quotation marks around the word 'temporary' whenever it referred to a 'temporary' taking, in order to make clear that it was using the concept in the specific sense in which it had defined it." *Id.* at 778 n.16.

[105] *Id.* at 778 (quoting *First English*, 482 U.S. at 319). "Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a "temporary" one, is not a sufficient remedy to meet the demands of the Just Compensation Clause." *First English*, 482 U.S. at 317 (discussing the fact "that the government may elect to abandon its intrusion or discontinue regulations," and thereby turn what would otherwise be a permanent taking into a temporary taking).

[106] *Tahoe-Sierra*, 216 F.3d at 778.

[107] *Id.* at 776 (citing Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1674–78 (1988)).

[108] *Id.* at 781.

The Ninth Circuit denied *en banc* review,[109] although a forceful dissent was filed by Judge Kozinski.[110] He asserted that the panel decision written by Judge Reinhardt "does not like the Supreme Court's Takings Clause jurisprudence very much, so it reverses *First English Evangelical Lutheran Church v. County of Los Angeles*, and adopts Justice Stevens's *First English* dissent."[111]

As I have suggested in an earlier appraisal of *Tahoe-Sierra*, Judge Reinhardt's assertion that "the *First English* Court very carefully defined "temporary' regulatory takings [as] those regulatory takings which are ultimately invalidated by the courts"[112] does not seem supported by *First English* itself.[113] The first half of the quoted sentence refers to the task before the Court in *First English*—adjudicating the constitutionality of the California Supreme Court's *Agins* rule.[114] It is possible that the Court would have ordained such a categorical rule, but in the absence of an articulation of that intent, the better reading is that the Court was focused on the invalidated permanent regulation before it in *Agins* and *First English*.

Indeed, were the Court to adopt a categorical rule making *First English* application only to invalidated permanent takings, it would be staking a position beyond that of Justice Stevens in *First English* and Judge Reinhardt in *Tahoe-Sierra*. As previously observed, Stevens conceded that a temporary regulation could constitute a taking providing that its scope was substantial and also that it would have "to remain in effect for a significant percentage

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[109] *See* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 228 F.3d 998 (9th Cir. 2000) (denying rehearing *en banc*).

[110] *Id.* at 999 (Kozinski, J., dissenting, joined by O'Scannlain, Trott, T.G. Nelson, and Kleinfeld, JJ.).

[111] *Id.* (citing First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987)).

[112] *Tahoe-Sierra*, 216 F.3d at 778 (quoting *First English*, 482 U.S. at 310).

[113] *See* Eagle, *supra* note 97, at 10227.

[114] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 310 (1987).

> Appellant asks us to hold that the California Supreme Court erred in *Agins v. Tiburon* in determining that the Fifth Amendment, as made applicable to the States through the Fourteenth Amendment, does not require compensation as a remedy for "temporary" regulatory takings – those regulatory takings which are ultimately invalidated by the courts.

Id.

of the property's useful life."[115] Likewise, Judge Reinhardt noted that

> were a temporary moratorium designed to be in force so long as to eliminate all present value of a property's future use, we might be compelled to conclude that a categorical taking had occurred. We doubt, however, that a true temporary moratorium would ever be designed to last for so long a period.[116]

In other words, neither opinion asserts that a moratorium on development for, say, thirty or fifty or one hundred years would be immune from a takings challenge. To debate whether an articulated moratorium was a true moratorium is a matter of semantics.

C. Permanent Regulatory Takings, Temporary Regulatory Takings, and Normal Delays

A better approach would focus not on whether a taking labeled a moratorium was permanent or temporary, but rather, whether it imposed more than a reasonable delay on the landowner's beneficial economic enjoyment of his property. In *First English*, the Supreme Court established a *de minimis* test for temporary regulatory takings, the recognition that there are normal delays in administrative processes. But this threshold test for temporary regulatory takings is essentially no different from the requirement that a permanent physical occupation must be more than transitory,[117] or that injunctive relief in nuisance cases requires more than *de minimis* injury.[118]

The Court announced in *First English* that temporary regulatory deprivations would not be deemed takings if owners were deprived of use rights for modest periods: "We . . . of course do not deal with . . . the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like . . . ."[119] This threshold requirement is based in part on the Court's realization that governmental review could not be instantaneous, and the consequent need for a standard that might "lessen to some extent,"

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[115] *Id.* at 331 (Stevens, J., dissenting).

