A Critical Analysis of the 1987 Takings Trilogy: The Keystone, Nollan and First English Cases

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A CRITICAL ANALYSIS OF THE 1987 TAKINGS TRILOGY: THE KEYSTONE, NOLLAN AND FIRST ENGLISH CASES

John Martinez*

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INTRODUCTION

The fifth amendment's just compensation clause¹ prohibits federal and state governments² from taking private property for public use³ without paying just compensation.⁴ Interpretation of the clause generally arises in two settings. The typical context involves governmental exercise of the power of eminent domain to acquire private property.⁵ The most familiar example is the condemnation of houses along the right-of-way of a proposed highway.

The other setting involves governmental exercise of power, other than the intentional exercise of the power of eminent domain, that affects private property so as to require invalidation of the governmental action, compensation or some other remedy. This other setting is usually described as the “takings problem.”⁶ It may arise

1. The just compensation clause provides:
[N]or shall private property be taken for public use, without just compensation.
U.S. CONST. amend. V.
2. The Supreme Court first held the fifth amendment's just compensation clause applicable to the states through the fourteenth amendment's due process clause in Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 241 (1897). See e.g. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2383 n.4 (1987) (“The Fifth Amendment . . . applies to the States through the Fourteenth Amendment.”).
5. The power of eminent domain, sometimes known as the power of “direct condemnation,” is an inherent governmental power sometimes referred to as an attribute of sovereignty. See, e.g., Berman v. Parker, 348 U.S. 26 (1954); City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 62, 646 P.2d 835, 837, 183 Cal. Rptr. 673, 675 (1982).
6. Classical analyses of the takings problem include B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977); Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 Harv. L. Rev. 1165 (1967); Sax, Takings, Private Property and Public Rights, 81 YALE L.J. 149 (1971); Sax, Takings and the Police Power, 74 YALE L.J. 36 (1964); Van Alstyne, Taking or Damaging by Police Power:
from the exercise of almost any governmental power. This problem has arisen most frequently, however, when governments have exercised the power to control land use.8

After generally avoiding decisions on the merits in takings cases for nearly a decade, the Supreme Court in 1987 decided three cases involving “takings” challenges to states’ exercise of the power to control land use.9 In Keystone Bituminous Coal Ass’n v. DeBenedictis,10 the Court held that Pennsylvania could prohibit coal mining under certain structures unless coal “pillars” were left to support the overlying structures,11 even though that effectively prevented coal owners from mining about 2% of their coal, which amounted to about 27 million tons.12 In Nollan v. California Coastal Comm’n,13 the Court held that the Commission’s requirement that the Nollans convey an easement to the state allowing public access along the seaward side of their coastal property as a condition on the Commission’s grant of a permit to allow them to demolish an existing dilapidated bungalow and construct a new three-bedroom house was a “taking.” The Court further held that since the condition did not substantially advance a legitimate state interest, the just compensation clause required compensation. In First English Evangelical Lutheran Church v. County of Los Angeles,14 the Court held that if a county’s zoning ordinance prohibited all use of land and was therefore held to be a taking of property through regulatory action, then the property owner could recover damages from the county for the period of time during

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The Search for Inverse Condemnation Criteria, 44 S. Cal. L. Rev. 1 (1971).

7. For example, in Summa Corp. v. California, 466 U.S. 198 (1984), the state asserted a “public trust” easement over private lands under state constitutional authority. In Dames & Moore v. Regan, 453 U.S. 654, 688 (1981), the plaintiff complained that the President’s freezing of Iranian assets under the power over foreign affairs improperly affected its property. In Kaiser Aetna v. United States, 444 U.S. 164 (1979), the United States was trying to force the plaintiff to allow public access to a private marina under the federal commerce power to regulate navigable waters.

8. Governmental power to control land use derives from the police power to regulate for the general health, safety, welfare and morals. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).


11. Coal “pillars” are similar to the columns supporting the next higher floor in a parking structure. The surface of the next higher floor is analogous to the overlying surface under which mining occurs.


which the ordinance had been in force against the property.

The takings problem can be productively examined according to a three-part analytical framework: First, is private property involved? Second, has governmental action so affected it as to require a remedy? Finally, what should be the appropriate remedy? The three takings cases decided in 1987 fit nicely within that framework: The Keystone case is principally concerned with the threshold question of defining private property for purposes of the just compensation clause; the Nollan case deals primarily with the circumstances under which a "taking" will be found and the First English case concerns the question of the appropriate remedy.

This article critically examines these decisions in terms of this analytical framework and concludes that they represent the proverbial one step forward and two steps backward along the path toward a coherent takings jurisprudence. First English is the lone step forward: it held that compensation, not just invalidation, is the constitutionally compelled remedy for takings, thus resolving a hotly contested debate of long standing. Keystone, however, adds new uncertainties about how the Court will identify the relevant property for takings purposes. Nollan takes another step backward by introducing a per se taking justification rule which appears to be an intermediate construct between the takings and remedy determinations.


16. This article is thus primarily descriptive. My prescriptive analysis with respect to the takings problem is set out in Martinez, Reconstructing Takings Doctrine by Redefining Property and Sovereignty, 16 Fordham Urb. L.J. — (1987) (unpublished), in which I suggest that the disarray in takings jurisprudence results from the Supreme Court's ambivalent approach to defining property for federal constitutional purposes and recommend that the Court should forthrightly adopt a principled approach toward defining constitutional property. I describe a functional approach that may prove useful.

I. DISTINGUISHING PRIVATE FROM PUBLIC LEGISLATIVE PURPOSES AND IDENTIFYING THE RELEVANT PROPERTY—THE QUESTIONABLE CONTRIBUTIONS OF THE KEYSTONE CASE

In Pennsylvania Coal Co. v. Mahon,18 decided in 1922, the Court held that Pennsylvania could not prohibit coal owners from mining without leaving pillars of coal to prevent subsidence of overlying structures. The Keystone case involved facts so similar to Pennsylvania Coal that it was viewed as Pennsylvania Coal, reincarnated.19 This time, however, the coal companies lost. The Court found the two cases distinguishable on two major grounds. We might refer to the first as the “public purposes” ground and to the second as the “relevant property” ground.

