


12-1-1988

# Takings, Narratives, and Power

Gregory S. Alexander  
*Cornell Law School, gsa9@cornell.edu*

Follow this and additional works at: <http://scholarship.law.cornell.edu/facpub>

 Part of the [Constitutional Law Commons](#), [Land Use Planning Commons](#), [Property Law and Real Estate Commons](#), and the [Public Law and Legal Theory Commons](#)

---

## Recommended Citation

Alexander, Gregory S., "Takings, Narratives, and Power" (1988). *Cornell Law Faculty Publications*. Paper 467.  
<http://scholarship.law.cornell.edu/facpub/467>

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Faculty Publications by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

## TAKINGS, NARRATIVES, AND POWER

*Gregory S. Alexander\**

“The Regulatory Takings Problem” is the title given to a story, or narrative, that has become prominent in the literature on just compensation issues.<sup>1</sup> The story is one of power and fear. It is about a perceived imbalance of power between the two groups of actors involved in the process of public land-use regulation—private landowners and government regulators. It depicts scenarios of past or threatened abuse of power by local land-use regulators, and it looks to the takings clause generally and regulatory takings doctrine specifically as crucial corrective devices, essential to set the power imbalance aright.

The dominant narrative describes local regulators as empowered, possessing enormous leverage over private landowners, who are depicted as unempowered. The authority to regulate land use in a wide variety of ways places local regulators in a position of potentially enjoying virtual monopoly power over land-use entitlements<sup>2</sup> unless such power is checked by constitutional strictures. Furthermore, this narrative sees these local agencies as motivated to behave opportunistically, abusing their discretion by strategically manipulating the situation of the vulnerable landowners. Thus, chroniclers of this narrative argue, courts must develop constitutional norms aimed at controlling the behavior of government land-use regulators because only regulators, not landowners, are empowered.

There are narratives of power embedded in several opinions from the Supreme Court’s 1987 quartet of takings cases.<sup>3</sup> These narratives, stories about the power relationships between the parties involved in the cases, constitute a second level of the opinions, operating just below the abstract, impersonal doctrinal analysis. It is at this second

---

\* Professor of Law, Cornell University. Thanks to Bill Fischel, Steve Shiffrin, Susan Williams and participants at the Dartmouth Regulatory Takings Conference for comments on an earlier draft.

1. See, e.g., R. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985) [hereinafter R. Epstein, *Takings*]; Cunningham, *Inverse Condemnation as a Remedy for “Regulatory Takings,”* 8 *Hastings Const. L.Q.* 517 (1981); Epstein, *Takings: Descent and Resurrection*, 1987 *Sup. Ct. Rev.* 1 [hereinafter Epstein, *Descent and Resurrection*]; Kmiec, *Regulatory Takings: The Supreme Court Runs Out of Gas in San Diego*, 57 *Ind. L.J.* 45 (1982); Krier, *The Regulation Machine*, 1 *Sup. Ct. Econ. Rev.* 1 (1982).

2. James Krier invokes the image of a “regulation machine, driven by an energy source unavailable to private firms—call it the police power. Designed to promote the public good, this machine [like private monopolies] is claimed to work private harm.” Krier, *supra* note 1, at 1.

3. Nollan v. California Coastal Comm’n, 107 S. Ct. 3141 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378 (1987); Hodel v. Irving, 107 S. Ct. 2076 (1987); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 107 S. Ct. 1232 (1987).

level, not the first, that one can gain deep insight into the Court's recent takings decisions. Takings doctrine is generated not by any abstract methodological or theoretical concern, but by the pictures that judges have in their heads about the participants in the public land-use planning arena, pictures about who is empowered, who is unempowered and how those who enjoy a power monopoly have used that power to their strategic advantage. Takings doctrine is shaped by striking pictures and powerful metaphors that communicate basic assumptions about who holds power and how those who hold power use it. These pictures, or narratives, are shaped by underlying political visions, that is, belief structures about how society is and ought to be organized. While merely descriptive at the surface, these political visions, to borrow Richard Parker's words, "figuratively communicate ideological assumptions—general assumptions of political life—through their characteristic rhetoric and their characteristic metaphor."<sup>4</sup>

The 1987 takings decisions have intensified discussion about the Court's methodology in takings law. In recent years the Court has rejected the use of any single comprehensive test to determine when government land-use regulations constitute takings. Justice Brennan's widely discussed opinion in *Penn Central Transportation Co. v. New York City*<sup>5</sup> explicitly states that the Court would approach regulatory takings questions on an ad hoc basis, balancing in each case several identified factors.<sup>6</sup> Some commentators, including Frank Michelman and Margaret Jane Radin,<sup>7</sup> have detected a methodological shift in recent takings decisions, a reaction against open-ended balancing. Specifically, they have pointed to the categorical reasoning of the Court in *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>8</sup> and *Keystone Bituminous Coal Association v. DeBenedictis*,<sup>9</sup> and to the Court's conceptualistic approach to defining constitutionally protectible property interests in *Kaiser Aetna v. United States*<sup>10</sup> and *Hodel v. Irving*.<sup>11</sup> Radin suggests that the Court is

---

4. R. Parker, *Political Vision in Constitutional Argument, Part I* (1979) (unpublished manuscript), quoted in H. Steiner, *Moral Argument and Social Vision in the Courts: A Study of Tort Accident Law* 206 (1987). This Article's focus on narratives of power is similar to other recent works that have unpacked the social visions embedded in doctrinal argumentation. Henry Steiner's book examines the social visions underlying modern tort law. Richard Parker's unpublished work focuses on constitutional argumentation as a "cultural artifact . . . shaped by our vision of the present reality and possible perfection of our political life." *Id.* at 205.

5. 438 U.S. 104 (1978).

6. *Id.* at 123-24.

7. See Michelman, *Takings*, 1987, 88 *Colum. L. Rev.* 1621-22 (1988); Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 *Colum. L. Rev.* 1667, 1681 (1988).

8. 458 U.S. 419 (1982).

9. 107 S. Ct. 1232 (1987).

10. 444 U.S. 164 (1979).

11. 107 S. Ct. 2076 (1987). HeinOnline -- 88 *Colum. L. Rev.* 1753 1988

constitutionalizing the classical liberal conception of property.<sup>12</sup> Michelman interprets the new formalism as rule-of-law symbology generated in the aftermath of the death of property.<sup>13</sup>

This Article argues that if the Court has reinvigorated rule-of-law values, it has done so in reaction to perceptions of the allocation of power in the relevant social relationships. These perceptions in effect constitute interpretations of events—interpretations whose meanings derive from distinct political visions. Different political visions lead interpreters of the same events to attach different, incompatible meanings to these events.<sup>14</sup> Examining the opposing narratives of power in several of the 1987 cases enables us to perceive the contingent character of what appear at the surface to be mere descriptions. The conflicting descriptions of power expressed in the various opinions are not statements of fact subject to empirical verification. Rather, they are constructions of the social reality that takings doctrine is meant to address. Recognizing that the descriptions are only narratives exposes the contestability of every public conversation about basic visions of the appropriate political ordering of our society.

Parts I and II of this Article reconstruct the narratives and counter-narratives expressed in the opinions of the two major cases in the 1987 quartet, *First English Evangelical Lutheran Church v. County of Los Angeles*<sup>15</sup> and *Nollan v. California Coastal Commission*,<sup>16</sup> and identify the various metaphors used to express political visions in the competing narratives of these cases. Part III then connects the narratives and counter-narratives with two opposing visions of government: republicanism and public-choice theory. Finally, Part IV discusses the relationship between narrative and the Court's increased emphasis on formality in takings reasoning.

