

# Property Rights in the U.S. Supreme Court: A Status Report

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A series of opinions handed down in the last few years—most notably the *Nollan*,<sup>1</sup> *Keystone*<sup>2</sup> and *First English*<sup>3</sup> cases decided in 1987, but also such recent cases as *Loretto*<sup>4</sup> and *Kaiser Aetna*<sup>5</sup>—suggest that the Supreme Court may be effecting a major revision, one might say a reawakening, of the constitutional law of property rights. The circumstances seem propitious; we have a conservative Court in a time hospitable to conservative sentiments, and an issue that has been consciously neglected in the constitutional arena for more than half a century. The very phrase “economic rights” has had a whiff of obsolescence about it, a hint of the defense of child labor, or the yellow dog contract. It is therefore notable that the Court took the occasion in its 1987 Term to speak out for property rights.

## WHAT THE CASES SAY

### 1. *Nollan*

In the *Nollan* case, the California Coastal Commission was told that it could not demand that an easement of passage along the sand beach be granted to the public in exchange for permission to beach-front landowners to enlarge their house. The formal ruling in *Nollan* was only that publicly required dedications (long accepted in settings such as road or parkland exactions in new subdivisions)<sup>6</sup>

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

2. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). While decided against the property claim, the closeness of the case (5-4 decision) and the vigor of the dissent makes the decision potentially significant.

3. *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 107 S. Ct. 2378 (1987).

4. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

5. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

6. See generally Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 *YALE*

must bear a causal nexus to some activity of the owner: A road dedication must be justified by traffic the new development will generate, for example. That is not a new or radical doctrine. It has always been understood that government cannot simply order landowners to contribute land to the public for public use. Wherever dedications have been required, even in California, the assumption has been that there is a nexus, or causal connection, between the dedication demanded and the effects from the landowner's development.<sup>7</sup>

What seemed striking about the *Nollan* case, both to some observers and to the dissenting justices, was that the majority refused to defer to the Commission's finding that there *was* a rational nexus between the Nollans' project and the access requirement. The Court majority made its own factual finding that such a relationship was "utterly"<sup>8</sup> lacking and that the exaction was "an out-and-out plan of extortion."<sup>9</sup>

The suggestion that *Nollan* portends fundamental change in constitutional property rights litigation rests on the assumption that the Court is ready to give much stricter scrutiny to property regulation, brushing aside traditional deference to the regulators, and deciding for itself the needfulness of various controls and "the outer limits of 'legitimate state interests.'"<sup>10</sup>

## 2. Keystone

*Keystone* was not a victory for the property owner, but it was a surprisingly narrow defeat. The Supreme Court sustained by a 5-4 vote a Pennsylvania law which was designed to protect the land surface against subsidence from coal mining. The act prohibited the extraction of a portion of the coal beneath and supporting designated structures—public buildings, residences and cemeteries—which was about two percent of the total coal in place. The law in question was very similar to the statute in the celebrated case of

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L.J. 1119 (1964); Note, *Subdivision Exactions: A Review of Judicial Standards*, 25 WASH. U.J. URB. & CONTEMP. L. 269 (1983).

7. Though some of the intermediate appellate cases leading up to *Nollan*, such as *Grube v. California Coastal Commission*, 212 Cal. Rptr. 578, 166 Cal. App. 3d 148 (1st Dist. Ct. App. 1985), were blurring the nexus element to the point of disappearance, the leading California case, like the statute it interpreted, expressly recognized the nexus requirement. *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, *appeal dismissed*, 404 U.S. 878 (1971).

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

9. *Id.*

10. *Id.*

*Pennsylvania Coal v. Mahon*<sup>11</sup> where Justice Holmes had held that the coal required to be left in place to prevent surface subsidence was constitutionally "taken." The majority in *Keystone* sought to distinguish *Pennsylvania Coal* on the ground that the law there was simply a private benefit statute for overlying owners, while here the statute was enacted to protect "the public interest in health, the environment and the fiscal integrity of the area,"<sup>12</sup> but the dissenters were unpersuaded.

### 3. First English

The temporary taking case, *First English*, could be read as a hint of far-reaching things to come. The claimant in *First English* owned land located in a flood plain. The structures on its land had been destroyed in a recent flood, and the County had enacted an interim flood plain ordinance that prohibited rebuilding on the land. The Court did not pass on whether the ordinance constituted a taking. It did, however, hold that *if* the ordinance was a taking, it was not sufficient simply to cease enforcing it; the owner would be entitled to compensation for the loss incurred during the time the unconstitutional law was in effect. This interpretation of the constitutional requirement of just compensation had never before been given by the Supreme Court, and the general practice had simply been to cease enforcing laws upon a holding of unconstitutionality, leaving the owner to bear the economic loss during the interim between enactment and invalidation.