A. Distinguishing Pennsylvania Coal on Public Purposes Grounds

It is helpful to locate the “public purpose” inquiry in relation to the three-part analytical framework for takings questions.20 Both the just compensation and due process clauses prohibit governmental action not undertaken for a public purpose.21 Thus, if “property” has been “taken”—even if an appropriate “remedy” is provided—the governmental action is nevertheless improper unless it is for a public purpose.22

In Pennsylvania Coal, the Court held that the Kohler Act,24

18. 260 U.S. 393 (1922).
20. See supra notes 15-16 and accompanying text.
21. The fourteenth amendment’s due process clause provides in pertinent part: [N]or shall any State deprive any person of ... property, without due process of law. ... U.S. CONST. amend. XIV. There is a similar due process provision in the fifth amendment: No person shall ... be deprived of life, liberty or property, without due process of law. ... U.S. CONST. amend. V. See generally Tushnet, The Newer Property: A Suggestion for the Revival of Substantive Due Process. 1975 SUP. CT. REV. 261; Comment, Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis, 57 WASH. L. REV. 715 (1982) (authored by Ross A. Macfarlane).
22. See Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (interpreting the “public use” provision in the just compensation clause as the equivalent of the due process clause requirement that governmental action must be justified by a legitimate governmental objective).
23. Whether the absence of a public purpose alone constitutes a “taking” for purposes of the just compensation clause has not been definitively determined. See infra note 57 and accompanying text. The Court did not have to address that issue in Keystone because it found that the Subsidence Act was justified by several public purposes. See infra note 26 and accompanying text.
which prohibited coal mining under residences, advanced only the private interests of the homeowners. In *Keystone*, on the other hand, the Court held that the Subsidence Act, which similarly prohibited coal mining under residences, advanced the public interest in conservation of surface land areas, protected the public safety from the harmful effects of subsidence, enhanced the value of surface lands for taxation, aided in the preservation of surface water drainage and public water supplies, and generally improved the use and enjoyment of surface lands.

The difference in outcomes between the *Pennsylvania Coal* and *Keystone* decisions might be explained in any of several ways, none of which proves entirely satisfactory. First, perhaps the Pennsylvania legislature had done a better job of explicitly setting out the "publicness" of its purposes in the Subsidence Act than it had in the Kohler Act. Yet it would seem odd if the way in which a legislature articulates its purposes is dispositive of what those purposes are insofar as a reviewing court is concerned. If legislative enactments that affect only private economic interests are presumed valid—and, at least until *Nollan* was decided, that is what courts generally presumed—then any reasonably articulable legitimate governmental objective will suffice, even if the legislature had not expressly or clearly set it out in the legislation.

Second, perhaps the Court in *Keystone* was simply more receptive to the Pennsylvania state counsel's arguments about the publicness of the Subsidence Act's purposes than it had been with respect to similar arguments about the Kohler Act. Yet, again, it would seem odd (although not unknown to happen), if the Court varied its holdings depending on how forcefully counsel make arguments. This presumes, of course, that the Court is reasonably made aware of those arguments. Yet the Court in *Pennsylvania Coal* had been made aware of several public purposes which the Kohler Act was enacted to achieve, including prevention of loss of human life and damage to streets, public and private buildings and public utility

27. The extent to which the Court defers to legislative identification of public purposes is discussed below with respect to the *Nollan* decision. See infra notes 60-95 and accompanying text.
28. The manner in which legislators articulate their purposes is an important guide to understanding what they voted on, but it is certainly not dispositive.
29. See infra notes 61-62 and accompanying text.
connections.  

Finally, perhaps the social milieu with respect to the need for regulation of coal mining activities had changed between 1922 and 1987 to the point that the Justices were more willing to defer to legislative identification of the Subsidence Act’s public purposes. This is evidenced by the Court’s telling statement in Keystone that, “[t]he Subsidence Act is a prime example that ‘circumstances may so change in time . . . as to clothe with such a [public] interest what at other times . . . would be a matter of purely private concern.’”  

Keystone represents the traditional deference to legislative purposes that has characterized the Court’s approach to governmental conduct affecting property. Thus, this feature of the case makes no new law, but instead represents a correction of the departure in Pennsylvania Coal from the traditional deferential approach. The troublesome aspect about this distinction between Keystone and Pennsylvania Coal is that we are given no indication of what factors other than the passage of time made the Court more receptive to the publicness of the Subsidence Act than it had been to the Kohler Act.

B. Distinguishing Pennsylvania Coal on the Ground of the Relevant Property

After determining that the public purpose requirement had been met, the Court went on to consider whether a “taking” of “property” had occurred. Since the coal companies had made a facial attack on Pennsylvania’s Subsidence Act, the appropriate standard for determining whether a “taking” had occurred, the Court held, was whether “economically viable use” of property had been denied.


32. See infra notes 72-84, 94-95 (discussing judicial deference to legislative determinations).

33. Keystone, 107 S. Ct. at 1247 (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)). In contrast, in attacks on legislation as applied to specific property, the challenger must show that in consideration of several factors—including “the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action”—justice and fairness require that the economic injuries caused by the legislation should be borne by the government, rather than by the property owner. Id. (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)).

The demarcation between facial attacks and attacks on legislation as applied may not be quite as definite as Keystone suggests. In Nollan, where legislation was attacked as applied to a particular parcel, the Court said the applicable standard was whether the Nollans had been denied the “economically viable use” of their land. See infra note 88 and accompanying text.
This, in turn, required the Court to define the relevant property.

The Court's perception of the relevant property is the second distinction between Pennsylvania Coal and Keystone. In Pennsylvania Coal, the Court defined the relevant property narrowly, as consisting of the pillars of coal that would have to be left to prevent subsidence of the overlying structures. In Keystone, the Court defined the relevant property broadly, as consisting of the entire coal mine holdings of the companies involved. The scope of the relevant property becomes critical to determining whether there has been a "taking": if the relevant property is narrowly defined, considerably less intrusive governmental action will constitute a taking, both for purposes of a facial attack on legislation, as was involved in Keystone, and for purposes of an attack on legislation as applied, as in Pennsylvania Coal. Moreover, and perhaps of greatest significance, the analytical task of defining the relevant property appears to be the same for both purposes.\textsuperscript{34}

1. Pennsylvania Coal's Narrow Focus on the Relevant Property

Pennsylvania law recognizes three distinct property interests in coal lands: the right to use the surface of the land, the right to support of the surface and the right to mine coal under the surface. The right to use the surface can be alienated—disembodied, as it were—indepedently of the right to support of the surface.\textsuperscript{35} In

\begin{footnotesize}
This is the standard which the Court in Keystone says applies only to facial attacks. Moreover, the "as applied" standard itself is not as monolithic as the Keystone Court describes. See infra note 49 and accompanying text (describing the two variations of that standard, the \textit{per se} rule and the multi-factor analysis).