## I. FIRST ENGLISH

### A. Narrative: "Taking by Subterfuge"

*First English Evangelical Lutheran Church v. County of Los Angeles*<sup>17</sup> is a slippery case, and Chief Justice Rehnquist's majority opinion is a slippery text. Narrowly construed, his opinion resolves only a remedial issue, although one that has been the subject of intense speculation and argument in recent years.<sup>18</sup> Assuming that a taking exists, is judicial

12. Radin, *supra* note 7, at 1671–84.

13. Michelman, *supra* note 7, at 1625–29; accord Grey, *The Disintegration of Property*, in *Nomos XXII: Property* 69 (J. Pennock & J. Chapman eds. 1980).

14. Cf. Kennedy, *The Turn to Interpretation*, 58 S. Cal. L. Rev. 251, 266–75 (1985) (interpretations of factually straightforward O'Henry story depend heavily on reader's starting point).

15. 107 S. Ct. 2378 (1987).

16. 107 S. Ct. 3141 (1987).

17. 107 S. Ct. 2378.

18. The principal catalysts for the remedy controversy are Justice Brennan's dissent

invalidation of the offending regulation the only remedy the aggrieved landowner may get, or may landowners additionally recover “interim” damages—that is, damages for the period between the regulation’s enactment and its termination? Rehnquist’s opinion, however, also touches on the substantive question whether takings of time-limited property interests are protected under the just compensation clause.<sup>19</sup> This discussion suggests, as Justice Stevens pointedly remarks in his dissenting opinion, that the Court has implicitly resolved not only the remedial issue but also the substantive questions of what was taken and when the taking occurred.<sup>20</sup> That Rehnquist’s opinion touches upon both the substantive and remedial issues is not surprising; a vision of power underlies Rehnquist’s opinion, and from the perspective of this vision, the substantive and remedial issues cannot be isolated from each other.

Chief Justice Rehnquist tells the story of abuse of regulatory power and manipulation of powerless landowners. The Lutheran church wanted to rebuild its summer camp for handicapped children on land that it owned in a Southern California canyon, but it was prevented from doing so by Los Angeles County’s flood control ordinance, which prohibited construction in the canyon.<sup>21</sup> As Rehnquist tells the story, the particularly objectionable aspect of the county ordinance was its durational indefiniteness. Although nominally an interim measure, it lacked any fixed time limit. As a result the church was left in limbo, powerless to rebuild or to use its land in any other feasible way for an uncertain amount of time, conceivably forever.<sup>22</sup>

The picture that lies beneath the surface of the Chief Justice’s opinion is a “taking by subterfuge.”<sup>23</sup> The picture that emerges from his opinion is one of local planners scheming to take private property without paying compensation by imposing substantial restrictions on land use without limiting the duration of the restrictions. As the planners anticipated, if the restrictions went unchallenged or were sustained after constitutional attack, they would become permanent, depriving the owner of all use of its land. Even if the ordinance were struck down, converting the restriction into a de facto temporary taking, judicial termination would occur only after repeated and lengthy rounds of litigation, so that the county still would have gained the advantage of taking the church’s land for an extended period of time with-

---

in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 636 (1981) and *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), aff’d on other grounds, 447 U.S. 255 (1980).

19. *First English*, 107 S. Ct. at 2387–88.

20. *Id.* at 2391–93 (Stevens, J., dissenting).

21. *Id.* at 2381–82.

22. *Id.* at 2388–89.

23. Michelman, *supra* note 7, at 1611–12. Michelman applies this characterization to Justice Scalia’s vision of *Nollan*; I believe it is also embedded in Chief Justice Rehnquist’s view of *First English*. HeinOnline -- 88 Colum. L. Rev. 1755 1988

out paying compensation.<sup>24</sup> Moreover, if the ruling of the California Supreme Court in *Agins v. City of Tiburon*<sup>25</sup> were followed, the only remedy that the church could obtain would be judicial invalidation of the ordinance and not damages.<sup>26</sup> Hence, regulators had incentives to behave strategically. They would respond to judicial invalidation of the original ordinance by enacting a second, slightly milder version of the same measure with the hope that it either would pass constitutional muster or, better yet, would wear down the objecting owner into acquiescing in the restriction.<sup>27</sup> According to this scenario, the *Agins* rule is the real source of the governmental abuse of power, for that rule eliminates all incentive for regulators to behave responsibly toward private landowners. It is, then, the *Agins* rule that Chief Justice Rehnquist goes after in *First English*.<sup>28</sup>

The *Agins* rule itself implicates the substantive questions of whether and when a taking has occurred. The rule that interim damages are not available rests on the premise that if there is a taking, it occurs at the time of final judicial determination of the ordinance's invalidity, not when the ordinance is initially adopted. The Court in *First English* rejects that premise, redefining the "*Mahon* moment"<sup>29</sup>—that is, the time when regulators have crossed the elusive threshold to which Justice Holmes alluded in *Pennsylvania Coal Co. v. Mahon*,<sup>30</sup> transforming regulation that can be undertaken with impunity into a compensable taking of property.<sup>31</sup> To see why the Court does so and how the vision of power imbalance connects with its redefinition of the time when a taking occurs requires some elaboration.

Imagine two different time lines. On the first time line, the regulation is enacted at T-1. Moving to the right, a regulation is declared a taking at T-2. T-3 represents an indefinite moment, occurring any time after T-2 if the regulatory agency maintains its restriction. As Chief Justice Rehnquist sees things, on the view taken by the California Supreme Court in *Agins*, T-2, not T-1, is the time when the owner (O) loses his entitlement, that is, the *Mahon* moment. It follows that the

24. See *First English*, 107 S. Ct. at 2384.

25. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), aff'd on other grounds, 447 U.S. 255 (1980).

26. Id. at 275-77, 598 P.2d at 29-31, 157 Cal. Rptr. at 376-78.

27. Professor Epstein has recently suggested that this rationale justifies extending the *First English* ruling to other contexts of public land-use planning; that is, the pain of paying interim damages is needed to deter regulatory strategic behavior. See Epstein, *Descent and Resurrection*, supra note 1, at 30-31.

28. See *First English*, 107 S. Ct. at 2387.

29. The phrase is an oblique reference to J. Pocock, *The Machiavellian Moment* (1975). In respect to *First English*, it is also intended to underscore the temporal dimension of the problem there. Finally, 1987 was in a sense the final "moment" for the actual decision in *Mahon*, which, it seems quite likely, the Court has now reversed in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232 (1987).

30. 260 U.S. 393, 415 (1922).

31. *First English*, 107 S. Ct. at 2388. 88 Colum. L. Rev. 1756 1988

period between T-2 and T-3 is the time frame during which *O* has been deprived of property and for which he is constitutionally entitled to monetary compensation in exchange for the agency maintaining its regulation. More to the point, under the *Agins* interpretation, *O* was not deprived of any entitlement during the time period between T-1 and T-2. Consequently, there is no basis for awarding interim damages because *O* suffered no constitutional injury during this time.