*First English* is notable for several reasons. Most obviously, it represents a revived judicial willingness to look at local land use zoning, a subject the Supreme Court has conspicuously avoided, with infrequent exceptions,<sup>13</sup> since the era of the landmark *Ambler Realty*<sup>14</sup> case in the 1920's. In addition, it adopts a new and potentially very expensive doctrine so far as local zoning authorities are concerned, a rule that requires compensation for the time challenged regulations are in effect if they are ultimately held invalid as takings. *First English* confirms earlier hints that some of the Justices believe zoning officials have gotten seriously out of hand, and

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11. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

12. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 487-88 (1987).

13. The most prominent exceptions are: *Berman v. Parker*, 348 U.S. 26 (1954); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978).

14. *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926).

need to be restrained.<sup>15</sup>

#### GREAT CHANGES ARE NOT UNDERWAY

Despite this flurry of recent cases, despite the symbolic importance of property to a more conservative Court, and despite the Court's plain desire to speak out forcefully against what it sees as regulatory excesses, I am confident that we are not at the leading edge of a major revitalization of property rights. The basic reason is that the fate of property is inextricably tied to the enlarged role of contemporary government in the management of the economy. This role is one to which legislatures and the executive are deeply committed. Only a radical judicial repudiation of the direction modern government is taking could significantly change the status of property rights. In the following pages, I shall examine the several factors that lead me to conclude there will be no significant turning back from the modern, circumscribed status of property rights.

#### THE LIMITEDNESS OF *NOLLAN* AS A PRECEDENT

As I noted above, what makes *Nollan* potentially far reaching is the seeming willingness of the Court to probe for itself the accuracy and appropriateness of the Coastal Commission's findings. If courts are going to hold agencies and legislatures to a high standard to justify the imposition of noncompensable legislation, no doubt a considerable amount of regulation will be jeopardized. Taking the majority opinion at its most expansive, Justices Brennan and Marshall in their dissent attributed precisely this prospect to the decision: "the Court imposes a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century."<sup>16</sup> And going back to *Sproles v. Binford*, a 1932 deci-

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15. In *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 655 n.22 (1981), where the issue of interim compensation was raised but not decided, Justice Brennan in a dissent to the majority's unwillingness to decide the issue quoted at length from a municipal attorneys' conference at which one City Attorney gave his fellows the following advice: "IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START ALL OVER AGAIN. . . . See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war." Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (including Inverse Condemnation)*, 38B NIMLO MUN. L. REV. 192-93 (1975). Later in the opinion Justice Brennan said—drawing on the analogy of law enforcement officials whose misconduct has been central to the Court's modern agenda—"After all, if a policeman must know the Constitution, then why not a planner?" 450 U.S. at 661 n.26.

16. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3151 (1987). There is real uncertainty about the scope of review of legislative judgment that some justices are

sion, they quote the Court saying "that debatable questions as to reasonableness are not for the courts but for the legislature."<sup>17</sup>

It is important to keep in mind how significant a commitment to judicial weighing of legislative judgments—how much judicial activism—would be involved in pursuing this aspect of the *Nollan* decision. Is the Court really likely to start looking closely at whether something a legislature wants to regulate is a "legitimate state interest," and if it is, whether the regulatory scheme adopted "substantially advances" that interest? I don't think so,<sup>18</sup> and I believe that the Court's very generous attitude toward the scope of the police power, revealed in a series of cases I shall describe momentarily, demonstrates how little taste it has for deciding in the economic sphere what legislatures should be legislating, and whether they have legislated appropriately.

What is *Nollan* if not a harbinger of such judicial supervision? It is—as seen by the majority—an extreme case that the Court will rarely encounter, and it will turn out to be a precedent of very limited applicability for judicial scrutiny of regulation. The critical element in *Nollan* was not that the Coastal Commission lacked exquisite precision in justifying its regulation. It was a much more primitive failing than that. Justice Scalia said the condition imposed by the Commission "utterly fails to further the end advanced as the justification . . ."<sup>19</sup> and that whatever may be the outer limits, "this is not one of them."<sup>20</sup>

The Court knew that the Coastal Commission had an ongoing program of acquiring public coastal access, and that it wanted a right of way across the *Nollan* property whether or not there was an improvement of the *Nollan*'s home. The Court might well have concluded that permit applications sought by coastal landowners like the *Nollans* simply offered the Commission a pretext to get a

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urging. In a footnote in 107 S. Ct. at 3147 n.3, Justice Scalia is at pains to say that he is urging something less than the strict scrutiny found in equal protection or due process cases. And in his dissent in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 511 n.3 (1987), Justice Rehnquist restates approvingly the tradition of judicial deference to legislative statements of purpose in assessing the legitimacy of statutes.