\textsuperscript{34} Perhaps because it was aware of the difficulty of reconciling its decision with \textit{Pennsylvania Coal}, the Court in Keystone first suggested that \textit{Pennsylvania Coal} was inapplicable because that case involved an attack on the Kohler Act as applied, whereas Keystone involved a facial attack on the Subsidence Act. See \textit{Keystone}, 107 S. Ct. at 1241 ("[U]ncharacteristically—Justice Homes provided the parties with an advisory opinion discussing 'the general validity of the Act.' "). The Court in Keystone emphasized that the "takings" standard for facial attacks differs from that for "as applied" attacks. See supra note 33 and accompanying text. In its discussion of the relevant property, however, the \textit{Keystone} Court treated both Justice Holmes' discussion regarding the validity of the Kohler Act as applied, as well as his discussion about its facial validity, as controlling precedent. See \textit{Keystone}, 107 S. Ct. at 1248-51. We may infer, therefore, that identifying the relevant property for purposes of determining whether there is a "taking" under a facial attack does not differ from identifying the relevant property for purposes of determining whether there is a "taking" under an attack on legislation "as applied."

\end{footnotesize}
Pennsylvania Coal, that is what happened to the land upon which the Mahons built their house. In 1878, the Pennsylvania Coal Company had sold the surface use rights to the land to Mrs. Mahon's father. In the deed, the company had retained the right to the coal under the land, as well as the right to support of the surface. Moreover, Mrs. Mahon's father had also contractually waived all claims against the company for harm caused by subsidence resulting from mining operations. The company therefore claimed both property and contractual sources for the right to mine under the Mahons' house without liability for subsidence resulting from mining operations.

If it was established that the company did not have the right to mine without providing for surface support or, conversely, that it would have been liable for subsidence resulting from mining operations, then it would have had to either leave pillars of coal to support the surface or install wooden timbers to achieve the same result. The company argued that leaving wooden timbers was out of the question because their cost would have far exceeded the value of the coal in the pillars. The issue thus narrowed to whether the company had to leave pillars of coal or not. So interpreted, therefore, Pennsylvania Coal concerned the coal in the pillars as the relevant property.

The early part of Justice Holmes' opinion seemed to adopt this perspective of the relevant property: "[T]he extent of the taking is great. [The Kohler Act] purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs." Whether conceived as deriving from property or contract, the nature of the right was the same—the right to mine irrespective of surface subsidence—evidenced by the pillars of coal.

Later in the opinion, however, Justice Holmes made an ambiguous reference to the relevant property: "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."

36. Under Pennsylvania common law, such covenants run with the land. See Keystone, 107 U.S. at 1252 n.32 (1887).
39. Id. (emphasis added).
One interpretation of this language which is perfectly consistent with the Court's narrow definition of the relevant property is that the words "certain coal" and "with profit" refer to mining the coal in the pillars. The company had argued that the value of the coal in the pillars was exceeded by the cost of installing timber supports and that therefore there would be no profit from mining that coal. Accordingly, Justice Holmes' reference to the state's preventing the coal company from mining with profit refers narrowly to mining the coal in the pillars.

2. Keystone's "Profit" Test

In Keystone, the Court interpreted Pennsylvania Coal quite differently, however. The Court considered the coal companies' rights under three categories: the deed-retained right to mine coal, the deed-retained right to the support estate and the contractually-acquired right to mine coal without liability for damages from resulting subsidence. With respect to the right to mine coal, the Court focused on Justice Holmes' reference to "profit" as the operative term. It said:

The 27 million tons of coal do not constitute a separate segment of property for takings law purposes.

We do not consider Justice Holmes' statement that the Kohler Act made mining of "certain coal" commercially impracticable as requiring us to focus on the individual pillars of coal that must be left in place. That statement is best understood as referring to the Pennsylvania Coal Company's assertion that it could not undertake profitable anthracite coal mining in light of the Kohler Act.40

The Keystone court thus purported to introduce a "profit" test for determining takings: If profit-making operations are precluded, whether narrowly focused on mining the coal in the pillars or on the entire operations of the individual coal company, a taking occurs. Thus, mining the coal in the pillars was supposedly held unprofitable in Pennsylvania Coal because the cost of wooden timbers exceeded the value of the coal in the pillars.41 Similarly, mining coal in gen-

41. Of course, the company also argued that the Subsidence Act made it commercially impracticable to mine the very coal that had to be left in place. Although they could have constructed pillars for support in place of the coal, the cost of the artificial pillars would have far exceeded the value of the coal. See Pennsylvania Coal [Co.] v. Mahon, Petitioners' Brief in Error, O.T. 1922, No. 549, pp. 7-9.
eral was supposedly unprofitable for the Pennsylvania Coal Company, since six coal mines were unable to operate.\footnote{42}

Applying the test to the facts in Keystone, the Court held:

When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners' coal mining operations and financial-backed expectations, it is plain that the petitioners have not come close to satisfying their burden of proving that they have been denied economically viable use of that property. The record indicates that only about 75\% of petitioners' underground coal can be profitably mined in any event, and there is no showing that petitioners' reasonable "investment-backed expectations" have been materially affected by the additional duty to retain the small percentage that must be used to support the structures protected by [the Subsidence Act].\footnote{43}

A "profit" test is a treacherous foundation for takings doctrine. Under such a test, whether a taking occurs depends on whether governmental regulation prevents the profitable operation of the industries being regulated. That would depend, in turn, on whether the cost of avoiding the detrimental effects of industrial operations—surface subsidence, toxic wastes or any other negative externality—can be passed on to consumers. Thus, the ultimate upshot of the Keystone court's conclusion, explained under a "profit" test, would be that in 1922 the price of coal could not be raised to account for the costs of compliance with the Kohler Act, whereas in 1987 the price of coal can be adjusted to account for the costs of compliance with the Subsidence Act.\footnote{44}

However, there was no discussion of the relative ability of the

Keystone, 107 S.Ct. at 1249 n.26. (This footnote from Keystone is ambiguous. It seems to refer to the Petitioners argument in the Pennsylvania Coal case, yet refers to the Subsidence Act, involved in the Keystone case).  
\footnote{42} For example, the coal company claimed that one company was "unable to operate six large [coal mines] in the city of Scranton." Keystone, 107 S. Ct. at 1249 (quoting Motion to Advance for Argument in Pennsylvania Coal Co. v. Mahon, O.T. 1922, No. 549, p. 2.)  
\footnote{43} Keystone, 107 S. Ct. at 1249.  
\footnote{44} Admittedly, the Court in Keystone held only that the companies had failed to show that they could not operate profitably. \textit{Id.} at 1249. However, the Court seemed to conclude that no such showing would have been possible:  
When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners' coal mining operations and financial-backed expectations, it is plain that the petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property.  
\textit{Id.} \textit{See infra} notes 88-92 and accompanying text (discussing the meaning of "economically viable use."')}
coal companies to pass on the costs of compliance in either Pennsylvania Coal or Keystone. More fundamentally, a "profit" test would mean that if such costs could not be passed on, takings would result. The relative efficiency of the regulated industries in passing on costs would therefore determine whether takings had occurred. The most inefficient industries could not be regulated—at least not without payment of just compensation—because of their inefficiency. Surely both economists and lawyers would agree that this is not a sound approach.