[116] *Tahoe-Sierra*, 216 F.3d at 781.

[117] *See, e.g.*, Hendler v. United States, 952 F.2d 1364, 1376 (Fed. Cir. 1991) (noting that government-monitored wells on private property were far from temporary, even though intended for use for a limited period of time).

[118] *See, e.g.*, Estancias Dallas Corp. v. Schultz, 500 S.W.2d 217 (Tex. Civ. App. 1973) (discussing quantum of harm to neighbors from noisy apartment house air conditioner).

[119] *First English*, 482 U.S. at 321.

but not eliminate, "the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations."[120]

The expansion of the normal delay to include administrative appeals and prolonged litigation, as in *Landgate, Inc. v. California Coastal Commission*,[121] seems totally unwarranted. Indeed, this expansion threatens to vitiate *First English*.[122] It appears that the freedom and flexibility contemplated in *First English* has been used by some localities and courts as a sword for circumventing temporary takings liability rather than as a shield for a normal administrative review process. Indeed, a recent dissent by three U.S. Supreme Court Justices[123] quoted with favor the assertion that "the California appellate courts ha[ve] reacted to the Supreme Court's decisions in *First English Evangelical Lutheran Church v. County of Los Angeles* and *Nollan v. California Coastal Commission* by seeking ways to evade their evident mandate, either procedurally or substantively."[124] If the period of normal delay is exceeded, "only after the delay becomes unreasonable would a taking begin."[125] While this distinction makes sense in the case of routine administrative review of a development application, it does not in the case of an agency claim of jurisdiction that is unwarranted as a matter of law.[126]

III. The "Temporary Taking" as Oxymoron

In its recent decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[127] the Supreme Court declined "to define with precision the elements of a temporary regulatory takings claim."[128] Notions of precision aside, the Court has yet to develop a coherent method for determining or articulating

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[120] *Id.*

[121] 953 P.2d 1188 (Cal. 1998).

[122] *See* Eberle v. Dane County Bd. of Adjustment, 595 N.W.2d 730 (Wis. 1999).

[123] *See* Lambert v. City & County of San Francisco, 529 U.S. 1045 (2000) (Scalia, J., with Kennedy and Thomas, JJ., dissenting from denial of certiorari).

[124] *Id.* at 1049 (quoting Michael M. Berger, *Recent Developments in the Law of Inverse Condemnation*, Q203 ALI-ABA Video Law Review Study 1, 4 (1991) (citations omitted)).

[125] Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 803 (Fed. Cir. 1993).

[126] *But see Landgate*, 953 P.2d at 1195–98.

[127] 526 U.S. 687 (1999).

[128] *Id.* at 721.

the property interest taken in a temporary regulatory taking.

A. The Temporary Taking is the Permanent Taking of a Temporal Interest

From the perspective of property rights theory, the term temporary taking is oxymoronic. Government takes all of the rights that it arrogates to itself through explicit condemnation or implicit takings. The taking consists of the interests taken.