17. *Sproles v. Binford*, 286 U.S. 374, 388 (1932) (quoted in Justice Brennan's dissent 107 S. Ct. 3141, 3151 n.1).

18. Only where other very important, non-economic interests are at stake does the Court seem inclined to scrutinize legislative justification and appropriateness in property cases. See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (mental retardation); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (free speech); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (family rights).

19. 107 S. Ct. at 3148.

20. *Id.*

public right of passage without paying for it; and that claims of a causal relationship between the construction project and public access to the coast were after-the-fact justifications put forward by the Commission for the purpose of defending itself in litigation once its 'expropriation/acquisition' program had been challenged.

This is, I suggest, how the majority saw the case. Justice Scalia used very harsh words. The permit condition, he said, was "an out-and-out plan of extortion."<sup>21</sup> He called the Commission's argument a mere "play on words,"<sup>22</sup> and said "there is nothing to it." Scalia added that "it is quite impossible to understand"<sup>23</sup> how there could be a relationship between loss of view of the ocean from the Nollans' construction and provision of a public walkway, the link upon which the Commission largely rested its case. Though the Commission said it was trying to make up for loss of visual access, it did not try to get the Nollans to maintain visual amenities, though, the Court noted, it might directly have imposed conditions to protect preexisting views.<sup>24</sup>

The facts in the record, and the very strong condemnatory language in Justice Scalia's opinion, suggest that *Nollan* is basically an abuse of authority case, rather than a new departure in property law.

#### THE KEYSTONE DISSENT: A HINT OF CHANGE

If it is correct to dismiss *Nollan* as an exceptional case, there is nonetheless language elsewhere in recent decisions that seems to reinforce *Nollan*'s broader implications. In his dissent in *Keystone*, Justice Rehnquist took pains to comment on the scope of judicial inquiry. "[T]he legitimacy of . . . purpose," he said, "is a question of federal . . . law, subject to independent scrutiny by this Court."<sup>25</sup>

If a law regulating coal mining to protect against surface subsidence can only garner a 5-4 majority in favor of constitutionality, and if the legitimacy of the asserted public purpose for the regulation is going to generate serious debate within the Supreme Court, then it would seem that something dramatic *is* occurring in the constitutional law of property rights. I suggest, however, that *Keystone* in its way is as distinctive, and atypical, a case as was *Nollan*.

The most plausible explanation for the Court's deep division in

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21. *Id.*

22. *Id.* at 3149.

23. *Id.* at 3149.

24. *Id.* at 3147-48.

25. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 470 U.S. 480, 512 (1987).

*Keystone* is that the minority was reluctant to reverse *Pennsylvania Coal*,<sup>26</sup> one of the most famous of all takings cases,<sup>27</sup> and it was (understandably) offended by the unconvincing distinction of the two cases offered by the majority. In both cases protection against subsidence had been contracted away by the surface owner. That surely was a crucial factor for Justice Holmes many decades earlier, as it most likely was for the dissenters in *Keystone*.<sup>28</sup> That seems the most plausible explanation since otherwise *Keystone*—as a test of the constitutional limits on the non-compensable regulation of property—doesn't seem significantly different from a setback or a height ordinance, both of which typify permissible regulation. Insofar as the significance of the contract was the issue that split the court, it makes clear that *Keystone* is a peripheral case as far as takings law is concerned.

#### MODERN CASES ROUTINELY SUSTAIN EXTENSIVE REGULATION

Indeed, there isn't a single modern case in which the Court has effectively told a legislature that a regulatory scheme it wants to use (though expensive to property owners, and far removed from traditional health, safety, or nuisance, regulation) is unconstitutional as a taking. The only exceptions have been cases where there is a physical expropriation, as in *Kaiser Aetna*, *Nollan* and *Loretto*,<sup>29</sup> and a sprinkling of cases that seem to rest on a finding of means greatly excessive to any reasonable legislative goal.<sup>30</sup> Based on this

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26. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

27. See the description of *Pennsylvania Coal* and *Keystone* above.

28. There was also an effort in *Keystone* to reargue the 'segmentation of the fee' issue that Justice Rehnquist had lost a decade earlier in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). In that case Penn Central had argued that its air rights (on which it was forbidden to build) should be considered separately from the rest of Grand Central Station, and viewed as totally taken. The Court rebuffed that claim, explicitly rejecting *Pennsylvania Coal v. Mahon* as an authority. 438 U.S. at 130 n.27.

29. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987); *Loretto v. Teleprompter*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

30. Even with very limited scrutiny of legislative propriety of economic regulation, as noted earlier, there is some point at which the Court will find economic regulation so unjustified or unfair as to demand judicial intervention. See *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980) (expropriation of the interest in an interpleader fund held a taking: "No police power justification is offered for the deprivation."). See also *Hodel v. Irving*, 107 S. Ct. 2076 (1987), where in an effort to get rid of tiny fragmentary interests in Indian land allotments, legislation effectively forfeited interests, when other means might have permitted the owners to benefit without intruding on the legislative purpose. See also *U.S. v. Security Industrial Bank*, 459 U.S. 73 (1982), where the bankruptcy law was amended to exempt from the claims of lenders property on which they had a pre-existing lien. The Court held, 6-3, that retroactive application of the exemption constituted a taking. The Court did not explain its

experience, I suggest that the "substantial advancement of a legitimate state interest" test is a paper tiger; that economic, environmental and land use regulation is no more in jeopardy now than it has been in recent decades; and that, except in situations seen as "utterly" lacking in justification for the regulation, the Court currently is at least as likely to accept legislative goals in taking cases as it was when, against the claim of no public use, it gave the go-ahead to slum clearance in *Berman v. Parker*,<sup>31</sup> saying that "[t]he concept of the public welfare is broad and inclusive. . . ."<sup>32</sup>

One might expect a Court that was reviving property rights to be signalling a need for regulatory retrenchment, except to fulfill traditional goals such as health and safety. But there is no indication that the Court is moving in this direction. On the contrary, it has in recent years effectively approved a very broad range of permissible regulatory acts, as long as they leave some economically viable use to the owner: among these are open space zoning,<sup>33</sup> billboard regulation,<sup>34</sup> wetland protection,<sup>35</sup> historic preservation,<sup>36</sup> pesticide regulation,<sup>37</sup> endangered species protection<sup>38</sup> and strip mine land restoration.<sup>39</sup> In *Nollan* the majority indicated that protection of visual amenities was appropriate. If this is any indication of the Court's view, it certainly sees the scope of "legitimate state interest" as broadly as any legislature does, and so far there is no indication that the Court is prepared to demand more than the very modest sort of evidence legislatures produce in support of these regulations, such as that of San Diego in the *Metromedia* case regulating bill-

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holding very fully. It has long disfavored retroactive abolition of creditors' specific claims in bankruptcy, *Louisville Joint Stock Bank v. Radford*, 295 U.S. 555 (1935). Absent a problem the owner has caused (e.g., as in *Connolly and Turner Elkhorn Mining*, discussed *infra* notes 62-66 and accompanying text) retroactive abolition of established property interests is held invalid. See the concurring opinion of Justice O'Connor in *Connolly*, 475 U.S. at 229 ("[R]etroactive liability on employers, to be constitutional, must rest upon some basis in the employer's conduct. . . .").

31. *Berman v. Parker*, 348 U.S. 26 (1954).

32. *Id.* at 33.

33. *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

34. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). In his dissent, Justice Rehnquist observed, "In my view, the aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community . . . regardless of whether the particular community is 'a historical community such as Williamsburg' or one as unsightly as the older parts of many of our major metropolitan areas." 453 U.S. at 570.

35. *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).

36. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

37. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

38. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

39. *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981).

boards<sup>40</sup> or that behind *Tiburon's* open space ordinance.<sup>41</sup> Nor has the Court, majority or minority, given any hint that it wished to examine the evidence so it could decide whether measures such as the historic ordinance in *Penn Central*,<sup>42</sup> or the extremely broad coverage of wetlands in *Riverside Bayview*,<sup>43</sup> was "substantially advancing" a legitimate state interest.

#### THE PENNELL CASE: RENT CONTROL IN SAN JOSE

If further evidence of judicial permissiveness was needed, the Court supplied it when in February of 1988, in the wake of *Nollan* and *First English*, it decided the San Jose, California, rent control case, *Pennell v. San Jose*.<sup>44</sup> The case presented a rather unusual question, whether a rent control law could limit permissible increases based on the financial circumstances of individual tenants. On that question, the Court split 6-2 in favor of permitting the individual tenant's financial need to be taken into account.<sup>45</sup> On the more fundamental question, whether rent control is *per se* a taking of property, however, there was no debate. The majority expressly reaffirmed the constitutionality of rent control,<sup>46</sup> and Justices Scalia

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40. See *supra* note 34 and accompanying text.