3. Keystone's Approach Construed as a Broad Focus on the Relevant Property

A frank acknowledgement by the Court in Keystone that it was taking a broader focus of the relevant property, on the other hand, would have been justifiable on a principled basis and also consistent with the rest of the Court's opinion. Perhaps the considerations which justify a broader or narrower focus of the relevant property are historically contingent. Thus, the Court's approach in Keystone may reflect the development of a social consensus between 1922 and 1987 regarding the need for governmental regulation to avoid the profound, long-term threats to public health and safety, such as subsidence, that coal mining represents. Accordingly, a broader focus and, consequently, greater leeway for governmental regulation, was proper. Since the extent of the threat posed by the use of property is significantly related to, if not necessarily directly correlated with, the property under the control of the owner, narrowing or broadening the scope of the relevant property in accordance with evolving social consensus seems a sensible approach.

Judicial declaration that a general social consensus has developed with respect to an issue of public concern is not without its shortcomings. Courts could understandably be challenged on whether they should be engaged in "taking the public pulse" as well as on the inexactness of that undertaking. In Keystone, however, the broadening of the scope of the relevant property was determined by the legislature, not by the Court. This was most evident in the Court's discussion of the companies' contract right to be free from liability caused by mining subsidence. Though conceding that the

45. The just compensation clause does not prohibit takings; only uncompensated ones. See First English, 107 S. Ct. at 2385-86 ("[The just compensation clause] does not prohibit the taking of private property, but instead . . . secure[s] compensation in the event of otherwise proper interference amounting to a taking.").
Subsidence Act "substantially impaired" the companies' contract rights, the Court held that such impairment was justified in light of the public interest in preventing mining operations from making a "shambles of . . . buildings and cemeteries." 46

The emphasis on the broader focus of the relevant property concerning the right to mine coal is also consistent with the Keystone court's discussion of the effect of the Subsidence Act on the coal companies' support estate interest. Contrary to the distinct character of that interest under Pennsylvania law, the Court held that the support estate was not "property" for federal constitutional purposes:

[I]n practical terms, the support estate has value only insofar as it protects or enhances the value of the estate with which it is associated. Its value is merely a part of the entire bundle of rights possessed by the owner of either the coal or the surface. Because petitioners retain the right to mine virtually all of the coal in their mineral estates, the burden the Act places on the support estate does not constitute a taking. 47

Thus, the Court essentially refused to take a narrow focus of the support estate in isolation from the right to mine the coal or the right to use the surface.

4. Keystone Summary

The Court's decision in Keystone can best be explained as involving a broader focus of the relevant property than Justice Holmes undertook in Pennsylvania Coal. The difference in focus is historically contingent, based on a legislatively determined increased societal need for regulation of coal mining. Instead of forthrightly acknowledging this difference, the Court in Keystone introduced a "profit" test that is analytically suspect.

The difference in the focus of the relevant property in each case had a dramatic impact on the subsequent question whether a taking had occurred. Thus, in Pennsylvania Coal, the coal owner was deemed to have been deprived of all of the relevant property, leading to the conclusion that a taking had occurred, whereas in Keystone, although the coal owner was deemed deprived of some of the relevant property (the coal in the pillars, the support estate and the contract rights involved), a complete deprivation was not involved, so no taking was found. Under the Keystone court's "profit" test, one

47. Id. at 1250.
would have to conclude that the coal company in *Pennsylvania Coal* could not profitably carry on its operations whereas in *Keystone* the coal companies had not shown they could not do so. This distinction, as pointed out above, is more than problematic; it is analytically unsound.

Since the scope of the relevant property thus dramatically affects the outcome in a takings case, it is critical that the controlling factors should be identified with precision. Unfortunately, the Court did not do so in *Keystone*. We are thus left with a powerful difference in the scope of the relevant property without clear guidance about the factors that motivated the change. That omission will inevitably lead to greater uncertainty in the field, with property advocates predictably asserting that the relevant property in their circumstances is very narrow in scope and governmental advocates asserting with equal conviction that the relevant property is very broad.

II. WHAT CONSTITUTES A “TAKING”?—THE COURT FORMULATES A JUSTIFICATION RULE FOR PER SE TAKINGS IN NOLLAN

The *Nollan* decision establishes two fundamental propositions. One favors governmental entities, the other favors property owners. Favoring governmental entities, the Court held that even if governmental conduct is held to be a per se taking, it will not necessarily run afoul of the just compensation clause. Favoring property owners, the Court held that per se takings will trigger a close level of judicial scrutiny that has not been generally available for protection of property interests since the early part of this century.

A. Not All Per Se Takings Require Compensation

The Court has developed two major standards for determining whether the application of a governmental regulation to specific property effects a “taking”: a multi-factor analysis and a per se rule. Under the multi-factor analysis the Court has said that three factors have particular significance: the economic impact of the reg-

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48. In *Keystone*, the Court emphasized that in facial attacks on legislation affecting property, the challenger must show that he or she has been deprived of "economically viable use" of the property. In contrast, in challenges to legislation as applied, the multi-factor analysis and the per se rule control. *See supra* notes 33-34 and accompanying text.

ulation on the claimant, the extent to which the regulation interferes with identifiable investment-backed expectations and the character of the governmental action. However, the Court has not particularly defined those factors nor explained their relationship to each other, and candidly admits that it engages in essentially ad hoc inquiries.