Outside of the realm of takings law constructs, for instance, the term "temporary leasehold" would be perceived at once as tautological or redundant. Within the context of traditional property terminology, a "temporary taking of a leasehold" implies a (non-existent) future interest in the leasehold (apart from the owner's reversion). A "temporary taking of a fee simple" focuses on the larger interest originally owned rather than the smaller interest taken by government. The term "taking of a leasehold interest" expresses the relationship best. However, in a locution that should strike the property lawyer as odd, the Supreme Court, in *First English,* limited government liability to "the period during which the taking was effective."[129] Government can change its mind, and a taking can be truncated.[130] This, too, makes the temporary taking less tractable than otherwise might appear. The failure to properly ground the temporary regulatory taking in a precise array of interests taken has profound implications for whether the condemnation award will properly be ascertained.[131]

B. The Prospective Nature of Temporary Takings

Takings are inherently prospective in nature. When government engages in a taking, it assumes for itself rights to use, exclude others, or alienate a

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[129] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987).

> Once a court determines that a taking has occurred, the government retains the whole range of options already available – amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain. Thus we do not . . . "permit a court, at the behest of a private person, to require the . . . Government to exercise the power of eminent domain . . . ." We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.

Id. (citation omitted).

[130] *See* discussion *infra* Part IV.

[131] *See infra* Part IV.

property right previously belonging to the owner of the fee. Just compensation must be provided as of the date of the taking,[132] although a delay in paying compensation does not render a taking unconstitutional.[133] Interest from the date of taking is an implicit part of just compensation.[134] These precedents flow from the fact that the taking is an arrogation of the owner's prospective exercise of his or her rights. The sum of the value of these various rights discounted by an applicable interest rate, less the sum of the obligations to others associated with the rights, similarly discounted, are what constitutes the condemnation award.

The self executing nature of the Takings Clause,[135] *prevents* harm by requiring compensation measured by the present value of the rights taken, determined as of the date of the taking. It is important to distinguish the Takings Clause, which is thus prophylactic in nature, from tort law, the goal of which is *rectification* of a preexisting harm.[136] Putting the matter differently, there would be no inconsistency between private rights and government action were government to tender payment just prior to a taking. There would be an inconsistency were government to tender payment just prior to the commission of a tort.

First English declares that permanent and temporary takings "are not different in kind."[137] This buttresses the fact that temporary takings, too, are prospective in nature. However, the Supreme Court has declined to provide an adequate theoretical framework and its praxis suggests that temporary regulatory takings are established retrospectively. The First Circuit has suggested, in an unexplained analogy, that "just compensation for temporary takings . . . would seem to be irreducibly retrospective."[138] But, it is only the calculation of the takings award that might be retroactive; the obligation to pay for the property interest taken is established at the moment of the taking.

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[132] *First English*, 482 U.S. at 320.

[133] Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 11 (1990) (citing Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1985)).

[134] *See* Library of Congress v. Shaw, 478 U.S. 310 (1986).

[135] United States v. Clarke, 445 U.S. 253, 257 (1980) (citing 6 P. NICHOLS, EMINENT DOMAIN § 25.41 (3d rev. ed. 1972)).

[136] *See generally* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995).

[137] *First English*, 482 U.S. at 318.

[138] Parella v. Ret. Bd. of the Rhode Island Employees' Ret. Sys., 173 F.3d 46, 57 n.6 (1st Cir. 1999) (applying prospective-retrospective distinction to Eleventh Amendment).

C. Distinguishing the Governmental Tort

It might be, as Judge Plager suggested a decade ago in *Hendler v. United States*,[139] that the temporary taking has been treated as if akin to a common law trespass.[140] However, the Constitution implies a sharp line between the consequences of tort and eminent domain.

As Judge Easterbrook has noted, "[a]ccidental, unintended injuries inflicted by governmental actors are treated as torts, not takings. And torts are compensable only to the extent the Federal Tort Claims Act permits."[141] While the duty to pay just compensation for takings is self-executing, the duty to pay tort damages is dependent on waiver of sovereign immunity.[142] The lack of an intent to deprive another of property, or the lack of knowledge that a deprivation would be a direct consequence of a government act, is easy to discern in contexts such as driving accidents. However, the distinction is more problematic regarding public projects where officials might contemplate, although ostensibly not intend, that private property might be damaged.[143] Hence, "[i]n order to obtain just compensation, a plaintiff need not prove the Government's intent to take the property, but it need only prove that the 'invasion of property rights resulting from governmental action was a natural and probably consequence of the governmental acts in question.'"[144]

A threshold rule, notably the *First English* provision for "normal delays,"[145] is a reasonable method for dealing with transient incursions into a property owner's rights, and the tort analysis might serve for accidental incursions of an inconsequential nature. However, a property law based analysis is essential for the protection of Fifth Amendment rights where truncation terminates otherwise permanent takings, resulting in additional losses to the landowner.