41. *Agins v. City of Tiburon*, 447 U.S. 255 (1980). There Justice Powell said: "In this case the zoning ordinances substantially advance legitimate governmental goals. The State of California has determined that the development of local open-space plans will discourage the premature and unnecessary conversion of open-space land to urban uses. . . . The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill effects of urbanization. Such governmental purposes have long been recognized as legitimate." 447 U.S. at 261. If this is all that is required—legislative findings that the Court does not probe—there will be little that will fail to pass muster. Even if it is troubled by such laws, how is the Court going to delve into determinations of the causes and effects of "premature . . . conversion?"

42. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

43. *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).

44. 108 S. Ct. 849 (1988).

45. *Id.* A simple view of the split in the Court is this: the majority justified rent control as a sort of regulation of monopoly. So long as it only limited some of the 'excess' profit, the legislature might decide to engage controls solely, or specially, to benefit tenants suffering economic hardship. It need not necessarily regulate away the whole of the excess profit, and it is rational to select poor tenants to benefit from aspects of a rent control scheme.

The minority, on the other hand, viewed the law as imposing on landlords a duty to subsidize their poor tenants, helping alleviate a problem for which the landlords were not responsible (any more than are the grocers or shoemakers for the existence of poor people). The minority apparently did not assume that the 'subsidy' would come out of 'excess profits' derived from the landlord's monopoly-type position, so that the landlords might be said to be causally responsible for an aspect of the tenants' plight. See *infra* note 52 expanding on the minority position in the case.

46. 108 S. Ct. 849, 857 n.6 (1988).

and O'Connor, in their dissent, implicitly conceded its validity, without explicitly so holding. The Court's unwillingness to take up the challenge of reconsidering the constitutionality of rent control is quite significant as a test of whether the Supreme Court is departing in a major way from modern judicial attitudes about property.

It is useful to recall that when rent control was first challenged, and sustained, in the context of the First World War, it was considered a very close question. The cases were decided by 5-4 votes, with vigorous dissents,<sup>47</sup> a far less common occurrence than it is now. Justice Holmes himself said rent control "went to the verge of the law."<sup>48</sup> Today it would be difficult to name a regulatory scheme that is more subject to criticism for misguided benevolence or plain counterproductivity.<sup>49</sup> And rent control is a form of pure wealth redistribution, taking from A (the landlord) and giving to B (the tenant).

Yet the Court in *San Jose* did not at all take the bait. The majority opinion was written by Justice Rehnquist, who reaffirmed the States' "broad power to regulate housing conditions in general, and the landlord-tenant relationship in particular, without paying compensation for all economic injuries that such regulation entails."<sup>50</sup> Even Justice Scalia, surely the strongest property advocate on the Court, observed (though with a tone of reservation) that "of course all economic regulation effects wealth transfer. When excessive rents are forbidden, for example, landlords as a class become poorer and tenants as a class . . . become richer. Singling out landlords to be the transferors may be within our traditional constitutional notions of fairness . . ."<sup>51</sup> This is not the language of judges who are about to effect a radical restructuring of property law.<sup>52</sup>

47. *Block v. Hirsh*, 256 U.S. 135 (1921); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921).

48. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416 (1922).

49. RENT CONTROL: MYTHS & REALITIES: INTERNATIONAL EVIDENCE OF RENT CONTROL IN SIX COUNTRIES (W. Block & E. Olsen, eds. 1981).

50. 108 S. Ct. 849, 858 n.6 (1988).

51. *Id.* at 863.

52. Here, as in *Nollan*, Justice Scalia chose to rest on a rather 'mainline' point. He distinguished the question in *Pennell* from rent control generally, which could be viewed as requiring landlords to solve (via rent control) a problem they in effect had caused by taking advantage of their monopoly-like position in times of housing shortage. In effect Scalia was reiterating the nexus notion he had advanced in *Nollan*: One can only be required to give up property to cure a problem the property owner has, in some respect, caused. While one might dispute that position as a constitutional limitation, its adoption certainly would not jeopardize much actual regulation.

One recent situation suggests a setting to test Justice Scalia's nexus theory. Assume that at a time of deep unemployment in a state traditionally dependent on lumber mills,

## HOW FAR IS TOO FAR: THE DIMINUTION-OF-VALUE TEST

The preceding comments suggest that the Supreme Court is not embarking on a campaign to decide for itself what sort of regulation appropriately advances legitimate state interests,<sup>53</sup> and is not in that sense upsetting the long-standing status of takings law. Is there any reason to believe that the other major avenue toward a finding of a taking, transgression of the so-called "diminution of value" test,<sup>54</sup> is undergoing significant change? If a regulation goes too far, the Court has said for many years, even though it does advance a legitimate public interest, compensation will have to be paid. But how far *is* too far? The Court has been silent, suggesting that it will confront that issue one case at a time.