The per se rule, on the other hand, provides that a permanent physical occupation undertaken directly by government or by private parties authorized by government is a taking. That rule was first announced in *Loretto v. Teleprompter Manhattan CATV Corp.*, in which the Court held that New York could not authorize a private television cable company to install cables and relay boxes on privately owned apartment buildings to provide cable television services to the tenants because such cables and relay boxes were “permanent physical occupations” of private property which constituted “takeings” per se.

In *Nollan*, the Court began by applying the per se rule. It held that requiring a private property owner to give the public “a permanent and continuous right to pass to and fro, so that the real property [would] continuously be traversed, even though no particular individual [was] permitted to station himself permanently upon the premises,” amounted to a permanent physical occupation that constituted a per se taking.

In *First English*, decided just prior to *Nollan*, the Court held that if a taking is found, compensation is constitutionally required under the just compensation clause of the fifth amendment. It therefore would have been natural to expect the Court in *Nollan* to have held without further analysis that the Commission was required to pay the Nollans just compensation. Instead, the Court considered whether the lateral access condition imposed on the Nollans “substantially advanced a legitimate state interest” or denied them

52. 458 U.S. 419 (1982).
54. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378 (1987) is discussed below. See infra notes 96-100 and accompanying text.
55. Although *First English* did not involve a per se taking, as did *Nollan*, the Court in *First English* did not differentiate between per se takings and takings ascertained using the multi-factor analysis.
"economically viable use" of their land. Since the Court found that the access condition did not substantially advance a legitimate state interest, it did not consider whether the Nollans were nevertheless denied economically viable use of their land. The Court's consideration of whether the access condition substantially advanced a legitimate state interest is potentially so significant, however, that we may refer to it as the "per se taking justification rule" for purposes of further analysis.

It is helpful to situate the per se taking justification rule in the context of the larger "property-taking-remedy" framework for analysis. The rule is an intermediate construct between the determination that a taking has occurred and the remedial question, with implications for both. It does not directly concern whether a taking has occurred because the Court did not articulate and apply the per se taking justification rule until after it had found a taking under the per se rule. On the other hand, if governmental action is justified under the rule, and government is thereby exonerated of responsibility, then the result is the same as if no "taking" had been found in the first place. Similarly, the per se taking justification rule is not directly concerned with the remedy that should be provided for takings because under First English, it seems clear that compensation is

57. There is some authority which suggests that there is a third takings test for challenging legislation "as applied," in addition to the per se rule and the multi-factor analysis discussed above. See supra notes 48-51 and accompanying text. The Court has said that if governmental action does not substantially advance a legitimate governmental objective, a "taking" occurs. United States v. Riverside Bayview Homes, Inc., 106 S. Ct. 455, 459 (1985) (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)); see Laitos and Westfall, Government Interference With Private Interests in Public Resources, 11 HARV. ENVTL. L. REV. 1, 66 (1987) (referring to this as a "third" takings test).

Treating all circumstances in which governmental action merely "reasonably" rather than "substantially" advances legitimate governmental objectives would come dangerously close to making it a tort for government to govern. Dalehite v. United States, 346 U.S. 15, 57 (1952) (Jackson, J., dissenting). Recognizing this, perhaps, the Court recently held that deliberate, rather than merely negligent, governmental conduct must be shown in order to establish a due process deprivation. Daniels v. Williams, 474 U.S. 327 (1986), overruling Parratt v. Taylor, 451 U.S. 527 (1981). If the Court will not impose governmental liability for negligent governmental conduct, a fortiori, it should also be unwilling to impose it for reasonable conduct.

The per se taking justification rule adopted by the Court in Nollan looks suspiciously like the questionable "third" takings test for determining whether a taking has occurred. And one could argue that if governmental action is justified under the per se taking justification rule, and therefore government is exonerated of responsibility, then the result is the same as if no "taking" had been found. However, that overlooks the critical fact that the Court in Nollan had found a taking before it embarked on the elaboration of the per se taking justification rule. Accordingly, the "third" takings test notwithstanding, it is fairly clear that the per se taking justification rule is not for the purpose of determining whether or not there has been a taking.
constitutionally compelled. On the other hand, the remedial impact of the rule is unquestionable: if governmental action is justified under the rule, even though a per se taking has been established, no remedy is forthcoming.

Regardless of whether the per se taking justification rule is characterized as part of the takings determination, as part of the remedial determination, as part of both, or as a completely different construct, it should partially relieve governmental agencies' fears about the potential for extensive, unpredictable and recurrent governmental liability generated by the Court's decision in First English. On the other hand, there is continuing reason for such fears given the manner in which the Court indicated it will apply the per se taking justification rule.

B. Analysis of the Per Se Takings Justification Rule

The per se taking justification rule is a standard for judicial review of governmental action. Standards of judicial review may be analyzed in terms of four factors: First, what kind of private interest is affected? Second, how important must the justificatory governmental objective be? Third, how tight must the "fit" between the means used in the circumstances and the governmental objective be? Fourth, to what extent will a court require that the means used in

58. See infra notes 96-100 and accompanying text.
59. However, since the case involved a per se taking, it is not necessarily relevant where a taking is ascertained using the broader, multi-factor alternative to the per se rule. See supra notes 48-51 and accompanying text. Such circumstances might arise where governmental actions are not clearly physical invasions. In those settings, perhaps, governmental agencies may nevertheless be subject to the almost automatic determination that compensation must be provided, apparently dictated by First English.

In a sense, such a result might be appropriate. The primary criticism of the per se rule has been that it does not allow for consideration of the countervailing public interest factors in any given situation. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 442 (1982) (Blackmun, J., dissenting); Costonis, Presumptive and Per Se Takings: A Decisional Model for the Taking Issue, 58 N.Y.U. L. REV. 465 (1983). Accordingly, it makes sense for the Court to have formulated the per se taking justification rule to ameliorate that problem. As discussed below in the text, the per se taking justification rule allows for weighing of the public and private interests involved even though a per se taking has been found. See infra notes 61-92 and accompanying text. That balance favors the private interests affected, so the per se situation as a whole is still less favorable to governments than the multi-factor approach.

In contrast, the multi-factor approach takes public interests into account as part and parcel of the takings determination. Accordingly, it may make no sense to apply the per se taking justification rule outside of the per se context because to do so would give the government two chances to argue the public interests involved instead of one.

60. Justice Brennan's dissent in Nollan discusses this issue. See Nollan, 107 S. Ct. at 3151-54 (Brennan, J., dissenting).
the circumstances be the least restrictive of the private interest affected? In terms of these four factors, the per se taking justification rule represents at least a potential source of greater protection for property interests. Governmental objectives need only be "legitimate" rather than "substantial" or "compelling," but the means used must "substantially advance" them. Finally, it is unclear whether the "least restrictive means" must be used.