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[139] 952 F.2d 1364 (Fed. Cir. 1991).

[140] *Id.* at 1376–77; *see also* Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573, 1582 (Fed. Cir. 1993).

[141] *In re* Matter of Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 799 F.2d 317, 325 (7th Cir. 1986).

[142] United States v. Sherwood, 312 U.S. 584, 586 (1941).

[143] *See, e.g.*, Odello Bros. v. County of Monterey, 73 Cal. Rptr. 2d 903 (Cal. Ct. App. 1998).

[144] Allenfield Assocs. v. United States, 40 Fed. Cl. 471, 487 (1998) (quoting Cloverport Sand & Gravel Co. v. United States, 6 Cl. Ct. 178, 201 (1984)).

[145] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987). For discussion of normal delays, see *supra* Part II.C.

IV. The Problem of Governmental Truncations of Otherwise Permanent Takings

A. The Lack of a Conceptual Framework for Truncations of Takings

As the Supreme Court noted in *United States v. Dow*,[146] the effective date of a taking is the date upon which the intrusion begins, not the date upon which condemnation proceedings are instituted:[147] "[I]t would certainly be bizarre to hold that there were two different 'takings' of the same property, with some incidents of the taking determined as of one date and some as of the other."[148] Also, "[b]ecause of the uncertainty when, if ever, a declaration would be filed after the Government's entry, manipulations might be encouraged which could operate to the disadvantage of either the landowner or the United States."[149] However, the Court in *Dow* went on to add:

> It is also argued that a property owner might be prejudiced under the Government's view because the project could be abandoned and the condemnation proceedings discontinued before title passed to the Government. But the possibility of such an abandonment exists whenever the Government enters into possession of property without filing a declaration of taking and without otherwise providing compensation for acquisition of the title. In any event, such an abandonment does not prejudice the property owner. It *merely results in an alteration in the property interest taken* — full ownership to one of temporary use and occupation. In such cases compensation would be measured by the principles normally governing the taking of a right to use property temporarily.[150]

Dow does not explain why, three years after the government had acquired *full ownership*, it was free to alter that interest unilaterally. Alterations, even those characterized as mere, lend themselves to manipulation by the altering party.

Subsequently, in *First English*, the Supreme Court averred that "the government may elect to abandon its intrusion or discontinue regulations."[151] The opinion added: "[o]nce a court determines that a taking has occurred, the government retains the whole range of options *already available* —amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain."[152] There is no explanation of how the range of

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[146] 357 U.S. 17 (1958).

[147] *Id.* at 23.

[148] *Id.* at 24.

[149] *Id.* at 25.

[150] *Id.* at 26 (citations omitted) (emphasis added).

[151] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 317 (1987).

[152] *Id.* at 321 (emphasis added).

options *became* available, nor of why exercises of these options should not themselves be compensable takings.

It seems reasonable to assume that, many years after a landowner had accepted a compensation award, the government would not be free to demand that the owner take the land back and pay a just price for it. There is no reason why it should matter if the time period were shorter, or if the landowner had not yet received the award when the government changed its mind. While the government might cease inflicting tortious damage upon property in *medias res*, there is no conceptual basis for it to stop taking what already had been a completed taking. Perhaps in its post-World War II cases the Court regarded the return of commandeered parcels at the end of hostilities to be implicit. Even in those cases, however, the condemnation of leasehold interests had been done in cautious increments.[153] In any event, *First English* does not refer to or explicitly build upon any such understanding.