The reality is that the Court continues to hold to a view of the diminution test that is about as unfavorable as it could be for property owners. As recently as the *Riverside Bayview Homes* case, in 1985, the Court required nothing more to sustain a regulation than that there remain to the owner an "'economically viable' use of the land in question."<sup>55</sup> The Court has never specified the limits of this ambiguous formulation, but it has continued to sustain, or indicated that it would sustain, regulations that impose very severe economic impacts on landowners.<sup>56</sup>

The *First English* case is revealing on this point. It is no secret that the Court had been searching for a case in which to decide the temporary takings issue.<sup>57</sup> It needed a case that was ripe for adjudication, and that involved a taking. From what has just been said, it

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a law is enacted prohibiting the sale for export of raw logs. The law is costly to certain timber land owners who have been selling raw logs abroad, and who will now lose an important market. The timberland owners obviously did not cause the unemployment problem. Is such a law a taking of their property? Perhaps, but it is not self-evident that a causal nexus is constitutionally required in a case not involving a compelled dedication to the public.

53. At most it could be said that Justice Scalia—based on his majority opinion in *Nollan* and his dissent in *Pennell*—is edging in this direction, but as discussed at length in the text, even Scalia has a rather finely-honed test of what it takes to justify judicial intervention and evaluation of legislative purpose.

54. See Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 50 (1964).

55. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 127. Justice Scalia reiterated this formulation in his dissent in *Pennell*, 108 S. Ct. at 861.

56. The most important modern diminution case is *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). See also *Agins v. Tiburon*, 447 U.S. 255 (1980), though the Court did not decide the diminution issue in that case. Cf. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

57. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986).

might have been thought difficult to find a case so far-reaching that there actually was a regulatory taking. And indeed it was difficult. The Court seems to have seized upon *First English* precisely because it involved a situation in which it could presume *arguendo* a taking based upon the plaintiff's (unlitigated) allegation "that the ordinance . . . denied [the landowner] all use of its property."<sup>58</sup> The Supreme Court made clear that it was not deciding the taking question in *First English*,<sup>59</sup> and it remanded for a decision on that point. Whether a taking will be found remains to be seen. There are not many regulatory cases in which a landowner actually loses all economic use of the land. Even Justice Rehnquist, who wrote the majority opinion in *First English*, and who is one of the Justices most sympathetic to property claims, seems to accept the constitutional significance, for saving a regulation, of retaining even a very small right of use to the owner, as contrasted with the constitutionally forbidden "complete extinction of the value of a parcel of property."<sup>60</sup>

#### WHY NO MAJOR CHANGE IS LIKELY

What I have said to this point might be summed up with the observation that while we have a quite conservative Supreme Court, it would take a libertarian Supreme Court to make a major revision of the constitutional law of property. The reason is that the range of existing government regulation is very great and much of it significantly affects property values (is, indeed, consciously redistributive). Only a Court prepared to order legislatures to get out of much of the current business of legislation could really bring about more than a peripheral change in the status of property rights. The

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58. *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 107 S. Ct. 2378, 2389 (1987).

59. *Id.* at 2384-85.

60. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 513 (1987). In his dissent Justice Rehnquist asserts that even in *Mugler v. Kansas*, 123 U.S. 623 (1887); *Miller v. Schoene*, 276 U.S. 272 (1928) and *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), regulation, though it made the property "of little value . . . did not completely extinguish the value. . . ." *Id.* It remains to be seen where Justice Rehnquist is going with his interpretation of the diminution of value test. He appears to be developing some sort of graded diminution test, more severe for non-traditional health and safety, or nuisance-type cases, than for others. He (along with Justice Scalia) is ready to repudiate *Andrus v. Allard*, 444 U.S. 51 (1979), where the Court sustained a law prohibiting dealers from selling eagle feathers they had legally acquired before the law prohibiting acquiring such feathers was enacted. As a case applying the diminution of value test to its utmost (though unsaleable, the Court held, the feathers could be given away or devised), *Allard* is extreme. Justices Rehnquist, Scalia and Powell said they would limit *Allard* to its specific facts. *Hodel v. Irving*, 107 S. Ct. 2076, 2085 (1987).

prospect of a radically activist conservative Supreme Court stripping down legislative agendas until they met some notion *it* has of a more limited, "legitimate" role of government is not great.