1. Property Rights Protection Versus "Fundamental Rights" and "Suspect Trait" Protection

When only property rights are affected, the Court has traditionally deferred to governmental agency identification of legitimate governmental objectives and selection of the means through which such objectives should be achieved.61 Such governmental determinations are presumed valid, meaning that the government need only make a minimal showing that there is a rational relationship between the means used and a legitimate governmental objective, whereupon the challenger must overcome the resulting presumption that the governmental objective is legitimate and that the relationship to the means is reasonable.62 In contrast, such deference is not forthcoming when fundamental rights such as speech or privacy,63 or suspect trait classifications such as race,64 are involved. In such "close scrutiny" cases, after the challenger has made out a prima facie case that a fundamental right has been affected or that a suspect trait classification is involved, the government has a heavy burden of showing that the means used are essential or necessary for achieving a substantially important or compelling governmental objective.

The rights involved in Nollan were clearly property rights. The

61. See generally L. Tribe, American Constitutional Law §§ 16-2 to 16-5 (1978) (discussing minimum rationality review under the equal protection clause).

But see R. Epstein, Takings: Private Property and the Power of Eminent Domain (1985) (arguing that close scrutiny is required when property is affected by governmental action).

62. The classic case for minimum rationality review, in which the Court itself articulated the possible justificatory legitimate governmental objectives that would sustain a statute, is Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955).


But see Baker, Property and its Relation to Constitutionally Protected Liberty, 134 U. Pa. L. Rev. 741 (1986) (criticizing the dichotomy between liberty and property interests and suggesting that we need to refine our understanding of both).

64. See generally L. Tribe, supra note 61, § 16-14 (1978).
Nollans were being affected in their ability to exclude others from their land, particularly from the portion of their land that would have been subject to the public access easement. Ordinarily, this would call for relatively minimal judicial scrutiny. Yet the Court's application of the per se taking justification rule indicates that it is a more searching inquiry. We may explore the dimensions of the rule in terms of the other factors for analyzing standards of judicial review.

2. "Important" Versus Merely "Legitimate" Governmental Objectives

Under minimal scrutiny judicial review courts ask whether there is any conceivable "legitimate" governmental objective involved. Since governmental authority generally includes the power to regulate for the general health, safety, welfare and morals, traditionally collectively referred to as the police power, at least one of these will usually be available to justify governmental action.

In contrast, close scrutiny judicial review requires a significantly important justificatory governmental objective. How a "legitimate" governmental objective is to be distinguished from a more significantly important governmental objective has been the subject of much debate, but little consensus. In Nollan, however, the Court held that preservation of the public's view of the beach and even

66. Conventional standards of judicial review apply to a court's examination of the whole case. In contrast, the per se taking justification rule is a special form of judicial review, triggered only after a per se taking has been found. Thus, Nollan should not be read as the adoption of "whole-case" close scrutiny judicial review, either with respect to cases involving governmental action affecting property in general, or with respect to takings cases in particular. See also supra note 59 (discussing the related point that the per se taking justification rule is not an alternative "takings" test to the per se rule and the multi-factor analysis approach).
67. See supra note 60 at 3151-54 and accompanying text.
68. See supra notes 61-62 and accompanying text. Thus, only when improper governmental objectives are involved will governmental action fail this aspect of judicial review. See e.g., City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980) (Even aside from its effects on fundamental concerns such as privacy, preventing groups of unrelated persons from living together in a single family residence zone on the ground that they would create an immoral environment for families with children would not pass minimal scrutiny as a legitimate objective of a city ordinance restricting a "single family residence" zone).
acquisition of public access along the beach were "legitimate" governmental interests.\textsuperscript{71}

3. "Tight" Versus "Loose" Fits Between Means and Ends

In minimal scrutiny settings, governmental action is typically sustained if the means used to achieve the relevant governmental objective are reasonably likely to lead to its achievement. This is commonly referred to as the "rational relationship" standard.\textsuperscript{72} In contrast, in close scrutiny situations, the means used must be "necessary" to the achievement of the governmental objective. Under that criterion, the government must show that there is no other feasible way in which the objective can be achieved other than through the means selected.

In \textit{Nollan}, the Court set out a standard that requires more than a rational relationship between means and ends, but less than a necessary connection. The means used must "substantially advance" the governmental ends sought to be achieved.\textsuperscript{73}

The Commission contended that the Nollans' proposed three-bedroom house would obstruct public view of the beach and that this would in turn deter the public from using the admittedly public portions of the beach lying immediately adjacent to the Nollans' property.\textsuperscript{74} The Commission thus argued that the primary objective it sought to achieve through the access condition was the preservation of public views and that protecting public access was merely a secondary, related objective.\textsuperscript{75}

The Court assumed without deciding that the Nollans' house would obstruct public views.\textsuperscript{76} It agreed with the Commission that protecting the public's view of the beach, considered independently, was a legitimate state interest that could be protected through the Commission's power to limit or deny the Nollans' coastal development permit. It also agreed that public views might have been protected through conditions on permits such as height and width limi-

\textsuperscript{71} Nollan, 107 S. Ct. at 3147-48.
\textsuperscript{72} See generally L. Tribe, \textit{supra} note 61, §§ 16-2 to 16-5 (1978).
\textsuperscript{73} Nollan, 107 S. Ct. at 3146.
\textsuperscript{74} Nollan, 107 S. Ct. at 3143-44. The Court noted:
[a] quarter-mile north of [the Nollans' property] is Faria County Park, an oceanside public park with a public beach and recreation area. Another public beach area, known locally as "the Cove," lies 1,800 feet south of their lot.
\textit{Id.} at 3143.
\textsuperscript{75} \textit{Id.} at 3148-49.
\textsuperscript{76} \textit{Id.} at 3147.
tations and bans on fences. Moreover, it also expressly approved a condition requiring the Nollans to provide a viewing spot on their property for the public to use.\textsuperscript{77} Thus, the Court did not object to a public access condition as long as it was imposed as a measure to mitigate obstruction of public views resulting from the nature or manner of construction of the proposed development.

The Court concluded, however, that the access condition "utterly failed" to advance the objective of protecting public views.\textsuperscript{78} Further, it disagreed with the Commission that blocking of public views would in turn obstruct public access.\textsuperscript{79} Thus, the Court held that the access condition was not justified either to protect public views or to preserve public access detrimentally affected through the

\begin{footnotes}
\item[77] The Court said:

The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree. Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house— for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.