B. An Archetypical Case—*Yuba Natural Resources*

An important illustration of the alteration of a taking after it commenced is the truncation in *Yuba Natural Resources, Inc. v. United States*.[154] The government had prohibited a mineral owner from exercising its rights, and asserting paramount title.[155] Six years later, after Yuba prevailed in its quiet title action, the government retracted its letter of prohibition.[156] The Claims Court noted:

> Although the Yuba's mineral rights were returned to it by the United States in 1982, nothing in the record supports the notion that in 1976 the United States took such rights only for a temporary period. When on April 9, 1976, the United States barred Yuba's right to dredge and enjoy the possession of the minerals thereby unearthed, it did not confine such prohibition to any limited period. . . . That 6 years later the government chose to return the property to Yuba rather than to pay just compensation for what it had taken in 1976 did not retroactively convert the government's absolute taking of Yuba's property into a temporary holding thereof. The government was not obligated to return the property at the end of 6 years or any other limited period rather

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[153] In *Kimball Laundry*, for instance, the term condemned initially expired June 30, 1943, and subsequently was extended several times. The last year's extension was to end on June 30, 1946, but the property was finally returned on March 23, 1946. Kimball Laundry Co. v. United States, 338 U.S. 1, 3 (1949).

[154] 10 Cl. Ct. 486 (1986), *rev'd*, 821 F.2d 638 (Fed. Cir. 1987).

[155] *Id.* at 487.

[156] *Id.*

> than pay just compensation therefor; and, similarly, Yuba was not obligated to accept the return of the property rather than to demand just compensation therefor.[157]

The Federal Circuit reversed the Claims Court in *Yuba*.[158] Its opinion did not attempt to refute the trial court's well-reasoned analysis, but merely quoted *First English* to the effect that the government was free to abandon its intrusion.[159]

V. A Property Rights Approach to Temporary Takings

In *General Motors*, the Supreme Court characterized property as including the right to use:

> [T]he group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers term the individual's 'interest' in the thing in question. That interest may comprise the group of rights for which the shorthand term is 'a fee simple' or it may be the interest known as an 'estate or tenancy for years', as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess.[160]

Given that this definition of property includes the *right* to use, it seems anomalous to convert this right of the property owner into an obligation for the ownership of property. However, the Court of Federal Claims, in its recent opinion in *Bass Enterprises*,[161] commenced its "Temporary Takings Analysis" with the following assertion: "To prevail on a temporary takings theory, plaintiffs must demonstrate that but for the Government's action, they would have undertaken development efforts."[162] The court cited for this proposition Justice Kennedy's concurring opinion in *Lucas*.[163] While the

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[157] *Id.* at 499.

[158] 821 F.2d 638 (Fed. Cir. 1987).

[159] *Id.* at 641–42 (quoting First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 317 (1987)). It merely results in "an alteration in the property interest taken—from [one of] full ownership to one of temporary use and occupation. . . . In such cases compensation would be measured by the principles normally governing the taking of a right to use property temporarily." *First English*, 482 U.S. at 317.

[160] United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945).

[161] Bass Enters. Prod. Co. v. United States, 45 Fed. Cl. 120 (1999).

[162] *Id.* at 122 (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1033 (1992) (Kennedy, J., concurring)).

[163] *Lucas*, 505 U.S. at 1033 (Kennedy, J., concurring).

observation was dicta in *Bass*, it is worth noting, since it substitutes a measure of damages associated with torts for the eminent domain measures associated with just compensation.

It is true, as *First English* indicated, that "the landowner has no right under the Just Compensation Clause to insist that a 'temporary' taking be deemed a permanent taking."[164] But that admonition only highlights the lack of a coherent definition of the temporary taking.

A definitive determination of the property taken must be made as of the time of the taking—ordinarily the time of the governmental intrusion. This was the Claims Court's view in *Yuba*.[165] If the government wishes to acquire not only possession, but also to acquire the right to relinquish possession at a time of its choice, it may do so. But the latter acquisition constitutes a taking just as much as the former. In determining the correct characterization of the interest taken by government in the temporary taking, the following principles should be applied.