A very different time line emerges from Rehnquist's analysis of the timing of entitlement deprivation. Using the same three points in time, T-1, when the regulation is first enacted—not T-2, when it is first declared to be a taking—is the time when *O*'s property is initially taken. T-1 is the *Mahon* moment, when a regulatory taking first occurs, even though judicial determination of the *Mahon* moment follows it by some period of time (which in the case of *First English* was almost nine years, a point that one strongly suspects particularly bothers the majority). It follows, according to this analysis, that even if the county terminates the restriction immediately after the judicial determination that a regulatory taking has occurred, *O* still must receive damages for the deprivation of her entitlement during the period between T-1 and T-2. Judicial termination of the regulation alone is an inadequate constitutional remedy for it does nothing to respond to what happened to *O*'s constitutional property before the judicial declaration. In other words, for the same reason that *O* is entitled to receive damages between T-2 and T-3, *O* is entitled to monetary compensation between T-1 and T-2. From the perspective of protecting *O*'s constitutional property, the two time frames are indistinguishable. This is why Chief Justice Rehnquist states that the *Agins* holding, while not repudiating the "general rule" that "if regulation goes too far it will be recognized as a taking,"<sup>32</sup> nevertheless "truncated the rule by disallowing damages that occurred prior to the ultimate invalidation of the challenged regulation,"<sup>33</sup> for it is also established doctrine, he notes, that "in the event of a taking, the compensation remedy is required by the Constitution."<sup>34</sup>

One way of thinking about Rehnquist's analysis of the remedy issues in *First English* is in terms of retroactivity.<sup>35</sup> The right to recover interim damages is a kind of transitional rule. Damages are both justified and necessary because the injunction remedy lags behind the critical event, the taking of property. This is the gist of the Court's statement that if a regulation is later held to be a taking, the owner is entitled to back compensation because the regulation was equivalent to a temporary physical appropriation.

---

32. *Id.* at 2386.

33. *Id.* at 2387.

34. *Id.* at 2386.

35. See Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 *Am. B. Found. Res. J.* 379, 430–32 (discussing the retroactive application of the takings clause). HeinOnline -- 88 Colum. L. Rev. 1757 1988

The analogy to temporary physical appropriations in *First English* connects for the first time two principles that previously existed separately in Supreme Court takings jurisprudence. The first principle is the *Mahon* principle itself—that is, governmental actions that nominally only regulate land use may go so far as to become takings of property. This principle in a sense represents a rejection of nominalism, a rejection that is necessary for the takings clause to do the job that Holmes and others have presumed it was intended to do—namely, create a constitutional bulwark against excessive collective action,<sup>36</sup> or more directly, impede excessively redistributive legislative schemes.<sup>37</sup>

The second principle predating *First English* is that a dispossessed owner is constitutionally entitled to damages when the government has physically appropriated her land even if the appropriation is only temporary.<sup>38</sup> It has long been understood that a total taking occurs when a regulation deprives an owner of a “definite element”<sup>39</sup> of the land package, such as a servitude or a leasehold estate. That the regulation does not prevent *O* from possessing or using the land forever is not controlling since many discrete, legally recognized property interests do not entitle the owner to possess or use indefinitely; yet, when the entirety of such an interest has been taken from an owner, she is entitled to be compensated for its loss. Judicial abrogation of the regulation after the interest’s time limit has passed does absolutely nothing to compensate the ousted owner.

Combining these two principles, the Court treats the Los Angeles County ordinance prohibiting Mill Creek Canyon owners from constructing on their land as a physical appropriation of an estate even though there was no ouster of the sort that had existed in *United States v.*

36. On the intellectual roots of the just compensation clause, see Note, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694 (1985) (arguing that the emergence of a just compensation requirement, first in post-revolutionary state constitutions and later in the fifth amendment of the federal Constitution, represented the general shift from republican political ideology to liberal ideology).

37. For Holmes’s attitude toward legislative redistribution of property rights, see 2 Holmes-Pollock Letters 108 (M. Howe ed. 1961). Referring to his recent opinion in *Mahon*, Holmes wrote to Pollock:

My ground is that the public only got on to this land by paying for it and that if they saw fit to pay only for a surface right they can’t enlarge it because they need it now any more than they could have taken the right of being there in the first place.

*Id.* at 109 (letter of Dec. 31, 1922). On *Mahon* as an antiredistributive decision, see Rose, *Mahon* Reconstructed: Why the Takings Issue Is Still a Muddle, 57 S. Cal. L. Rev. 561, 581–87 (1984).

38. See, e.g., *United States v. Dow*, 357 U.S. 17, 22 (1958) (government takes physical possession of right-of-way easement across privately owned land for a pipeline); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 16 (1949) (government takes physical possession of the facilities of a laundry company).

39. The term comes from Jacob, *The Law of Definite Elements: Land in Exceptional Packages*, 55 S. Cal. L. Rev. 1369, 1372–86 (1982).



*Dow* or the other decisions protecting ownership fragments.<sup>40</sup> Judicial invalidation only affects the duration of the estate that the government has taken. Just compensation for the *total* loss of the time-share estate requires the award of money damages:

To gain perspective on the critical leap in the Court's reasoning, one must sketch a brief typology of governmental actions that affect a private landowner's use of her land. This kind of categorizing of cases is very much a part of Chief Justice Rehnquist's reasoning. In type 1 cases, the government through formal condemnation takes permanent title to land. This is the classic forced sale to the government that the eminent domain power permits. The ousted owner receives money compensation equal to the value of the fee estate taken. In type 2 cases, the government, acting again under its eminent domain power, takes physical possession of land for a limited period of time. The only difference between type 2 cases and type 1 cases is the durational nature of the appropriated estate. Physical ouster occurs in both, and the owner receives monetary compensation for the lost value of a time-limited estate such as a leasehold. In type 3 cases, the government does not itself formally take possession of the land for any period of time or oust the private owner, but it imposes restrictions on the owner's use of indefinite length and of such magnitude that the owner's ability to use or enjoy the parcel is practically nil so long as the restrictions remain in effect. During that time, her estate is reduced to bare title. This is a regulatory taking. It is problematic because unlike the exercise of eminent domain, there is an interval during which there is uncertainty whether a taking has occurred and during which the owner has lost the use of her property without compensation for that loss. *First English* falls into this third category.<sup>41</sup>

The question, which the Court answers affirmatively, is whether type 3 cases should be assimilated into the type 2 category. The effect of doing so is to conclude that just as the taking occurs when government first acts in category 2, so in category 3 the taking occurs when the regulation is first adopted. Similarly, with respect to the compensation issue, just as the *Dow* line of cases concluded that no distinction should be drawn between categories 1 and 2 because in both instances, estates, albeit of different durational character, are taken, so the Court should not distinguish category 3 cases from category 2 cases when judicial determination turns the regulation into a temporary taking.<sup>42</sup>

Assimilating these last two categories of governmental action rep-

40. See, e.g., cases cited *supra* note 38.

41. At least it does so on the Court's construction of the facts. The ordinance did not literally preclude the church from occupying its land. The prohibition on construction and reconstruction of flood-destroyed buildings, however, effectively did end the church's use of the land as a retreat center for handicapped children.