I would therefore suggest that the most revealing indicator of where the Supreme Court stands, and where it is likely to go, is not to be found in *Nollan* or in *First English* (or even in *Pennell*, revealing though it is of the Court's hewing to established views about property). Neither is the place to look the rather inflated property rhetoric in some of Justice Rehnquist's dissents,<sup>61</sup> in *Keystone*, for example, or in *Penn Central*. Rather, the place to look is at main-line regulation cases, the kind that are really costly to property interests and are overtly redistributive. I can think of no better example than the 1986 decision in *Connolly v. Pension Benefit Guaranty Corp.*,<sup>62</sup> decided by a unanimous Court.<sup>63</sup>

Employers in a pension plan were terminating their participation in accordance with the contractual terms of their plan. They were required by a law enacted subsequent to the formulation of the plan to pay certain sums upon termination in order to protect the covered employees from being left adrift by underfunded or abandoned pension plans. In a 9-0 decision, the Court rejected the employer's claim that a law requiring a transfer of assets for the private use of a pension trust, enacted subsequently to the creation of the trust and

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61. Justices may be willing to go a good deal further in a dissent where they need not obtain the acquiescence of their colleagues, than in an opinion written for the court. See, e.g., *Interview with California Supreme Court Justice Stanley Mosk*, San Francisco Chronicle, May 9, 1988, at 1, col. 1.

62. 475 U.S. 211 (1986).

63. Posing a comparison with cases like *Connolly* raises the question whether land use cases are different from business regulation cases. I think not, and certainly the Court has never suggested that a different constitutional standard applies to land than is applied to other forms of property. Indeed, it is far from obvious that there is a distinct regulatory area of "land." Is a water pollution law a land use regulation, or a business regulation? Is regulation of toxic discharges into water somehow to be distinguished from regulation of storage of toxics in waste dumps, and from exposure of workers to toxics?

Moreover, what is said in the following pages about general economic regulation also applies to land use regulation. Certainly government has an active interest as the responsible party of last resort in problems relating to land use. Sometimes land regulation is designed to promote or protect economic development, which is a source of jobs for residents, and of economic viability for the community. Even more often, regulation is designed to protect the public investment in infrastructure, such as roads, schools and parks, in the face of rapid or sprawling development. This is not to deny that a considerable amount of land use regulation is unwise, unwisely burdensome, or a victory for one interest group over another. But that is only to say that it properly must bear its share of the criticism to which all governmental regulation is subject.

inconsistently with the agreed-upon terms of the trust made between the parties, was an unconstitutional taking of property.

While the Court did not say so explicitly, the case raised fundamental questions of takings law: why should the burden of fulfilling some public goal be imposed on this individual rather than upon the community as a whole? And why should the legislature intrude to bail out the employees when they did not adequately protect themselves by contract? *Connolly* must seem at first like an appealing property rights case. It is a pure case of retroactive regulation, imposing economic burdens after the fact for conduct that was perfectly legal at the time. Plainly the employers' "investment-backed business expectations" were being disappointed (though the Court says they were not). Indeed, the very essence of a claim of taking in a retroactive regulation case, where the conduct was lawful when engaged in, is that it is a disappointment of a reasonable expectation. The case involved no wrongful or nuisance-like activity; and, notably, it had the precise element about it that dominated both the old *Pennsylvania Coal* case, and the recent *Keystone* case: The legislature had enacted a law to bail one party (here employees, rather than surface owners) out of a contract it had previously concluded to its satisfaction, where the contract limited the obligation of the employers to the pension fund. Moreover, the amount involved was considerable.<sup>64</sup>

In the course of the opinion, Justice White set out what I believe to be the *real* rule of property law in the Supreme Court:

In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. For example, Congress may set minimum wages, control prices, or create causes of actions that did not previously exist. Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.<sup>65</sup>

A little later in his opinion, Justice White put forward the reason for the rule, and it, I suggest, explains *why* there will be no major turning away from the current status of property rights. "We are far from persuaded," he said, "that fairness and justice require the public, rather than the withdrawing employers and other parties to pension plan agreements, to shoulder the responsibility for rescuing

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64. Nearly 25% of the net worth of one firm which the Court cites as an example. 475 U.S. at 222.