\textit{Id.} at 3147-48.

\item[78] "[T]he condition . . . utterly fails to further the end advanced as the justification for the prohibition." \textit{Id.} at 3148.

\item[79] The Court said:

Rewriting the argument to eliminate the play on words makes clear that there is nothing to it. It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house. We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land use power for any of these purposes.

\textit{Id.} at 3149 (footnote omitted).
\end{footnotes}
assumed negative impact on public views.

Since the Court held there was no connection between the regulatory objectives involved and the access condition, the circumstances would not have passed muster under the rational relationship standard either. This may cast doubt on the Court’s statements that the means must “substantially advance” the ends sought to be achieved, since that part of the opinion was not integral to the outcome and thus not part of the holding. Still, the Court specifically rejected the idea that rational relationship will be the standard. 80 Thus, even if the enhanced “substantial advancement” standard is not essential to the outcome in Nollan, it is certainly instructive dictum.

Without the connection to the preservation of public views, the Court pointed out, the access condition was, by default, simply a means for advancing the entirely different state interest in acquiring public access across the Nollans’ private property. 81 Although that objective was also a legitimate one, achieving it through the regulatory route of imposing an access condition on the Nollans’ development permit under the circumstances was improper. The only proper means for achieving that objective in the circumstances, the Court concluded, was through the direct condemnation of an easement and the payment of just compensation for it. 82

The Coastal Commission has several options after the Supreme Court’s decision in Nollan. There was a question in the case whether the public already had rights in the land over which the easement

80. “We have required that the regulation ‘substantially advance’ the ‘legitimate state interest’ sought to be achieved, not that ‘the State ‘could rationally have decided’ the measure adopted might achieve the State’s objective.’” Id. at 3147 n.3 (citations omitted).

81. “[T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation.” Id. at 3148.

82. Id. The Court thus appeared to conceive of the Commission’s action as a destabilizing measure aimed at forcing a public benefit in the form of public access from the Nollans, whereas the Commission had contended that its action was a stabilizing measure aimed at preventing the Nollans’ proposed construction from causing public harm through reduction of public access.

So viewed, the Court’s analysis bears some resemblance to the Wisconsin Supreme Court’s discussion in Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972). In that case the court drew a distinction between governmental action securing a public benefit—which might amount to a taking for which compensation would be required—and governmental action preventing property owners from using their property to cause a public harm—which might justifiably be characterized as regulatory action for which compensation was not required. Id. at 16, 201 N.W.2d at 767-68. For a discussion of the Just case, see Large, This Land is Whose Land? Changing Concepts of Land as Property, 1973 Wis. L. REV. 1039 (1973).
condition was sought to be imposed.\textsuperscript{83} Thus, the Commission may subsequently establish that the public had rights over the property in spite of the decision in \textit{Nollan}.

If the Commission fails to establish pre-existing public rights over the property and it nevertheless wishes to acquire the public access easement, it can condemn such an easement and pay the Nollans its fair market value. Alternatively, the Commission may simply abandon the attempt to acquire such an easement and lift the condition. If the Commission chooses to condemn an easement or if it abandons the attempt altogether, as discussed below with respect to \textit{First English}, the Commission will have to pay the Nollans interim damages for the time when the condition was improperly applied to the property.\textsuperscript{84}

\textbf{4. Consideration of Alternative Means}

In some close scrutiny settings, even if governmental action is supported by a sufficiently important governmental objective and the connection between the objective and the means used is relatively close—though short of being necessary—challengers may show that there are other, less onerous means which would also lead to the achievement of the governmental objective.\textsuperscript{85} In those settings, the governmental entity may be required to utilize one of those other "less restrictive alternatives" instead of the means it has selected.

The Court in \textit{Nollan} did not discuss whether the least restrictive

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\textsuperscript{84} See infra notes 96-100 and accompanying text. Presumably, if the public had rights over the property all along, the Commission might not be required to pay interim damages.

Even if the public did not have pre-existing rights over the property, the Nollans might still not recover. First, they may be unable to show they have suffered any interim damages, since they went ahead and built their three-bedroom house in disregard of the Commission's condition. Second, even if they did suffer damages, the Commission may argue that they are estopped from recovering them because of that conduct.

\textsuperscript{85} If the connection between the means used and the objective sought to be achieved must be a "necessary" one, then the question of less restrictive means may drop out, since the government will have to show there are no other ways in which the objective might be achieved other than through the means it selected. \textit{See supra} notes 63-64 and accompanying text.

The least restrictive means notion may nevertheless come into play as a way in which the challenger can dispute the government's showing of the necessity of the means selected through demonstrating that there are other ways in which the objective could be achieved that would be less restrictive of the rights involved. (This is discussed in the text accompanying this footnote.).

\textsuperscript{86} See generally L. Tribe, \textit{American Constitutional Law} § 12-30 (1978) (discussing the concept of less restrictive alternatives in the context of first amendment protections from laws that are overbroad or vague).
means would be required, but in *Keystone*, the Court seems to have rejected that notion.\(^8^7\) Moreover, in *Nollan*, the Court said that the access condition would be allowed only if it “substantially advanced” a legitimate governmental objective and did not deny the Nollans “economically viable use” of their land.\(^8^8\) We may infer that if the access condition had substantially advanced a legitimate governmental objective, such as preventing the Nollans from obstructing public access, for instance, then the condition would have been unobjectionable unless it had also deprived them of “economically viable use” of their land. Whether that phrase is somehow a proxy for the least restrictive means requirement, however, is problematic.

“Economically viable use” of land might mean complete, unhampered use. Thus, any restriction would be invalid. This interpretation is highly unlikely, because the Court expressly approved the requirement of a “viewing spot” if proposed construction obstructed public views of the beach.\(^8^9\) Similarly, it would seem that if the Nollans had proposed constructing their house immediately inland of the ocean boundary of their property and that if such construction unquestionably obstructed the passage of the public to admittedly public lands adjacent to their property,\(^9^0\) then the Commission’s imposition of the public access condition would have been upheld.\(^9^1\) Since

\(^{87}\) The Court said there:

We do not suggest that courts have a “license to judge the effectiveness of legislation,” . . . or that courts are to undertake “least restrictive alternative” analysis in deciding whether a state regulatory scheme is designed to remedy a public harm or is instead intended to provide private benefits. That a land use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it. But, on the other hand, Pennsylvania Coal instructs courts to examine the operative provisions of a statute, not just its stated purpose, in assessing its true nature.