42. Justice Stevens's opinion in *First English* makes it clear that he was unwilling to assimilate type 2 and type 3 cases. See 107 S.Ct. at 2393 (Stevens, J., dissenting).

resents an extension of *Mahon's* antinomalist premise that government cannot escape its obligation to pay for what it has taken simply by using the form of a highly restrictive regulation. The question, however, that Rehnquist's opinion never addresses, let alone explicates, is why it is appropriate to extend the scope of the *Mahon* premise in this way, locating the *Mahon* moment at the time when the ordinance is first enacted.<sup>43</sup>

It is tempting, especially in light of the analogy to takings of leasehold estates, to say that Rehnquist's definition of the *Mahon* moment rests on sheer conceptualism, specifically on an essentialist conception of property. This interpretation becomes even more tempting when one places *First English* in juxtaposition with Justice O'Connor's opinion for the Court in *Hodel v. Irving*.<sup>44</sup> Her reference in *Hodel* to the "right to pass on property," like the right to exclude, as one of "the most essential sticks in the bundle of rights that are commonly characterized as property"<sup>45</sup> reflects the same sort of essentialist approach to property definition that Richard Epstein develops in his book *Takings*.<sup>46</sup>

Although Rehnquist's *First English* opinion does make noises about entitlement splitting,<sup>47</sup> it is inadequate simply to attribute *First English* to an essentialist theory of property. One reason for caution in emphasizing conceptions of property as central to the Court's recent takings

43. Richard Epstein has expressed the same view concerning the timing of the taking. Arguing that awarding interim damages does not bind the legislature to exercise its power of eminent domain, Epstein observes that the county has the option of not enacting the regulation in the first place. "The taking therefore occurs not at the time of the final judicial determination, but at the earlier moment when the regulation was first placed into effect." Epstein, *Descent and Resurrection*, *supra* note 1, at 28.

44. 107 S. Ct. 2076 (1987).

45. *Id.* at 2083 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

46. R. Epstein, *Takings*, *supra* note 1. Epstein revealed his unitary, aggregated conception of property several years ago when he attacked Bruce Ackerman for characterizing the ordinary person's conception of property as "irreducible crudity." See Epstein, *The Next Generation of Legal Scholarship?* (Book Review), 30 *Stan. L. Rev.* 635, 644-45 (1978) (citing B. Ackerman, *Private Property and the Constitution* 114-15 (1977)). To Epstein "common sense," rather than "science," provides a clear definition of the taking of property: "[a]ny diminution of rights in the bundle of any holder, no matter what becomes of those rights." *Id.* at 640. Such a definition would increase drastically the effect of the takings clause on an enormous variety of government regulations, which is precisely the normative point lurking behind Epstein's conceptual analysis. Epstein here, and even more elaborately in his book, in effect takes Charles Donahue's historical-descriptive claim about the "agglomerative tendency" in Anglo-American property law, see Donahue, *The Future of the Concept of Property Predicted from Its Past*, in *Nomos XXII: Property*, *supra* note 13, at 28, and transforms it into a conceptual-normative claim.

47. See *First English*, 107 S. Ct. at 2388-89. Rehnquist has exhibited an attraction to entitlement splitting in several previous cases. See *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980) (*dictum*); *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179-80 (1979); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 149 n.13 (1978) (Rehnquist, J., dissenting). See generally Note, *Justice Rehnquist's Theory of Property*, 93 *Yale L.J.* 541 (1984).

decisions is that the Court has sent very mixed messages about its whole conceptualization of property. Although *Hodel* has strong overtones of property essentialism,<sup>48</sup> it was only nine years ago that the Court in *Andrus v. Allard* seemingly rejected such an essentialist definition of property.<sup>49</sup> More importantly, Justice Stevens's majority opinion in *Keystone* reaffirms *Penn Central*'s rejection of entitlement splitting. " ' "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.' "<sup>50</sup>

This excerpt echoes the approach to the takings question that Bruce Ackerman has described as "Scientific Policymaking," an approach that rejects the outlook of the "Ordinary Observer": "for the legal Scientist, the cardinal sin is to discriminate among property-bundles and declare that some contain the essential rights of property while others do not."<sup>51</sup> "The real question for the law," he says, "is not to identify . . . 'the' property owner through some mysterious intuitive process but to determine in whose bundle one or another right may best be put."<sup>52</sup>

Chief Justice Rehnquist comes perilously close to committing the Scientist's "cardinal sin" in parts of *First English*.<sup>53</sup> From these passages, one could theorize that the Court has oscillated between the perspectives of the "Ordinary Observer" and the "Scientific Policymaker."<sup>54</sup> Focusing on the style or mode of reasoning, however,

48. See *Hodel*, 107 S. Ct. at 2083-84.

49. 444 U.S. 51, 65-66 (1979). Justice Brennan, who writes the majority opinion in *Andrus v. Allard*, joins Chief Justice Rehnquist's opinion in *First English*.

50. *Keystone*, 107 S. Ct. at 1248 (quoting *Penn Central*, 438 U.S. at 130).

51. B. Ackerman, *Private Property and the Constitution* 116 (1977).

52. *Id.* at 27.

53. See 107 S. Ct. at 2388-89.

54. This distinction between Scientific Policymaker and Ordinary Observer as well as Ackerman's necessitarian argument for the former is critiqued in Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 *Colum. L. Rev.* 1545 (1982). In an interesting variation on Ackerman's distinction, Professor Terry Fisher convincingly argues that public perceptions are central not only to Ackerman's Ordinary Observer, but also that the normative theories, which are the foundations of the two dominant versions of Scientific Policymaking, Kantianism and Utilitarianism, themselves require that "popular conceptions of the legitimate scope of governmental regulations of private property" be taken into account. Fisher, *The Significance of Public Perceptions of the Takings Doctrine*, 88 *Colum. L. Rev.* 1774, 1776 & n.12 (1988). The more significant point of which Fisher reminds us is that the causal relationship between legal doctrine and individual perceptions and preferences runs in both directions simultaneously: doctrine shapes as well as responds to ordinary perceptions. *Id.* at 1780-81. The point creates complications for both Ordinary Observing and Scientific Policymaking that result from the role of judicial doctrine in shaping the very perceptions that, according to these theories, are supposed to determine legal doctrine. Not only does this phenomenon of adaptive preferences complicate the utilitarian calculus of formalists, like Professor Rose-Ackerman, who reject "ad-hocery" because of its adverse consequences on economic behavior, see Rose-Ackerman, *Against Ad Hocery*, 88 *Colum. L. Rev.* 1697 (1982), but it also complicates the

misses the mark because it overlooks the Court's perceptions of the power stakes in the cases. *First English's* definition of the *Mahon* moment grows out of a distinct political vision evident in Chief Justice Rehnquist's narrative.

In a revealing part of his opinion, the Chief Justice first provides us with our normative bearings, reminding us that the just compensation requirement is " 'designed to bar Government from *forcing* some people *alone* to bear public burdens which, in all fairness and justice, should be born by the public as a whole.' " <sup>55</sup> He then pointedly refers to the fact that although the Lutheran church had filed suit within one month after the "interim" ordinance went into effect, more than eight years later it was still in limbo, all use of its land effectively blocked without having had the merits of its complaint heard. <sup>56</sup> The Court is palpably bothered by the church having been paralyzed indefinitely. Chief Justice Rehnquist's message is that the church has been grossly jerked around. The government has flagrantly abused its monopoly power over an unprotected landowner. Judicial termination of the ordinance is, under these circumstances, hardly the kind of protection that will even up the match. As Rehnquist states, "[i]nvalidation of the ordinance . . . after this period of time . . . is not a sufficient remedy to meet the demands of the Just Compensation Clause." <sup>57</sup> The Court wants to put a more robust remedy in the private landowner's hands, one with the kind of bite that would deter public planners from manipulating private owners. <sup>58</sup> In other words, the Court, by defining the picture of

---

(1988), but it also complicates decisional strategies (which, I take it, include Ordinary Observing and at least some versions of Kantian Policymaking alike) that start with the premise that judicial action derives legitimacy from its role in neutrally enabling individuals to realize self-defined preferences. The posture of neutrality is simply chimerical.