65. *Id.* at 223.

plans that are in financial trouble."<sup>66</sup>

A profoundly important fact underlies that rather laconic statement. In the area of employee pensions, as in many other areas, *the public has become the responsible party of last resort*. This has been the case in areas as diverse as unemployment, inflation, AIDS, education, toxic waste disposal, acid mine drainage, and highway maintenance. The public has in effect become a partner, sometimes active, sometimes simply a final guarantor, in the viability of the economy. It assumes that role through various means, including regulation, providing subsidies, guaranteeing bank deposits, and even sometimes arranging a bailout for troubled industries. Given the broad range of areas in which the public acts as guarantor of last resort, it is inescapable that government will have its say about what ought to be done to assure against failures. That is why, as Justice White put it, "fairness and justice" permit government to regulate those who generate potential public obligations; it is fair to act to prevent or redress the burden which actors effectively put on the public, though they are acting in the private sphere. And that means pervasive economic regulation that will at times be costly and redistributive.

It is for this reason that the Court's willingness to scrutinize legislative purpose and appropriateness in other constitutional areas is so unlikely to be carried over to the economic/property area. In other constitutional contexts, such as the first amendment, the general supposition of the law is that government should stay out altogether, or at least minimize its involvement. Such a presumption invites sharp judicial scrutiny. But in the modern world there is no such supposition against government involvement in economic affairs. Indeed, as I have just noted, government is today a major, active player in virtually every aspect of the economy. Strict scrutiny of economic regulation under such circumstances would in effect represent radical judicial intrusion into the established structure and style of the modern economy.

A review of recent property cases makes clear that *Connolly* is no aberration. Every important regulatory scheme that has come before the Court in recent years has been sustained by unanimous

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66. *Id.* at 227. The retroactive element in *Connolly* (as in *Usery v. Turner Elkhorn Mining*, 428 U.S. 1 (1976)) makes especially important Justice White's reference to "justice and fairness." The fact that the employers in *Connolly* and the mining companies in *Turner Elkhorn Mining* had caused the problems the legislation was addressing seems an important element where retroactive redistribution is concerned. See *Hodel v. Irving* and the *Security Industrial Bank* case, note 30, *supra* (owner had not created the problem the legislation was designed to cure).

or near-unanimous votes; and in this respect "important" means part of a significant public program and, usually, costly from the perspective of the property owner. Subsequent legislation requiring coal mine owners to compensate former employees for conduct neither negligent, nor known to be harmful at the time, was unanimously sustained in *Usery v. Turner Elkhorn Mining Co.*<sup>67</sup> Pesticide regulation forcing public release of very valuable manufacturing data was sustained by a 7-1 vote in *Ruckelshaus v. Monsanto Co.* in 1984.<sup>68</sup> By a 9-0 vote in *Hodel v. Virginia Surface Mining and Reclamation Ass'n*,<sup>69</sup> the constitutional permissibility of far-reaching stripmine land reclamation was recognized.<sup>70</sup> When the Court sustained Congress' extremely broad regulation of wetlands in *Riverside Bayview Homes*, also 9-0, it reiterated that an owner could only succeed in showing a taking if it could meet the stringent requirement that there remain no economically viable use for the property.<sup>71</sup>

The signs are about as clear as they can be. There is no judicial property rights rebellion on the horizon.<sup>72</sup>

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67. 428 U.S. 1 (1976). Contract Clause cases are consistent with the takings cases in not treating retroactive effect as constitutionally invalidating. *E.g.*, *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983), unanimously sustaining an Alabama law imposing a severance tax and prohibiting passing on the tax to consumers, despite preexisting contracts obliging consumers to reimburse severance taxes.

68. 467 U.S. 986 (1984).

69. 452 U.S. 264 (1981). The Court did not decide the specific taking claim. The owner had sought pre-enforcement review, raising a facial challenge to a law requiring stripmined land reclamation. No property had yet been affected by the Act, nor had the owners sought administrative relief. The essence of the case was that the owner would have had to use some of its property not for its own benefit, but to protect others against the effects of surface mining on its land.

70. *See supra* text accompanying note 39.

71. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 127 (1985).

72. One issue that seems genuinely to puzzle the Court is whether a property owner can be required simply to continue conferring a benefit on the public (*e.g.*, leaving a historic structure standing), as contrasted with ceasing to do something that is harmful (whether or not it is in some sense noxious or culpable). *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), was the most recent case to raise this issue. Even in 1978, that case divided the Court 6-3, though historic preservation cases have generally sailed through the lower courts.

A similar issue was suggestively raised in *Nollan*, where Justice Scalia indicated that an oceanfront owner might be compelled to continue providing visual access to the ocean from the coastal highway. The harm/benefit distinction is one of the most interesting issues in property law (among the questions being whether there is a distinction the law should recognize in this context between doing harm and ceasing to do good).