\(^{89}\) See *supra* note 77 and accompanying text.

\(^{90}\) See *supra* note 74 and accompanying text (discussing the public areas adjacent to the Nollans’ property).

\(^{91}\) It is unlikely that in those circumstances the Nollans could successfully argue, for example, that instead of imposing a public access condition the Commission should require them to elevate the first floor of the house along the seaward side, thereby allowing public access.

On the other hand, in a future situation indistinguishable from *Nollan*, the Court will disapprove of the Commission’s simply writing its findings to conclude that the proposed construction will directly impair public access along the coast:

We do not share Justice BRENNAN’s confidence that the Commission “should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access,” . . . that will
the access condition in those circumstances would not prevent the Nollans from building their house, certainly an "economically viable use of their land," the access condition would probably withstand judicial review.92

5. Nollan Summary

_**Nollan**_ sounds a retreat from an interpretation of _First English_ that would require compensation in all per se takings situations. Yet the manner in which the Court applied the per se taking justification rule leads one to believe that the Court will hold governments to a rather high standard of conduct to avoid the requirement of compensation. In a profoundly significant sense, the Court's determination that the Commission really intended to acquire an easement rather than to mitigate the potential adverse impact from the Nollans' proposed construction is inconsistent with recent decisions in which the Court has held that governments are not liable for harm caused un-intentionally or even negligently.89 The Court's decision in _Nollan_, coupled with its decision in _First English_, effectively holds the Com-

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92. This presupposes that the Court would treat the entire parcel as the relevant property. There are at least two alternative definitions of the relevant property, however.

If the relevant property were deemed to be the area along the seaward boundary of the Nollans' lot which would have been subject to the access condition, then whether the Nollans were deprived of the "economically viable use" of their property would focus more narrowly on that part of the lot. Although the Court has said that mere diminution of property is insufficient to constitute a taking, it is not clear whether allowing the public to cross and recross this smaller area would so affect its use by the Nollans that it would amount to deprivation of "economically viable use." _See_ Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 130-31 (1978) (diminution in the value of property alone does not constitute a taking).

As a third alternative, if the relevant property were deemed to be the Nollan's right to exclude others—whether from the entire parcel or from the smaller area along the seaward boundary of their property—then it is highly likely that the Nollans would prevail because they would thereby have been deprived of all their "property." _Cf._ First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378 (1987) (deprivation of all use of property assumed to be a taking).

All this, of course, demonstrates the importance of the threshold definition of the scope of the relevant property. _See supra_ notes 35-47 and accompanying text (discussing the relative uncertainty with respect to the factors that control the scope of the relevant property for takings purposes).

93. The Court had formerly held that negligent governmental conduct unduly affecting private property would give rise to a claim for damages under the due process clause. _Parratt_ v. _Taylor_, 451 U.S. 527 (1981). The Court recently overruled _Parratt_, holding instead that deliberate governmental conduct has to be shown in order to establish a due process deprivation. _Daniels_ v. _Williams_, 474 U.S. 327 (1986).
mission strictly liable.

In addition, the Court's second-guessing of the Commission regarding whether obstructing public views would in turn restrict public access may signal closer judicial scrutiny of governmental conduct found to be a per se taking. This may indicate the Court's willingness to assume an activist posture with respect to protection of property interests which has not been seen since the *Lochner* era at the turn of the century. If so, this may involve courts in general—and the Supreme Court in particular—in close supervision of government demands that developers make concessions such as contributions for road construction, recreational facilities and low-income housing before land development permits will be granted.

III. IF A TAKING HAS OCCURRED, COMPENSATION IS CONSTITUTIONALLY COMPULSED—First English

The issue in *First English* originates with Justice Holmes' opinion in *Pennsylvania Coal*. That case involves an appeal from a state court injunction preventing a coal owner from mining under a private residence in such a manner as to cause the residence to subside. Referring to the contract, due process and just compensation clauses, the Supreme Court held the injunction improper and allowed the coal owner to proceed. Since the coal owner did not request it, the Court did not consider whether compensation was required for the time between the imposition of the injunction and the lifting of it by the Court. As a result, the case gave rise to two contending theories.

The just compensation theory provided that the issue was to be


96. The contract clause prohibits a state from passing a "law impairing the obligation of contracts". U. S. Const. art. I, § 10, cl. 1.

97. *See supra* note 21 (quoting the text of the fourteenth amendment's process clause).

98. *See supra* note 1 (quoting the text of the fifth amendment's just compensation clause).
resolved under the plain meaning of the just compensation clause: if a taking occurred, compensation was required as a matter of course. The due process theory, on the other hand, interpreted Justice Holmes' reference to the just compensation clause metaphorically. Under that theory a "taking" was a situation where government had simply overstepped its bounds by improperly regulating private activity. In those circumstances, the theory provided, the due process clause requires only that the offending regulation should be invalidated.99

In First English, Los Angeles County had passed an interim ordinance prohibiting the rebuilding of a summer camp called Lutherglen after a storm had caused flooding which had damaged or destroyed most of the camp. The Court adopted the just compensation theory by holding that if the property owner had indeed been subjected to a taking by the county ordinance, (a question the Court did not decide), then not only was the ordinance invalid, but the county had to provide the property owner with damages for the period during which the property was so restricted.

The Court's adoption of the just compensation theory will have at least two significant effects on takings litigation. First, since the ultimate payoff for a successful challenge to a governmental restriction of property is money, such challenges are more likely to be brought. Second, this in turn may lead governmental officials to act with greater circumspection when takings might result, as proponents of the due process theory argued.100

The impact of First English may be overstated, however. Even if the Court had adopted the due process theory, takings litigation nevertheless would have been encouraged because it would still have been possible to reverse governmental action through the remedy of invalidation. Also, under a due process regime, governmental officials might have been just as anxious to avoid the negative publicity and expense of takings litigation. Finally, after Nollan, it seems that at least with respect to per se takings, compensation will not be automatically available.

CONCLUSION

Justice Stevens said in his dissent in First English:

99. See Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), in which the Court discussed the application of both the due process and just compensation theories, but refused to select one or the other.
100. Id. (discussing the opposing scholarly commentary regarding the two theories).
One thing is certain. The Court's decision today will generate a great deal of litigation.¹⁰¹

That also accurately summarizes the foreseeable effect of the 1987 trilogy of takings cases.