What Fisher leaves unexplored is the implication of his point regarding the "preference-shaping power of the judiciary," Fisher, *supra*, at 1790, for the methodological and, behind that, ideological debates. My sense is that Fisher's point reinforces my argument for a fluid takings methodology. See *infra* text accompanying notes 112-15. Combining Fisher's point with my point about the interpretive and ideological character of descriptions of power relations, public perceptions of what justice requires by way of the state's compensatory responsibilities to affected property owners rest to a significant extent on (contingent) interpretations of empowerment, which in turn imply distinctive normative visions of government. Preventing one interpretation or vision from acquiring a privileged status is less important at the popular level than it is at the level of legal discourse. In my view, it is especially in the area of takings law, because of its acutely political character, that *pace* Professor Rose-Ackerman, see Rose-Ackerman, *supra*, it is most important to maintain fluidity.

55. 107 S. Ct. at 2388 (emphasis added) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

56. *Id.*

57. *Id.*

58. Consider this scenario, which alternatively could be titled "Against All Odds" or "Annie Get Your Gun," described elsewhere by Professor Kmiec:

[I]nvalidation results only after protracted litigation in which a landowner, against incredible odds, proves that his property has been rendered worthless

a one-sided allocation of power between regulators and owner, creates the impression that only a damages remedy could alter this structural imbalance and prevent coercion.

B. *Counter-Narrative: Regulation and Deliberation*

A strikingly different view of the power relationships between private owner and government land-use regulators emerges from Justice Stevens's dissenting opinion. The picture that emerges from his narrative is one of regulators acting in good faith. In his account, the county ordinance is a straightforward safety measure, precipitated by the history of flooding in Mill Creek Canyon.<sup>59</sup> In circumstances such as these, government necessarily must act, imposing limits on private development when development creates harmful externalities and private agreement cannot resolve the problem. This kind of governmental action, remedying a market failure, cannot be a taking.

Stevens's vision of good-faith regulatory behavior is tied to an understanding of delay as the consequence of the deliberative character of politics. This connection is suggested by his analogy to the situation of a developer who sometimes must endure protracted delay as a zoning board and then courts hear his request before it is finally resolved.<sup>60</sup> Indefinite delay alone, Stevens says, does not justify an inference of abuse of power. Government delay is simply a fact of life in a regulatory state; it is the price that landowners must pay for deliberation and public conversation concerning land use. Thus he states, "I am convinced that the public interest in having important governmental decisions made in an orderly, fully informed way amply justifies the temporary burden on the citizen that is the inevitable by-product of democratic government."<sup>61</sup>

Similarly with respect to the church's position, Stevens provides a very different vision of empowerment. The history of flooding in Mill Creek Canyon makes him doubt that the church would have rebuilt even in the absence of the county's restriction, so that there is an element of disingenuousness to its claim.<sup>62</sup> Moreover, Stevens thinks that the church's remaining in limbo for an extended period of time was a

---

by regulation. However, invalidation does not mean that the landowner can proceed to develop his land. In fact, it often means just the opposite, since the landowner then faces a hostile local government, which not only has an arsenal of other controls with which to stymie the landowner, but also may have enough malevolent creativity to enact a regulation only slightly less restrictive than the one invalidated to start the litigation game all over again.

Kmiec, *supra* note 1, at 51 (citations omitted).

59. *First English*, 107 S. Ct. at 2391-92 (Stevens, J., dissenting).

60. *Id.* at 2396.

61. *Id.* at 2399.

62. Thus Stevens states, "In light of the tragic flood and the loss of life that precipitated the safety regulations here, it is hard to understand how [the Church] ever expected to rebuild on Luther Glen." *Id.* at 2399.

problem of its own making insofar as it had never sought a judicial declaration that the ordinance was invalid, requesting monetary compensation instead.<sup>63</sup> Perhaps the situation would not have been much different if the church had exhausted the appropriate state remedies as Stevens suggests,<sup>64</sup> but the point is that in the picture he describes, the power alignment is a lot more balanced than the Rehnquist narrative suggests.

What we are left with from the rhetoric of the opinions in *First English* are two strikingly different attitudes toward government regulators. One is suspicious and skeptical; the other is optimistic and sympathetic.

## II. *NOLLAN*

### A. *Narrative: Regulatory Extortion*

*First English* has been discussed at such length because it may be the most controversial of the 1987 quartet and the one potentially having the most dramatic implications.<sup>65</sup> Yet *Nollan v. California Coastal Commission*<sup>66</sup> tells much the same story as *First English*. Both are based, at bottom, on tellings of the story of regulatory power and coercion.

Justice Scalia's opinion tells a story of regulatory extortion and strategic behavior. He adopts a vivid metaphor, first used by the New Hampshire Supreme Court several years ago, describing a local government's exaction scheme as nothing more than "'an out-and-out plan of extortion.'"<sup>67</sup> The regulatory extortion in *Nollan* took the form of a conditional land-use permit for which the condition lacked, in the Court's judgment, a sufficient nexus with the ostensible state land-use objective.<sup>68</sup> Scalia's nexus scrutiny is a response to his perception of regulatory manipulation and virtual deceit. The access rationale, while itself a legitimate purpose, on the facts of this case was just a ruse, a trick by which the Coastal Commission could achieve an objective that it could not obtain directly without paying compensation—namely, obtaining a lateral public easement across the *Nollan* beachfront lot.<sup>69</sup>

63. *Id.* at 2397.

64. *Id.* at 2396-98.

65. The full effect of *First English's* interim damages remedy can be appreciated if one imagines its application to zoning cases in which developers successfully challenge a zoning restriction that remains in effect throughout the period of litigation. This is exactly the dream that *First English* has generated for those on the right who celebrate "privatization." See, e.g., Epstein, *Descent and Resurrection*, *supra* note I, at 31.

66. 107 S. Ct. 3141 (1987).

67. *Id.* at 3148 (quoting *J.E.D. Assocs. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)).

68. *Id.* at 3149-50.

69. Another metaphor that applies to *Nollan*, one that Frank Michelman introduces, is "taking by subterfuge." See Michelman, *supra* note 7, at 1612. Michelman imagines a scenario in which California legislators, whose actual objective is to impose a public easement laterally across the privately owned beachfront, try to avoid the *Loretto* categorical rule that even trivial permanent physical occupations are per se takings by condi-

You cannot get something for nothing, Justice Scalia says, and heightened judicial scrutiny of a regulation's instrumental efficacy is both appropriate and necessary whenever it appears that regulators have attempted indirectly to do just that.