A. Avoidance of Novel Interests in Land

There should be a marked preference against the creation of a new type of property interest unless absolutely necessary. It has long been a hallmark of the common law that "incidents of a novel kind" cannot "be devised and attached to property at the fancy or caprice of any owner."[166] One important justification for this is to prevent the imposition upon third parties of the increased costs that come from ascertaining their rights and potential liabilities with respect to unusual types of ownership rights inhering in others.[167]

B. Characterizing the Interest Taken as a Fee Simple Determinable

Under the traditional estates in land concept, the interest claimed by the government in *Yuba*[168] is best characterized as a fee simple determinable. It had taken a fee simple in the minerals, since its claim was of indefinite

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[164] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 317 (1987).

[165] Yuba Natural Res., Inc. v. United States, 10 Cl. Ct. 486, 499 (1986), *rev'd*, 821 F.2d 638 (1987); *see supra* Part IV.B.

[166] Keppell v. Bailey, 39 Eng. Rep. 1042, 1049 (1834).

[167] *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 26–34 (2000).

[168] *See supra* Part IV.B.

duration, and its denial of the owner's right to remove minerals constituted a taking of them.[169] The taking was determinable, since it would end automatically upon the happening of a specified event—announcement of the termination of the government's wish to keep the prohibition in place. The New York Court of Appeals has adopted such an analysis in a case involving an analogous interest, *Garner v. Gerrish*.[170] Alternatively, using contract terminology, the government might be said in *Yuba* to have taken both a fee simple and a put option giving it a right to reconvey to the former owner.

VI. Ascertaining Temporary Takings Damages

The Supreme Court noted over a century ago that when only part of a parcel is taken, the value of that part is not the sole measure of the just compensation due the owner. When the part not taken is of less value than it was before, the owner is entitled to additional compensation.[171] The standard analysis, as recently reiterated by the Federal Circuit in *Bass Enterprises*,[172] is that "[t]he just compensation for a permanent taking is generally the fair market value of the property taken, whereas the recovery for a temporary taking is generally the rental value of the property."[173]

The Court of Federal Claims, in accord with *Bass Enterprises*, added that "[i]n the temporary takings situation, rental value is seen as an appropriate measure because the property is returned to the owner when the taking ends, and the government, therefore, should only pay for its use of the property."[174]

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[169] Pa. Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

[170] 473 N.E.2d 223 (N.Y. 1984) (characterizing a lease to terminate on the date of the tenant's "own choice" as a life estate determinable since it would terminate at the tenant's death, subject to the contingency that he might wish to terminate it earlier).

[171] Bauman v. Ross, 167 U.S. 548, 549 (1897). As the Federal Circuit recently put it:

> In cases of a partial physical taking as that here, just compensation under the takings clause of the Constitution includes "not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing . . . injury due to the use to which the part appropriated is to be devoted."

Hendler v. United States, 175 F.3d 1374, 1383 (Fed. Cir. 1999) (quoting United States v. Grizzard, 219 U.S. 180, 183 (1911)).

[172] Bass Enters. Prod. Co. v. United States, 133 F.3d 893 (Fed. Cir. 1998).

[173] *Id.* at 895 (citing Yuba Natural Res., Inc. v. United States, 821 F.2d 638, 641 (Fed. Cir. 1987)).

[174] Pettro v. United States, 47 Fed. Cl. 136, 151 (2000) (citing First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 319 (1987)).