Like Rehnquist's *First English* opinion, Scalia's opinion portrays a grossly imbalanced power relationship between private owners and public regulators. Planning regulators are able to extort goods from private landowners because the agencies possess the same sort of bargaining superiority over regulated owners that loan sharks hold over their hapless victims. Owners accede to regulations, exactions or restrictions because they have no choice but to do so; they are simply powerless.<sup>70</sup>

To dramatize this view of regulation as extortion, Justice Scalia tells a parable that plays on Holmes's image of the person shouting fire in a crowded theatre.<sup>71</sup> Imagine, Scalia invites us, a state regulation that forbids patrons to shout fire in a crowded theatre but simultaneously grants dispensations from the prohibition to persons who are willing to contribute \$100 to the state treasury.<sup>72</sup> This story sets a benchmark for identifying governmental strategic behavior. Its message is that the state is attempting to conceal its coercion in the guise of the principle that the greater power includes the lesser. Under its police power, the state clearly could enact a ban simpliciter on shouting fire in a crowded theatre. Normally this greater power would include the power to enact measures less restrictive of free speech rights such as a conditional ban, but not, as here, when the specific condition appropriates property in a way totally unrelated to the objective that justifies the total ban. Under these circumstances, there is no paradox in concluding that the greater does not include the lesser, for to follow that principle blindly would enable the state to succeed in its coercive design and encourage similar strategic behavior by other officials. At the conclusion of this parable Scalia states his message in no uncertain terms: "In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction

---

tioning access to public utility services on the owner's agreeing to dedicate an easement of way to the public. *Id.* at 1611-12. Here we see abuse of power taking the form of sneaky, devious local regulators cooking up some scheme by which a defenseless owner's property is taken without compensation. Only it turns out that the regulators are not so devious after all because their real motive, to take without compensating, is transparent.

70. The same scenario of power imbalance appears in the recent and growing literature on land-use exactions. For example, referring to exactions recently imposed on San Francisco hotel developers, Professor Fischel states, "[t]hat some hotel developers willingly pay these exactions suggests the power of the municipality's position." Fischel, *The Economics of Land Use Exactions: A Property Rights Analysis*, *Law & Contemp. Probs.*, Winter 1987, at 101, 111.

71. *Schenk v. United States*, 249 U.S. 47, 52 (1919).

72. *Nollan*, 107 S. Ct. at 8148.

is not a valid regulation of land use but 'an out-and-out plan of extortion.'<sup>73</sup>

What does this mean for the practice of municipal exactions? Does it threaten those practices across the board?<sup>74</sup> Or is it limited to those exactions that are "Loretto-like" physical invasions, as Frank Michelman suggests?<sup>75</sup> Without answering these questions, it appears that fears of *Nollan's* implications for municipal exactions have some basis. The pre-*Nollan* focus on impact made it very unlikely that exactions would fall under the *Mahon* premise.<sup>76</sup> It is likely that Justice Scalia introduces the strict-scrutiny test precisely to overcome this weakness in the pre-existing analytic by which the validity of municipal exactions would be evaluated. Without some constitutional filter, Scalia may fear, regulatory inflation may occur as local governments strategically enact more and more planning restrictions, solely to extract benefits in exchange for their removal.

Applied to municipal exactions, the nexus requirement is similar to the private-law requirement that in order for covenants to run with the land or to be enforceable in equity against successors, they must "touch and concern" benefitted or burdened land.<sup>77</sup> That requirement has been notably problematic in connection with the analogous practice of developers' requiring subdivision exactions from purchasers in the form of covenants to pay fees for maintenance of common areas in the development. Since *Neponsit Property Owners' Association v. Emigrant Industrial Savings Bank*,<sup>78</sup> the trend has been that a covenant to pay money touches and concerns (that is, satisfies a nexus requirement to a legitimate land-use planning objective), even though the money is to be used for "public purposes" upon land other than the obligor's own parcel, when it is used to maintain areas that the obligor uses in common with other owners, including all subdivision common facilities.<sup>79</sup> Similarly,

---

73. *Id.* (quoting *J.E.D. Assocs. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)).

74. See Fischel, *Property Rights and the Takings Clause*, in *Significant Business Decisions of the Supreme Court, 1986-1987 Term* 47, 52-54 (1988).

75. See Michelman, *supra* note 7, at 1613-14.

76. See, e.g., *Grupe v. California Coastal Comm'n*, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985) (sustaining a conditional permit virtually identical to that in *Nollan* under the weaker "reasonable relationship" standard); *Home Builders Ass'n v. City of Kansas City*, 555 S.W.2d 832 (Mo. 1977) (sustaining mandatory dedication of land for park use under "reasonably attributable" standard); *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966) (sustaining monetary exactions used to buy land for park use under "reasonableness" standard); Babcock, *Foreword, Law & Contemp. Probs.*, Winter 1987, at 1, 3.

77. See, e.g., C. Berger, *Land Ownership and Use* 566 (3d ed. 1983).

78. 278 N.Y. 248, 15 N.E.2d 793 (1938).

79. See, e.g., *Kell v. Bella Vista Village Property Owners Ass'n*, 258 Ark. 757, 528 S.W.2d 651 (1975); *Rodruck v. Sand Point Maintenance Comm'n*, 48 Wash. 2d 565, 295 P.2d 714 (1956).  
HeinOnline -- 88 Colum. L. Rev. 1766 1988



exactions of on-site improvements<sup>80</sup> and perhaps some off-site improvements<sup>81</sup> might satisfy the takings nexus requirement. Yet what about cash exactions, especially those in which the money is to be used for nonspecific purposes of "neighborhood development," as in the case of a Chicago program?<sup>82</sup> Exactions of this sort look more like the hypothetical that Justice Scalia says would not pass constitutional muster.<sup>83</sup> He must have anticipated that introducing the nexus requirement would invite other property owners to challenge a variety of regulatory conditions, and it is easy to imagine that he was specifically aware of local government exactions, given the controversy surrounding that practice. One can only speculate, but it should not surprise anyone if in the future Justice Scalia characterizes programs like cash exactions for neighborhood improvement as, to borrow Professor Epstein's language, "an extortionate tax."<sup>84</sup>

Ultimately, the narrative of public regulatory power undergirds Justice Scalia's nexus requirement. It is a reaction to the response that regulators are abusing their power by trying to get something for nothing. Scalia's strict-scrutiny approach echoes Holmes's fear of "the petty larceny of the police power."<sup>85</sup>

#### B. *Counter-Narrative: Private Manipulation of Power*

Justice Brennan's narrative stands Justice Scalia's on its head. Brennan is explicit about whom, as between the Commission and the private owners, he sees as the manipulators. He states, "it is private landowners who are the interlopers,"<sup>86</sup> and "[i]t is . . . private landowners who threaten the disruption of settled public expectations."<sup>87</sup> He emphasizes that the conditional permit "is not unilateral government action."<sup>88</sup> The government's posture was merely reactive, benignly attempting to maintain a "reciprocity of advantage"<sup>89</sup> in response to the Nollans' plan to intensify development.

Brennan's perception that the Nollans, not the Coastal Commission, are the interlopers rests on his understanding of the character of land located within the coastal zone under California law. He states:

California . . . has clearly established that the power of exclusion for which appellants seek compensation simply is not a strand in the bundle of appellants' property rights, and appel-

80. See, e.g., *Brous v. Smith*, 304 N.Y. 164, 106 N.E.2d 503 (1952).

81. See, e.g., *Land/Vest Properties, Inc. v. Town of Plainfield*, 117 N.H. 817, 379 A.2d 200 (1977).

82. See Chicago Tribune, Aug. 26, 1985, § 1, at 1, col. 8.

83. See *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3148 (1987).

84. Epstein, *Descent and Resurrection*, supra note 1, at 37.

85. 1 Holmes-Laski Letters 457 (M. Howe ed. 1953).

86. *Nollan*, 107 S. Ct. at 3153 (Brennan, J., dissenting).

87. *Id.* at 3154.

88. *Id.* at 3158.

89. *Id.* (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

lants have never acted as if it were. Given this state of affairs, appellants cannot claim that the deed restriction has deprived them of a reasonable expectation to exclude from their property persons desiring to gain access to the sea.<sup>90</sup>

In his view, local law and social practices have impressed a public character on coastal-zone land, an arrangement very much like a public trust.<sup>91</sup> That perception leads him to recognize a much wider scope of discretion for the Commission to regulate all forms of access within the coastal zone. The quasi-public character of all coastal land undermines any sharp distinction between lateral and littoral access within the zone.

Justice Brennan's opinion, moreover, reflects a generally deferential attitude toward the Commission.<sup>92</sup> We hear repeatedly about the Commission's expertise, its attempt to make a reasonable adjustment of the competing interests in using coastal property and the particular need to maintain flexibility for government planning agencies when land-use demand is as intense as it is in coastal areas.<sup>93</sup> This is plainly not the same story that Justice Scalia tells, nor is it the same story that Chief Justice Rehnquist tells in *First English*. More fundamentally, it reflects a strikingly different attitude toward the role of regulators.

### III. NARRATIVES OF POWER AND VISIONS OF GOVERNMENT

The narrative of regulatory power, repeated in the majority opinions in *First English* and *Nollan*, in one sense transcends conventional labels of liberal or conservative. Both Justice Brennan and Professor Richard Epstein, for example, have been among its most forceful chroniclers.

Justice Brennan's widely noted dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*,<sup>94</sup> which laid the groundwork for *First English*, relies explicitly and heavily on the story of regulatory power and owner powerlessness.<sup>95</sup> His comparison in that case between gov-

90. *Id.* at 3159.

91. *Id.* at 3152-54; see also Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. Chi. L. Rev. 711, 727-30 (1986) (discussing historical origins and modern implications of public trusts in tidelands and waterways). One significant practical implication of *Nollan* may be the rejection of the "inherently public property" theory as a rationale for the exercise of broad public regulatory power over land use, although Justice Blackmun, perhaps more wishfully than assuredly, denies this implication. See *Nollan*, 107 S. Ct. at 3162 (Blackmun, J., dissenting).

92. Deference to regulatory decision makers is also evident in Brennan's majority opinion in *Pena Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124-25 (1978).

93. E.g., *Nollan*, 107 S. Ct. at 3151-54 (Brennan, J., dissenting).

94. 450 U.S. 621, 636 (1981) (Brennan, J., dissenting).

95. Joan Williams' interesting discussion of Brennan's opinion in *San Diego Gas & Electric* alludes to the story of power allocation. See Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 Wis. L. Rev. 83, 121-37.

ernment land-use planners and police<sup>96</sup> suggests a perception of planners as possessing monopoly power over those whom they regulate. As Joan Williams observes, "Brennan has emerged as the Burger Court's chief defender of property owners chafing under stringent economic regulations."<sup>97</sup>

Brennan's narratives in *San Diego Gas & Electric* and *Nollan* do not, however, contradict each other. Rather they are variations on a single theme. It is abuse of power that counts, but abuse of power can go both ways. In Brennan's view, unlike Scalia's and Rehnquist's, private landowners are not invariably powerless and vulnerable to regulatory coercion. Nevertheless, government regulators sometimes do exceed the scope of their authority, and when they do, private landowners must have available to them a remedy with some bite in order to redress the balance of power.<sup>98</sup>

Richard Epstein's recent book *Takings*<sup>99</sup> presents a pure, undiluted version of the story of regulatory coercion. His story is one of, in Frank Michelman's words, "politics unbounded."<sup>100</sup> Thus, Epstein writes:

The state can now rise above the rights of the persons whom it represents; it is allowed to assert novel rights that it cannot derive from the persons whom it benefits. Private property once may have been conceived as a barrier to government power, but today that barrier is easily overcome, almost for the asking.<sup>101</sup>

As this passage makes clear, Epstein's vision of excessive regulatory power is far broader than Justice Brennan's and is motivated by different concerns.<sup>102</sup> Using the just compensation clause as his sole

96. "[I]f a policeman must know the Constitution, then why not a planner?" *San Diego Gas & Electric*, 450 U.S. at 661 n.26 (Brennan, J., dissenting).

97. Williams, *supra* note 95, at 136.

98. See *Nollan*, 107 S. Ct. at 3162 n.14 (Brennan, J., dissenting).

99. R. Epstein, *Takings*, *supra* note 1.

100. Michelman, *supra* note 7, at 1626 n.130.

101. R. Epstein, *Takings*, *supra* note 1, at x.

102. Brennan's concern with preserving the damages remedy for other constitutional violations seemingly motivates his use of the remedy for regulatory takings. See Williams, *supra* note 95, at 120-37, 149-50. Brennan apparently believes that there is no basis for distinguishing between constitutional property claims and constitutional nonproperty rights, rather than, as in Epstein's case, having a fundamental aversion to legislative activism. (It is impossible to believe, for example, that Brennan shares Epstein's desire to dismantle the New Deal regulatory program or government entitlement programs.)

There is a large irony in this linkage of property rights and civil rights. See *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (Stewart, J., joined by Brennan, Douglas and Marshall, JJ.) ("[T]he dichotomy between personal liberties and property rights is a false one. . . . The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right . . ."). During much of the 1950s and 60s there existed both a perceived conflict between property rights and civil rights, with the political right using property rights to stave off the growth of civil rights, and a redefinition of property from the left to secure a broader range of constitu-

weapon, Epstein attacks regulatory institutions that Brennan would never dream of dismantling, including workers' compensation laws, progressive taxation and wealth transfer programs.<sup>103</sup> At least with respect to the public regulation of land use, however, both Brennan and Epstein have internalized the story of power imbalance.

Although the narrative of regulatory power is not told exclusively by persons on the political right, the left and the right tend to tell different stories. The exchange several years ago between Robert Ellickson and Gerald Frug about the status of cities indicates how differently the two ends of the political spectrum perceive the present allocation of power in society.<sup>104</sup> Frug's vision is one of city powerlessness, whereas Ellickson's account emphasizes the legal advantages that cities currently enjoy over private governance arrangements such as homeowners' associations. Justice Brennan aside, individuals on the right are far more likely to tell the story of power imbalance and abuse of regulatory power, at least in an overtly political version.

The tendency of individuals at different ends of the political spectrum to tell different stories about power suggests the possibility of connecting the narratives and counter-narratives with opposing theories of government. In recent years, legal and political theorists have distinguished two theories of government: republicanism<sup>105</sup> and public choice. Broadly described, republicans are committed normatively to the ideal of the common good.<sup>106</sup> Their commitment to governance in furtherance of the common good, which requires subordination of pri-

---

tional protection for government-provided benefits. In the late 1970s and 80s, with judicial protection of civil rights widely taken for granted, the right reversed its strategy, arguing that property rights cannot be distinguished from civil rights. The argument is strategic in that it aims at securing the same activist protection for property rights that was extended to civil rights during the height of the civil rights movement. Brennan's position on takings remedies is similarly strategic, but with the reverse objective—recognizing broad constitutional remedies for property rights to secure broad remedies for violations of nonproperty individual rights. The defects in the right's argument are detailed in Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. Pa. L. Rev. 741, 774–85 (1986).

103. See R. Epstein, *Takings*, *supra* note 1, at 245–55 (workers' compensation); *id.* at 295–303 (progressive taxation); *id.* at 309–24 (wealth transfer programs).