While the court cited *First English* for this proposition, the message of that Supreme Court opinion was more nuanced. It noted that the burden on a property owner in terminating a long-term lease so that the government might condemn a short-term interest "may be great indeed."[175] Furthermore, it recalled its admonition in *United States v. Causby*[176] that "[i]t is the owner's loss, not the taker's gain, which is the measure of the value of the property taken."[177] This was the context in which Justice Roberts had enunciated in *General Motors* that "[t]he value of such an occupancy is to be ascertained, not by treating what is taken as an empty warehouse to be leased for a long term, but what would be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier."[178]

In other words, where eminent domain results in government imposing itself as a tenant in a vacant unit and for a commercially customary term, fair rental value is a good measure of the owner's loss. On the other hand, where a temporary government occupation will slice a temporal section from what would have been the middle of a long-term tenancy, or otherwise constitute a non-standard rental interval, a substitute measure of just compensation would have to be utilized. The proper measure of damages in such a case is the difference between the value of the parent tract before the taking and its value after the taking.[179]

The before and after approach generally is regarded as the "simplest and perhaps the most widely used approach in severance damage determinations."[180] It avoids the need to account for separate factors that might affect the total amount of severance damage. It also allows for consideration of the fact that the condemnor might truncate the taking and *put* ownership of the land back to the original owner. In fact, courts have utilized a number of methodological approaches for ascertaining compensation for temporary regulatory takings. Some involve attempts to isolate the effects on value of various factors. Others involve differing sets of assumptions on how parcels might be used in the future.[181]

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[175] *First English*, 482 U.S. at 319.

[176] 328 U.S. 256 (1946).

[177] *Id.* at 261.

[178] *Id.* at 382.

[179] United States v. 8.41 Acres of Land, 680 F.2d 388, 394 (5th Cir. 1982).

[180] *E.g.*, Georgia-Pacific Corp. v. United States, 640 F.2d 328, 336 (Ct. Cl. 1980).

[181] For a useful and detailed summary, see J. Margaret Tretbar, *Calculating Compensation for Temporary Regulatory Takings*, 42 U. KAN. L. REV. 201 (1993). Among other good sources are WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION (Donald G. Hagman & Dean J. Misczynski eds., 1978) and Corwin W. Johnson, *Compensation for Invalid Land-Use Regulations*, 15 GA. L. REV. 559 (1981).

Where the parcel is undeveloped, additional problems arise. It is sometimes alleged that the payment of fair rental value would result in "a 'guessing game' between too little compensation on the one hand and providing a windfall on the other."[182] "Anticipated rentals from land that is presently undeveloped is just as speculative and uncertain as measuring anticipated profits from a presently unestablished business."[183] To counter this possibility, some courts have moved to an actual damages remedy: "Such actual damages must be provable to a reasonable certainty similar to common law tort damages."[184] However, such concerns should not detract from the fact that a diminution in the owners' intended use is of no relevance—what is important is the market value of the interest taken. The owner's intended use is one indication of market value. If the owner of unimproved land is required to submit substantial proof of the market value of the interest taken there should be no more likelihood of a windfall than in any other appraisal situation.

In suits brought under § 1983,[185] the theory of a constitutional tort dictates that the tort remedy of actual injury prevails.[186] Now that the Supreme Court has endorsed the use of a jury in determining § 1983 damages against a locality in a federal district court in *Del Monte Dunes*,[187] the remedy of damages for actual losses might gain more prominence. However, the claim in *Del Monte Dunes* arose with respect to the tortuous denial of a compensation remedy, not in inverse condemnation.[188]

While remedies that are implicitly or explicitly tort-based might seem efficacious in a given dispute, courts ought not lose sight of the need to vindicate the protection accorded private property under the Fifth Amendment, and to fashion remedies that in fact provide just compensation.

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[182] Corrigan v. City of Scottsdale, 720 P.2d 513, 518 (Ariz. 1986).

[183] City of Austin v. Teague, 570 S.W.2d 389, 395 (Tex. 1978).

[184] *Corrigan*, 720 P.2d at 519.

[185] 42 U.S.C. § 1983 (1994).

[186] *See, e.g., Corrigan*, 720 P.2d at 519.

[187] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 732 (1999).

[188] *Id.* at 699.