104. Ellickson, *Cities and Homeowners Associations*, 130 U. Pa. L. Rev. 1519 (1982); Frug, *Cities and Homeowners Associations: A Reply*, 130 U. Pa. L. Rev. 1589 (1982). Ellickson's article was a reaction to Frug's earlier paper, *The City as a Legal Concept*, 93 Harv. L. Rev. 1059 (1980).

105. I have expressed some misgivings about appealing to a "republican tradition," arguing instead that we need to develop a new form of republicanism compatible with the new epistemology. See Alexander, "Fragmented Survival": Republicanism as Rhetoric (unpublished manuscript delivered at The Eleventh Annual Conference of Critical Legal Studies, Oct. 2, 1988) (on file at the Columbia Law Review).

106. See, e.g., Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 Yale L.J. 1013, 1020–23 (1983); Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4, 17–24 (1986); Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29, 31 (1985).

vate (self) interest, is premised on the behavioral belief that governmental actors are capable of acting in the interest of the common good, rather than narrow self-interest.<sup>107</sup>

Public-choice theory, in contrast, argues that the production of laws is a market process.<sup>108</sup> Because governmental agents, like everyone else, act exclusively in their own self-interest, they produce legislation in order to "maximize the aggregate political support they receive from all interest groups."<sup>109</sup> For public-choice theorists, then, the notion of the common good is at best a utopian illusion, at worst a pretext for self-serving deals.

The narratives and counter-narratives of power can be connected with these opposed visions of government. For example, Stevens's *First English* dissent and Brennan's *Nollan* dissent echo familiar republican beliefs in the common good and the capacity of government to act in the interest of the common good. Similarly, Rehnquist's and Scalia's opinions in those cases reflect a profound sense of cynicism about the motives of governmental actors, an outlook that many commentators associate with public-choice theory.<sup>110</sup> Rehnquist and Scalia, like public-choice theorists, view government land-use regulators as constantly engaged in strategic behavior. By contrast, Stevens and Brennan hold a more benign view of regulators. They are more inclined to accept the legitimacy of public values that government planners allege to be their motives. Caricaturing the respective visions, republicans like Stevens and Brennan view government regulators as saints, while public-choice theorists like Rehnquist and Scalia regard them as villains.<sup>111</sup>

107. See, e.g., Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 *Phil. & Pub. Aff.* 317 (1977); Sunstein, *supra* note 106, at 81–85.

108. See, e.g., J. Buchanan & G. Tullock, *The Calculus of Consent* (1962); R. McCormick & R. Tollison, *Politicians, Legislation, and the Economy: An Inquiry into the Interest-Group Theory of Government* (1981); Peltzman, *Toward a More General Theory of Regulation*, 19 *J.L. & Econ.* 211 (1976); see also Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest-Group Model*, 86 *Colum. L. Rev.* 223, 227–33 (1986) (discussing the effect of interest-group maneuvering on legislation).

109. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange* (forthcoming 73 *Cornell L. Rev.* (1989)).

110. See, e.g., Kelman, "Public Choice" and Public Spirit, 87 *Pub. Interest* 80 (1987); Mikva, *Foreword: Symposium on the Theory of Public Choice*, 74 *Va. L. Rev.* 167, 167–69 (1988).

111. Public-choice theorists argue that their theory does not imply a vision of regulators as villains. They interpret political decisions in market terms, meaning that politicians act strategically to advance private, not public interests, but, they contend, this does not equate governmental strategic behavior with coercion. Regulators are passive agents, merely reflecting interest-group preferences to advance their own self-interest (such as being reelected or reappointed). Public-choice theorists conclude that we should expect regulators to forebear from regulating when regulation would disadvantage a well-defined interest group. See Tollison, *Public Choice and Legislation*, 74 *Va. L. Rev.* 339, 347–51 (1988). HeinOnline -- 88 *Colum. L. Rev.* 1771 1988

## IV. NARRATIVES AND METHODOLOGY

Connecting the narratives and counter-narratives of power in land-use regulation with these deeper political visions illuminates methodological arguments. Political vision has driven takings methodology. Thus, it is no coincidence that Chief Justice Rehnquist and Justice Scalia, who have attempted to infuse a new formalism in takings doctrine,<sup>112</sup> are also among those who tell the narrative of regulatory power. They tell that story in the belief that ad hoc balancing of the kind the Court has been practicing openly in recent years<sup>113</sup> feeds the villainous practices of land-use regulators.

One could, with some plausibility, turn public-choice theory on its practitioners to gain insight into the emerging methodological emphasis on formalism in cases like *First English* and *Nollan*. The new formalism really represents a new era of judicial activism in takings jurisprudence, carried out in support of the interests of individual landowners, from whom members of the Court gain advantages, albeit indirectly, such as landowners urging Congress to raise the Justices' salaries or perhaps to support their nominations to higher offices.

While Rehnquist's and Scalia's opinions in *First English* and *Nollan* unquestionably are activist in defense of private-property values, the more obvious and plausible explanation for their activism is political vision or ideology. Active judicial scrutiny of land-use regulation is vital to correcting the imbalance of power existing between regulators and the regulated. Those who tell the story of power imbalance and regulatory coercion develop regulatory takings doctrine instrumentally, expanding its scope to give otherwise vulnerable private landowners greater leverage against planning agencies. A broadly defined regulatory takings doctrine is a means of "level[ing] the playing field between landowners and their regulators."<sup>114</sup> It is this vision of power imbalance and the desire to empower owners against regulatory abuse that explains the reliance on categories and property conceptualism.

Conversely, those who hold a more benign view of government land-use regulators find less need for categories of per se takings and fixed definitions of property. Those elements bespeak fear of governmental abuse. The eclecticism of *Penn Central*'s methodology rejects such an attitude in favor of pragmatic commitment to the ideal of governance in the interest of the common good. That more benign out-

---

112. See supra notes 7-13 and accompanying text. It is doubtful, however, that the Court has shifted significantly toward formalism in its recent takings decisions. While the Court in cases like *Irving* unquestionably makes conceptualistic noises and relies on categorical reasoning in *Kaiser Aetna* and *Loretto*, in *Keystone* it leaves a great deal of its *Penn Central* balancing apparatus intact.

113. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

114. Fischel, supra note 74, at 51. Hyd Online -- 88 Colum. L. Rev. 1772 1988

look on government underlies the power of eminent domain.<sup>115</sup> It is benign, but pragmatically so. It recognizes that individually we are capable of acting without regard to others, and since government is a collection of individuals, government is also capable of acting abusively. Eclecticism of the kind practiced in *Penn Central* leaves open that possibility. Unlike formalism, however, it also leaves open the possibility of government for the common good.

#### CONCLUSION

The implications of taking the interpretive turn for takings methodology should be apparent by now. Since the interpretive perspective understands questions of who is empowered and who is coerced in the land-use planning context as open, it implies that courts should reject formalist approaches to regulatory takings disputes. Formalizing doctrinal practices merely privileges one interpretation over another, foreclosing edifying public conversation about power and its distribution in society. Maintaining public conversation requires that our doctrinal practices in takings law remain fluid and exposed to doubt. Acknowledging the narratives of power embedded in takings cases as narratives is a first step toward such a form of doctrine.

---

115. Krier, *supra* note 1, at 25 ("Surely it is the image of a benign government that lies behind . . . all government powers, including the power to regulate.").